BRIAN MOLEEN and
SHERI MOLEEN,

Plaintiff-Appellants,

vs.

RICHARD MOLEEN, LOUISVILLE LADDER, INC., XYZ CORPORATION 1-10 (FICTITIOUS DESIGNATIONS), and JOHN DOE 1-10 (FICTITIOUS DESIGNATIONS)

Defendant-Respondents,

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No. A-003624-23

Civil Action

ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: UNION COUNTY
Docket No. UNN-L-1240-18

Sat Below:

Hon. Thomas J. Walsh, J.S.C.
Hon. Daniel R. Lindemann, J.S.C.

PLAINTIFF-APPELANTS' BRIEF

BRACH EICHLER, LLC
BY: Edward P. Capozzi, Esq. [Attorney ID# 042602004]
ON THE BRIEF: Jeremy L. Hylton, Esq. [Attorney ID# 250392017]
101 Eisenhower Parkway
Roseland, New Jersey 07068
ecapozzi@bracheichler.com
jhylton@bracheichler.com
Attorneys for Plaintiff-Appellants

Date of Revision: 11/1/24

TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS, AND RULINGS BEING APPEALED

TABLE OF AUTHORITIES

Cases page

Statutes

Court Rules

APPENDIX TABLE OF CONTENTS

TABLE OF TRANSCRIPTS

PROCEDURAL HISTORY

This case arises from a fall off a ladder that occurred on September 2, 2017. Briefly, the Plaintiff-Appellant, Brian Moleen ("Plaintiff"), was performing painting services on his father, Defendant-Respondent, Richard Moleen's ("Defendant Moleen") house, located at 951 Capstan Drive, Forked River, New Jersey. While painting, Plaintiff was utilizing a 16-foot extension ladder manufactured by Defendant-Respondent, Louisville Ladder, Inc. ("Defendant Louisville"; collectively "Defendants"). At that time, the ladder experienced a structural failure, causing Plaintiff to fall to the ground and sustain injuries.

On April 9, 2018, the Plaintiff filed his Complaint alleging negligence against the Defendants, Richard Moleen and Louisville Ladder Company. (Pa1-10). Plaintiff asserted claims against Defendant Louisville under the New Jersey Product Liability Act. (Pa4-6). Specifically, Plaintiff asserted a manufacturing defect claim, a design defect claim, and a failure to warn claim. (Pa4-6). Plaintiff asserted a claim of negligence against Defendant Moleen for breaching his duty of care as social host. (Pa6-7). His then-wife, Plaintiff, Sheri Moleen (collectively "Plaintiffs"), maintained a *per quod* claim. (Pa7-8). On June 5, 2018, Plaintiffs filed an Amended Complaint to reflect Louisville Ladder, Inc., as the correctly identified defendant. (Pa13-22).

On June 19, 2018, Defendant Moleen filed an Answer to the Amended Complaint. (Pa23-32). On July 11, 2018, Defendant Louisville filed an Answer to the Amended Complaint and asserted cross-claims as to Defendant Moleen. (Pa34-40).

On March 13, 2020, the trial court entered a Case Management Order that set a deadline for Plaintiffs to serve liability expert reports by September 1, 2020. (Pa44-47).

On May 1, 2020, Defendant Moleen moved the trial court for summary judgment. (Pa522-23). After oral argument, the trial court granted summary judgment in favor of Defendant Moleen, dismissing him with prejudice by Order entered on June 5, 2020. (Pa50-51).

On September 14, 2020, the trial court entered a Case Management Order that set a deadline for Plaintiffs to serve liability expert reports by December 31, 2020. (Pa48).

On February 1, 2021, the trial court entered a Case Management Order that set a deadline for Plaintiffs to serve liability expert reports by March 5, 2021. (Pa49).

On March 5, 2021, Plaintiffs served a liability report authored by Richard Lynch, Ph.D., on Defendant Louisville, (Pa402-69).

On August 21, 2023, Plaintiffs served a liability report authored by Mark Bell, P.E., on Defendant Louisville (Pa470-95).[1]

On June 10, 2024, trial commenced in this matter. (Pa52). After five (5) days of trial, on June 14, 2024, Plaintiffs rested their case-in-chief. (Pa52). At the conclusion of Plaintiffs' case, Defendant Louisville moved for judgment. (Pa52). The trial court granted Defendant Louisville's motion, and entered an Order of Judgment reflecting the same on June 17, 2024. (Pa52-53).

Subsequently, Plaintiffs filed this Notice of Appeal and Case Information Statement with the Appellate Division on July 22, 2024. (Pa54-65). On July 23, 2024, Plaintiffs filed an Amended Notice of Appeal. (Pa66-71).[2] Also on July 23, 2024, Plaintiffs filed a Second Amended Notice of Appeal and Case Information Statement. (Pa72-83). On July 25, 2024, Defendant Louisville filed its Case Information Statement (Pa84-90). On July 30, 2024, counsel for Defendant Moleen filed a Notice of Appearance.

Plaintiffs' now appeal on the substantive and legal merits of this case against Defendants, Richard Moleen and Louisville Ladder, Inc.

---

[1] While this matter was listed for trial, Plaintiffs' were notified that their original expert, Richard Lynch, had passed away. As such, Plaintiffs were permitted to serve the liability report authored by Mark Bell.

[2] Pursuant to *R.* 2.6-8, the date of the designated transcript volumes are as follows: 1T – June 5, 2020; 2T – June 10, 2024; 3T – June 11, 2024; 4T – June 12, 2024; 5T – June 13, 2024; 6T – June 14, 2024; 7T – June 14, 2024 (witness testimony).

STATEMENT OF FACTS

A. On Summary Judgment

On September 2, 2017, Plaintiff, Brian Moleen, was staying at his father, Defendant Moleen's beach house, located at 951 Capstan Drive, Forked River, New Jersey, with Defendant Moleen's knowledge and permission. (Pa99 at 28:1-4; Pa103 at 41:21-25; Pa102 at 39:23-25). According to Plaintiff, he and his father had an agreement that Plaintiff could stay at Defendant Moleen's house, in exchange for Plaintiff assisting in the maintenance of the house. (Pa121 at 113:5-13). Defendant Moleen assumed that Plaintiff felt he needed to performed maintenance on the house in exchange for using the house for free. (Pa207-08 at 48:25-49:2).

According to Plaintiff, prior to September 2, 2017, Defendant Moleen asked Plaintiff to paint the two (2) attic louvers on the back of the house. (Pa103 at 42:13-43:3). Defendant Moleen already had the supplies needed to complete this painting work, such as the paint, the paint brush, and the subject ladder (Pa103 at 43:7-23; Pa206 at 46:20-24). Defendant Moleen gave Plaintiff no instruction on the means and methods to complete the task, other than what paint to use. (Pa121 at 113:22-114:4; Pa208 at 49:3-5).

After completing the right attic louver, Plaintiff then proceeded to paint the left attic louver. (Pa104 at 45:3-10). Before proceeding, Plaintiff attempted

to create a sturdy and level surface for the ladder by placing plywood that he retrieved from Defendant Moleen's garage down in a flower bed. (Pa105 at 51:24-52:4; Pa122 at 118:25-119:2). Plaintiff placed the ladder just above the window of the house with the rubber feet of the ladder against the plywood, then he extended the ladder, and then he climbed to the middle of the ladder. (Pa106 at 53:20-54:6; Pa107 at 57:1-6).

After painting a third of the louver, Plaintiff began to climb down the ladder, at which time he felt the ladder shift and begin to fall to the right. (Pa107 at 57:10-21; 58:23-25). As the ladder began to fall, Plaintiff pushed off the ladder and landed on the left-side of his body on the ground. (Pa108 at 62:5-14). After his fall, Plaintiff observed that the legs of the ladder were bent. (Pa114 at 88:8-12).

Defendant Moleen had owned another house on Capstan Drive, prior to the house where the subject incident occurred. (Pa185 at 25:7-9). The subject ladder was stored in the garage of that home. (Pa185 at 25:7-9). The ladder was also stored in the garage of the house where this incident occurred. (Pa100-01 at 32:21-34:1; Pa186 at 26:13-15). At any given time, items stored in Defendant Moleen's garages at the same time as the ladder included chemicals, tools, boating equipment, generators, fishing gear, anchors, and a car. (Pa187 at 27:14-34:4; Pa238 at 78:17-19). Further, with the location of both homes being near

saltwater, Defendant Moleen was aware that items in his garages corroded. (Pa238 at 78:4-16).

Prior to discovery concluding, Defendant Moleen filed his Motion for Summary Judgment, asserting that he did not breach any duty owed to Plaintiff as a social guest on his property. (Pa522-23; Pa496-501; 1T: 6:11-17).

B. <u>At Trial</u>

Trial in this matter began on June 10, 2024, between Plaintiffs and Defendant Louisville. (Pa52; 1T-7T). On the fourth day of trial, on June 13, 2024, Plaintiffs' Expert, Mark Bell, P.E., was sworn in. (5T: 204:4). After offering the jury his qualifications and *voir dire*, Bell was offered and admitted as an expert in metallurgical engineering. (5T: 217:15-17).

During his testimony, Bell opined that the right leg of the ladder broke first, and then the left leg bent towards the right. (5T: 223:24-224:6). In his opinion, to a reasonable degree of metallurgical engineering probability, the reason the ladder's right leg cracked was due to a pre-existing flaw defect formed during the extrusion process from the factory. (5T: 228:12-22). Once the right leg collapsed, according to Bell, the left leg held all the weight and then bent. (5T: 228:24-229:1).

Thus, in Bell's opinion, there was a pre-existing crack in the ladder when it left Defendant Louisville's factory and that this flaw happened at the factory.

(5T: 256:7-12; 259:17-22). Said another way, Bell opined that there was a micro structure flaw in the factory, and the crack occurred where the flaw was located. (5T: 260:9-15). Bell came to this conclusion after he found that there was delamination under the ladder's surface. (5T: 251:1-10).

On June 14, 2024, after Plaintiffs rested their case-in-chief, Defendant Louisville moved for judgment on the basis that there was no causal link between any condition that may have been present in the ladder and the occurrence of the subject incident. (6T: 9:6-10).

The Trial Court's Review

A. On Summary Judgment

On June 5, 2020, the trial court heard oral arguments on Defendant Moleen's Motion for Summary Judgment. (1T: 3-28).

Defendant Moleen argued that summary judgment was appropriate at this stage, because all fact discovery had been completed. (1T: 4:20-22). Defendant Moleen further argued that as a social guest, he owed no duty to Plaintiff and even if he did, then there was no negligence. (1T: 6:11-17). According to Defendant Moleen, there was no visible damage to the ladder that would be noticeable to a lay person, and there were no prior accidents involving the ladder that would have put him on notice of its structural issues. (1T: 5:13-22; 21:23-22:13).

Plaintiffs argued that summary judgment was premature, because destructive testing on the ladder needed to occur first to determine whether the ladder was improperly stored in Defendant Moleen's garages and became corroded as a result. (1T: 10:5-12; 10:24-11:4). Plaintiffs also emphasized that there were genuine issues of material fact as to Plaintiff's status as a social guest on Defendant Moleen's premises. (1T:11:14-19). Plaintiffs argued that a jury needed to determine whether Plaintiff was considered an independent contractor, an employee, or a mere social guest. (1T: 11:14-12:1). Plaintiffs further argued that it was a jury question on whether Defendant Moleen breached his duty of care to Plaintiff. (1T: 13:14-14:2).

Conjointly, Defendant Louisville argued that summary judgment was premature, on the same reasoning that the ladder had yet to undergo testing. (1T: 19:3-10). As asserted by Defendant Louisville, summary judgment was inappropriate until such a time when the ladder could be tested to evaluate the condition of the ladder at the time of the incident and at the time Plaintiff received it and used it. (1T: 21:3-3-10).

The trial court was unpersuaded by Plaintiffs' and Defendant Louisville's arguments and granted summary judgment in favor of Defendant Moleen. (Pa50-51; 1T: 28:8-11). In its reasoning, the trial court determined that Plaintiff was classified as a social guest and, as such, Defendant Moleen's only duty was to

warn Plaintiff of a dangerous condition known to him, but unknown to Plaintiff. (1T: 26:8-22). In the trial court's opinion, there was no indication that Defendant Moleen was aware of any dangerous condition on the ladder, and even if a dangerous condition was present, said condition would have been just as evident to Plaintiff. (1T: 27:21-28:3).

Lastly, the trial court concluded that the testing of the ladder was unlikely to reveal any additional evidence as to what would have been conspicuous to the parties. (1T: 28:4-7). Accordingly, the trial court found that there was no negligence by Defendant Moleen and, therefore, summary judgment was appropriate against the Plaintiffs' claims and Defendant Louisville's cross-claims. (1T: 28:7-11). On June 5, 2020, the trial court entered its Order Granting Summary Judgment. (Pa50-51).

The Plaintiffs' appeal before this Court and challenge the opinions of the trial court based upon the aforementioned facts presented, as well as the legal precedents that follow. This Honorable Court must decide whether the trial court erred as a matter of law in granting summary judgment to Defendant Moleen.

B. <u>At Trial</u>

Following Defendant Louisville's Motion for Judgment, the trial court heard arguments. (6T: 9-41).

Defendant Louisville argued that Plaintiffs' expert's testimony was unhelpful to the jury and failed to give a causal link between the ladder's condition and the Plaintiffs' theories of liability. (6T: 9:6-10, 18-22). Defendant Louisville proffered that Plaintiffs' expert had to testify, to a reasonable degree, that the flaw in the ladder caused the ladder to fail at the time of the incident. (6T: 9:18-22). According to Defendant Louisville, the most the expert testified to was that there was some form of an unspecified manufacturing defect in the ladder, but that the expert could not opine that any pre-existing crack actually caused the incident. (6T: 9:24-10:3; 11:5-8). Defendant Louisville further asserted that the expert did not provide any opinions as to Plaintiffs' theories of design defect and inadequate warnings, and that these claims should also be dismissed. (6T: 10:18-25).

In opposition, Plaintiffs argued that Bell provided sufficient testimony as to causation on a manufacturing defect theory. (6T: 13:22-14:2). Plaintiffs conceded that there was no expert testimony as to theories of design defect and failure to warn and so, therefore, waived these claims against Defendant Louisville. (6T: 15:11-16; 15:21-16:8).

The trial court recognized that Bell opined that there was a crack in the ladder, and that the crack occurred in the factory. (6T: 37:16-22). However, the trial court found that Bell did not opine as to the crack being the cause of the

ladder's failure. (6T: 37:22-23). In this case, according to the trial court, Bell's testimony did not causally link the crack in the ladder to the subject incident. (Pa52-53; 6T: 37:12-14). Therefore, the trial court granted Defendant Louisville's motion and dismissed Plaintiffs' claims. (Pa52-53; 6T: 41:1-11).

On June 17, 2024, the trial court entered its Order of Judgment against Plaintiffs. (Pa52-53). The Order held that Plaintiff's claim was a product liability claim and must be pursued as a statutory product liability action under *N.J.S.A.* 2A:58C-1, *et seq*. (Pa52). The Order held that Plaintiff voluntarily withdrew his claims for statutory design defect and failure to warn. (Pa52). After Plaintiffs rested their case, Defendant Louisville moved, pursuant to *R*. 4:40-1, for a judgment of no cause of action for the manufacturing defect claim. (Pa52).

Per the Order, Plaintiff only had one liability expert in this trial, Mark Bell, who failed to offer any opinion that a manufacturing defect in a product designed, manufactured and sold by Defendant Louisville proximately caused the subject incident. (Pa52-53). Due to this failure, Plaintiff's manufacturing defect claim could not proceed without an expert to establish proximate cause, as the jury would be forced to speculate on the cause of the subject incident. (Pa52-53). Thus, with the manufacturing claim being dismissed, and with Plaintiffs voluntarily withdrawing the other two claims, there was no viable cause of action remaining under the New Jersey Product Liability Act. (Pa53).

Lastly, since Plaintiff, Brian Moleen's claims had been dismissed, Plaintiff, Sheri Moleen's derivative *per quod* claim must also be dismissed with prejudice. (Pa53).

The Plaintiffs' appeal before this Court and challenge the opinions of the trial court based upon the aforementioned facts presented, as well as the legal precedents that follow. This Honorable Court must decide whether the trial court erred as a matter of law in granting judgment to Defendant Louisville.

STANDARD OF REVIEW

The Appellate Division reviews a ruling on a motion *de novo*, applying the identical standard governing the trial court. *Davis v. Brickman Landscaping, Ltd.*, 219 N.J. 395, 405 (2014) (citations omitted). Accordingly, the reviewing court "consider[s] whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 540 (1995).

Within the same vein, the court must consider the evidence presented "together with all legitimate inferences therefrom favoring the non-moving party." *R.* 4:46-2(c). Moreover, the Appellate Division also reviews issues of law *de novo* and affords no deference to the lower court's legal conclusions. *Nicholas v. Mynster*, 213 N.J. 463, 478 (2013); *Manalapan Realty v. Manalapan*

Twp. Comm., 140 N.J. 366, 378 (1995) (holding that "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference").

ARGUMENT

I. This Court should reverse the trial court's Order Granting Summary Judgment to Defendant, Richard Moleen, because further discovery would have revealed supporting evidence of Plaintiffs' claims against Defendant. (Pa50-51; 1T: 28:8-11).

It is well settled that summary judgment is appropriate, only when the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits, shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *R.* 4:46-2(c). The court is "to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." *Brill v. Guardian Life Ins. Co. Of America*, 142 N.J. 520, 540 (1995). "Only when the evidence is utterly one-sided may a judge decide that a party should prevail as a matter of law." *Gilhooley v. County of Union*, 164 N.J. 533, 545 (2000).

"Generally, summary judgment is inappropriate prior to the completion of discovery." *Wellington v. Estate of Wellington*, 359 N.J.Super. 484, 496 (App.

Div. 2003). If incomplete discovery is raised as a defense to a motion for summary judgment, it must be shown that further discovery would likely supply the necessary information. *J. Josephson, Inc. v. Crum & Forster Ins. Co.*, 293 N.J.Super. 170, 204 (App. Div. 1996).

In this matter, summary judgment should have been denied solely on the basis of discovery being incomplete. Summary judgment was granted before Plaintiffs' expert, Dr. Richard Lynch, had access to the ladder for an inspection and destructive testing. On March 5, 2021, Plaintiffs amended discovery to serve the liability report authored by Dr. Lynch. (Pa402-69). Per Dr. Lynch's report:

> The root cause of the ladder failure was degradation of the ladder by corrosion. Visual examination of the ladder shows the effect of significant corrosion. Red rust corrosion is evident on steel components including brackets, bolts, bolt heads, screws heads, and feet. Steel components rusted where the protective galvanized coating had sacrificially corroded away. The feet are protected with an apparent chromate coating which had worn away in some areas. This progressive corrosion occurred over years of exposure in a coastal marine environment due to chlorides in the air.

(Pa415) (emphasis added).

While Defendant Moleen maintained that any pre-existing damage to the ladder was not visible, Dr. Lynch was of the opinion that the ladder displayed "extensive corrosion" and that corrosion can be visible to the naked eye. (Pa418; Pa330 at 73:14-17). According to Dr. Lynch, the extensive corrosion resulted from the ladder being stored in Defendant Moleen's garages that were in a severe

marine environment. (Pa418). Dr. Lynch identifies the observed corrosion in Figures 13, 14, 19, 20, 21 of his report. (Pa411; Pa432-33; Pa436-37). Of note, these images in the report were clearly not made under a microscope.

Overall, Dr. Lynch concluded that the ladder was exposed to corrosive salt air during extended storage in unheated garages. (Pa420). He opined that the ladder experienced extensive pitting and intergranular corrosion due to exposure to chloride containing air. (Pa420). Plaintiffs' second expert, Mark Bell, similarly opined that the subject ladder was exposed to corrosive salt air during extended storage in unheated garages and that this extensive corrosion contributed to the ladder's collapse. (Pa492).

The foregoing supports Plaintiffs argument on summary judgment that the needed additional discovery, *i.e.*, the inspection and destructive testing, would have supplied the necessary information relevant to Plaintiffs' claims. *See J. Josephson, Inc. v. Crum & Forster Ins. Co.*, *supra*, 293 N.J.Super. at 204. Contrary to the trial court's ruling, the reports did present evidence that reasonable minds may have differed on as it pertains to whether there was visible, pre-existing damage on the ladder. (1T: 27:25-28:3).

For these reasons, this Honorable Court should reverse the trial court's granting of summary judgment and remand the case for further proceedings.

II. This Court should reverse the trial court's Order Granting Summary Judgment to Defendant, Richard Moleen, because there were genuine issues of material fact as to whether Defendant breached his duty of care. (Pa52-53; 6T: 41:1-11).

Plaintiffs' second assignment of error is in conjunction with Point I, in that the need for the additional discovery would have raised a genuine issue of fact as to Defendant Moleen's breach of his duty of care to Plaintiff.

The Appellate Division has stated, "[A] homeowner has a duty to warn the unwary social guest of a condition of the premises that the homeowner knows or has reason to know creates an unreasonable risk of injury." *Bagnana v. Wolfinger*, 358 N.J.Super. 1, 4 (App. Div. 2006) (citing *Parks v. Rogers*, 176 N.J. 491, 494 (2003). However, a landowner is not required to provide a social guest greater safety than he would for himself. *Id.* "In some cases, when it is abundantly clear that the risk of danger is open, obvious, and easily understood, there may be no duty to warn." *Id.* "Although the existence of a duty is a question of law, whether the duty was breached is a question of fact." *Jerkins ex rel. Jerkins v. Anderson*, 191 N.J. 285, 305 (2007).

As stated above, Dr. Lynch was of the opinion that there was extensive corrosion on the subject ladder at the time of its examination. (Pa418; Pa330 at 73:14-17). This should not have been surprising to Defendant Moleen, who was well aware that living by saltwater means that there will be corrosion on "everything." (Pa238 at 78:4-16). However, since Defendant Moleen does not

"pay too much attention to ladders," it is unknown if said corrosion would have been visible to him. (Pa218 at 58:9-14).

While Defendant Moleen may have not had a duty to inspect and discover latent defects, it is not proper policy to permit a landowner to be willfully ignorant of potentially dangerous conditions on their property. Defendant Moleen had owned the subject ladder for several years at the time of the incident. (Pa184 at 24:16-19). In that time, the ladder was stored in the garages of his two homes that were adjacent to saltwater. (Pa185 at 25:7-9; Pa100-01 at 32:21-34:1; Pa186 at 26:13-15). Defendant Moleen was well aware that saltwater corrodes everything. (Pa238 at 78:4-16).

In this matter, the trial court erroneously determined, as a matter of law, that Defendant Moleen did not breach his duty of care to Plaintiff. (Pa50-51; 1T: 28:7-11). It is indisputable that Defendant Moleen owed some level of reasonable care to Plaintiff. For argument's sake, if Plaintiff is classified as a social guest, Defendant Moleen still had a duty to relay to Plaintiff about dangerous conditions known to him, or that should have been known to him. *See Bagnana v. Wolfinger*, *supra*, 358 N.J.Super. at 4.

Reasonable minds could differ on if the corrosion should have been evident to either Defendant Moleen or Plaintiff. *See, Endrew v. Arnold*, 300 N.J.Super. 136, 143 (App. Div. 1997) (holding that no reasonable fact finder

could conclude that defects in a stairway were not open and obvious.). Thus, genuine issues of material fact existed with regard to whether Defendant Moleen breached his duty of care, and whether the corrosion on the ladder should have been evident to either Defendant Moleen or Plaintiff.

For these reasons, this Honorable Court should reverse the trial court's granting of summary judgment and remand the case for further proceedings.

III. This Court should reverse the trial court's Order for Judgment in favor of Defendant, Louisville Ladder, Inc., as there was sufficient evidence to raise a *prima facie* case of negligence to be determined by the jury. (Pa52-53; 6T: 41:1-11).

The New Jersey Product Liability Act imposes liability on a manufacturer or seller if a claimant proves that the product causing the harm was not reasonably fit, suitable or safe for its intended purpose because it deviated from the design specifications, formulae, or performance standards of the manufacturer or from otherwise identical units manufactured to the same manufacturing specifications or formulae. *N.J.S.A.* 2A:58C-2.

As with any negligence claim, a plaintiff must prove that the alleged defect in a product was the proximate cause of plaintiff's injuries. *Coffman v. Keener Corp.*, 133 N.J. 581, 594 (1993). "There is no requirement in the law that a single cause be found and proven." *Grassis v. Johns-Manville Corp.*, 248 N.J.Super. 446, 457 (App. Div. 1991). Said another way, a plaintiff is not required to show direct, indisputable evidence of proximate causation. *Beyer v.*

White, 22 N.J.Super. 137, 144 (App. Div. 1952). "Where the original defect, although not the sole cause of the accident, constitutes a contributing or concurrent proximate cause in conjunction with the subsequent conduct of the purchase, the manufacturer remains liable." *Butler v. PPG Indus, Inc.*, 201 N.J.Super. 558, 563-64 (App. Div. 1985).

"If the proofs permit an inference that the accident was caused by some defect, whether identifiable or not, a jury issue as to liability is presented." *Moraca v. Ford Motor Co.*, 66 N.J. 454, 458 (1975); *see also*, *Sabloff v. Yamaha Motor Co.*, 59 N.J. 365, 366 (1971) ("[W]henever the facts permit an inference that the harmful event ensued from some defect (whether identifiable or not) in the product, the issue of liability is for the jury, and the plaintiff is not necessarily confined to the explanation his expert may advance.").

In this case, Plaintiffs' expert, Mark Bell, provided sufficient testimony regarding his opinions on the cause of the subject incident. First, Bell opined that it was the right leg that cracked and broke first, causing the left leg to bend to the right. (5T: 223:24-224:6). Bell further testified that the failure in the right leg was due to a pre-existing flaw caused by the extrusion process at the factory. (5T: 228:12-22).

According to Bell, if the factory does not extrude the ladder properly, the ladder delaminates. (5T: 250:16-18). Bell's opinion is that the subject ladder

exhibited delamination, which was consistent with the ladder failing. (5T: 254:2-5). Defendant Louisville will correctly point out that Bell could not testify that the delamination that he observed was the cause of the ladder leg cracking. Even though Bell could not testify that the delamination was the "sole cause of the accident," he did testify that the pre-existing crack amounted to a "contributing proximate cause" of the fracture in the ladder. (5T: 256:7-20); *see Butler v. PPG Indus, Inc.*, *supra*, 201 N.J.Super. at 563-64.

Defendant Louisville will argue that Bell testified that there was a defect present in the ladder before it left the factory, but that he did not causally link this defect to the occurrence of the subject incident. However, Bell specifically testified that the ladder had a micro structure flaw at the factory, and that the ladder cracked where the flaw was present. (5T: 260:17-22). He testified that this flaw was revealed as a result of the ladder fracturing. (5T: 260:9-11). Even further, Bell testified that the flaw was an indication that there was a problem with the micro structure and overall manufacturing process. (5T:260:13-15).

While Plaintiffs concede that certain parts of Bell's testimony appeared to be at odds with other parts of the testimony, Bell did testify sufficiently to "permit an inference that the harmful event ensued from some defect." *See Sabloff v. Yamaha Motor Co.*, *supra*, 59 N.J. at 366. Further, "a plaintiff is not necessarily confined to the explanation his expert may advance." *See id.*

Accordingly, it should have been for the jury to decide whether the pre-existing crack from the factory, as opined by Bell, caused or contributed to the subject incident.

For these reasons, this Honorable Court should reverse the trial court's granting of judgment to Defendant Louisville and remand the case for further proceedings.

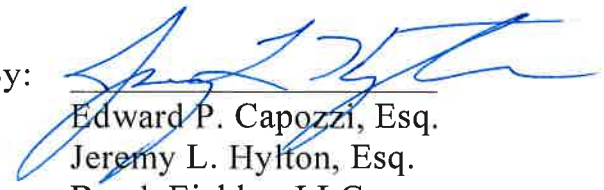
CONCLUSION

The trial court erred when it granted summary judgment to Defendant, Richard Moleen. Based on the evidence in the record, there were genuine issues of fact as to whether the corrosion would have been evident to either Defendant Moleen or Plaintiff, and whether Defendant Moleen breached his duty of care to Plaintiff.

Further, the trial court erred in granting judgment to Defendant, Louisville Ladder, Inc., at the time of trial. Based on Plaintiffs' expert's testimony, there was sufficient evidence to raise an inference that a pre-existing flaw in the subject ladder caused the ladder to fail.

For these reasons, this Honorable Court should reverse summary judgment as to Defendant, Richard Moleen, and reverse judgment as to Defendant, Louisville Ladder, Inc., and remand the case for further proceedings.

Respectfully submitted,

By: 

Edward P. Capozzi, Esq.
Jeremy L. Hylton, Esq.
Brach Eichler, LLC
Attorneys for Plaintiff-Appellants

Dated: October 21, 2024

Brian Moleen and Sheri Moleen **Plaintiffs/Appellants** **vs.** **Richard Moleen and Louisville Ladder Inc.,** **Defendants/Respondents**		**SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION** **DOCKET NO. A-003624-23 T2** **Civil Action** **ON APPEAL FROM THE JUNE 5, 2020 ORDER GRANTING SUMMARY JUDGMENT AND THE JUNE 17, 2024 ORDER OF JUDGMENT ENTERED ON MOTION AT TRIAL BOTH IN THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, UNION COUNTY, DOCKET NO L-1240-18** **SAT BELOW: Hon. Thomas J. Walsh, J.S.C. as to the June 5, 2020 order and Hon. Daniel R. Lindemann, J.S.C. as to the trial and June 17, 2024 order**

BRIEF OF DEFENDANT/RESPONDENT LOUISVILLE LADDER, INC.

DiRienzo & DiRienzo, P.A.
116 Saint Paul Street
Westfield, NJ 07090
Phone: (908) 233-6700
E-mail: jd1@dirienzo-law.com

JOSEPH DI RIENZO (047301993)
On the Brief

Date Submitted: December 9, 2024

TABLE OF CONTENTS

APPENDIX TABLE OF CONTENTS

INDEX OF TRANSCRIPTS

TABLE OF JUDGMENTS, ORDERS, AND RULINGS BEING APPEALED

INTERMEDIATE DECISIONS PERTINENT TO THE APPEAL

TABLE OF AUTHORITIES

State Supreme Court Cases

State Intermediate Appellate Court Cases

State Court Rules

PRELIMINARY STATEMENT

Plaintiff Brian Moleen [hereinafter "Brian"] and his then-wife Sheri Moleen's[1] [hereinafter "Sheri", and Brian and Sheri collectively referred to as "plaintiffs"] case against defendant Louisville Ladder, Inc. [hereinafter "Louisville"] was dismissed at trial because they did not offer an expert opinion that a defect in Louisville's product caused Brian's accident. Plaintiffs alleged that Brian's accident occurred due to a metallurgical defect in a 12-year-old ladder. As a matter of law, this required proof that a metallurgical defect in Louisville's product was a proximate cause of Brian's accident. Plaintiffs' required expert testimony to meet their burden of proof because the causal link between the ladder's metallurgy and Brian's accident is a matter beyond the average juror's knowledge. However, the only expert testimony plaintiffs offered was both equivocal as to whether the ladder contained a manufacturing defect and failed to allege a causal link between any such defect and Brian's accident. Plaintiff's expert testified that he observed conditions consistent with a crack that arose in the ladder's microstructure during the aluminum's extrusion process. The expert was asked three times whether the crack he observed caused Brian's accident, and each time he expert responded that he could not offer such an opinion within a reasonable degree of engineering certainty.

[1] Brian and Sheri divorced between the accident and the trial of this lawsuit.

The expert's inability to provide a causal link between a manufacturing defect and Brian's accident meant that there was no factual basis for plaintiffs' claims against Louisville to proceed beyond plaintiff's case-in-chief. No jury could conclude that the alleged defect caused Brian's accident without resorting to speculation or conjecture. New Jersey law holds that a jury should not be permitted to resolve fact issues by speculating instead of drawing logical conclusions from the evidence, so the trial judge properly removed these issues from the jury's consideration and entered a judgment of no cause for action in Louisville's favor. That judgment should be affirmed.

PROCEDURAL HISTORY

Plaintiffs filed suit against defendants Richard Moleen [hereinafter "Richard"] and Louisville on April 9, 2018. See Pa1. On June 5, 2018, plaintiffs amended their complaint to include fictitious defendants, see Pa13, and thereafter served Richard and Louisville. This lawsuit asserted negligence claims against Richard and product liability claims against Louisville on design defect, manufacturing defect, and failure to warn theories. See Pa16-Pa19. Richard answered plaintiffs' complaint on June 19, 2024. See Pa23. Louisville answered plaintiffs' complaint on July 11, 2018. See Pa34.

Between November, 2019 and March, 2020, the trial court entered three separate orders extending discovery. See DLA001 – DLA004; Pa44 - Pa47. The last

of these orders was entered on March 13, 2020 (the eve of the COVID-19 pandemic in-person shutdown). See Pa44. In this order, the court granted plaintiffs' motion to compel metallurgical testing, required the parties to attempt to agree on a test protocol by April 15, 2020, established deadlines of September 1, 2020 for the plaintiffs' liability expert reports and October 15, 2020 for defense liability expert reports, and set a November 16, 2020 discovery end date. See Pa45-Pa47.

With these deadlines firmly established, Richard moved for summary judgment on May 1, 2020, or four months before the expert report deadline. See Pa522. Louisville opposed this motion as premature, and plaintiffs opposed this motion both as premature and on substantive grounds. See Pa93 – Pa257; Pa496 - Pa589. On June 5, 2020, the Honorable Thomas J. Walsh granted Richard's motion for summary judgment and dismissed all claims and crossclaims against him. See Pa50-Pa51. Louisville did not cross-appeal this order, and it takes no position as to whether the trial court erred in granting Richard's summary judgment motion.

After Richard obtained summary judgment, the court extended discovery four times due to difficulties caused by the COVID-19 pandemic and disputes over metallurgical testing. See DLA005 – DLA006; Pa48-Pa49; DLA007. What was thought to be the final discovery extension was entered on March 31, 2021 and established a discovery end date of June 4, 2021. See DLA007. After a delay in scheduling a meaningful trial date due to both pandemic-related issues and judicial

shortages, the court heard motions in limine and entered a November 29, 2022 order scheduling a February 6, 2023 trial date with no further adjournments. See DLA008. However, when plaintiffs tried to schedule the trial appearance for their metallurgical expert, they learned that he underwent emergency back surgery and could not appear at trial in any form until he completed his rehabilitation. See DLA009. Plaintiffs requested an April 3, 2023 trial date, and, after considering the positions of both parties and their clients' and witnesses' availability, the court scheduled an April 3, 2023 trial date. See DLA009 – DLA014.

On March 14, 2023, plaintiffs requested another trial adjournment. See DLA032. Both plaintiffs and the expert's employer were unable to reach him, with the employer advising that it knew that the expert had experienced severe surgical complications but did not know his whereabouts. Id. The court scheduled an immediate hearing with the expert's employer present. See DLA033 – DLA034. Following that hearing, the employer located the expert and advised the court that his surgical complications rendered him unable to testify in April 2023 and likely would prevent his return to work at any time or in any capacity.[2] The April, 2023 trial date was adjourned for plaintiffs to obtain a new metallurgical expert.

No order was entered placing any restrictions on plaintiffs' service of a new expert report, and plaintiffs served their new report on August 21, 2023. See Pa470.

[2] Unfortunately, the expert ultimately passed away due to the surgical complications.

The new metallurgist was from San Diego, California. See Pa471. Whether to control costs or for some other reason he made no site visit, and he offered his opinions based solely on the tests performed by the parties during the initial discovery period. See Pa472. Plaintiff moved in limine to bar Louisville from cross-examining the new metallurgist on his failure to inspect the ladder or the accident scene and/or his failure to conduct new metallurgical testing, and the trial court denied this motion. See DLA038 – DLA040.

Trial began on June 10, 2024. On June 13, 2024, before plaintiffs' liability expert testified, the court heard Louisville's request for a R. 104 hearing on the foundation for his opinions that Louisville's ladder was improperly heat treated (a manufacturing defect theory) and should have been made of fiberglass (a design defect theory). See 5T150:3 – 5T152:22. Louisville argued that plaintiffs' expert could not opine whether the ladder's failure was caused by corrosion (a condition arising after the ladder left Louisville's control) or improper heat treatment (for which Louisville was responsible), so his opinion could not assist the jury in resolving design and manufacturing defect issues. See 5T179:25 – 5T183:3. Plaintiffs argued that this motion should have been brought as a summary judgment motion because granting it would require the dismissal of their case. See 5T155:19 – 5T156:9. Contrary to plaintiffs' position, barring their expert's testimony on manufacturing and design defect issues would not have dismissed their case because

plaintiffs' warnings claims could proceed. See 5T158:15 – 5T158:19. The court addressed Louisville's motion on the merits and ruled that plaintiffs' expert had a sufficient foundation to testify without conducting a R. 104 hearing. See 5T198:5 – 5T200:12. However, for the reasons set forth, infra, Louisville's position proved correct, and plaintiffs' expert's testimony failed to prove a prima facie case.

Plaintiffs rested their case on June 14, 2024. At the end of plaintiffs' case, and based on the testimony set forth, infra, Louisville moved to strike plaintiffs' liability expert testimony as lacking in foundation, and for judgment at trial under R. 4:40-1 on each of plaintiff's theories of liability. See 6T8:24 – 6T9:5. Plaintiffs' counsel conceded that plaintiffs had abandoned the design defect and failure to warn claims, and those claims were dismissed by consent. See 6T15:11 – 6T16:10. The trial judge (Hon. Daniel R. Lindemann, J.S.C.) found that plaintiffs' metallurgist testified that the accident ladder left Louisville's control with a microscopic flaw caused by problems with the manufacturing process, but he testified alternatively that he did not know if or did not want to say that this flaw caused Brian's accident. See 6T33:9 – 6T40:11. The trial judge held that plaintiffs' evidence did not support a finding that a defect in the ladder caused Brian's accident, so he dismissed Brian's manufacturing defect claim and Sheri's derivative per quod claim. See 6T40:12 – 6T41:13; Pa52-Pa53. With no claims remaining, a judgment of no cause for action was entered against plaintiffs and in favor of Louisville. See Pa52 – Pa53.

Plaintiffs filed a notice of appeal on July 22, 2024, and amended and second amended notices of appeal on July 23, 2024. See Pa54-Pa83. No cross-appeals were filed. Louisville's case information statement was filed on July 25, 2024. See Pa84 – Pa86.

STATEMENT OF FACTS

This lawsuit arises out of Brian's September 2, 2017 accident, which occurred while he was using a Louisville ladder at Richard's house in Forked River, New Jersey. 4T186:2 – 4T186:5; Pa3; Pa15; Pa545. While many facts surrounding Brian's accident are disputed[3], Plaintiffs' expert offered no opinion that a manufacturing defect in the Louisville ladder proximately caused Brian's accident.

[3] Louisville disputed Brian's evidence as to how the Louisville ladder was set up and used at the time of the accident, and the evidence thereof offered in plaintiff's case or references thereto made to the jury are noted in footnotes throughout the statement of facts, including but not limited to the following. While Brian maintains that he set the ladder up on a painted board in a specific location, Louisville produced evidence that Brian did not use a board, see 4T227:11 – 4T233:3, told the jury on opening statement that physical evidence it planned to offer showed that the ladder was set up at a different location, see 3T54:8-3T55:6; 3T59:21-3T60:12, and referenced some of that evidence in cross-examining Richard. See 7T30:20 – 7T31:19; 7T34:5 – 7T40:9; DLA058 – DLA065. Plaintiffs' appeal as to Louisville is from an order granting Louisville's motion for judgment at the end of plaintiffs' case, which required that all reasonable and legitimate factual inferences from the evidence be given to plaintiffs in deciding the motion. See, e.g., Holm v. Purdy, 252 N.J. 384, 400 (2022). As such, for purposes of both Louisville's motion and this appeal, Brian's description of the location where and the manner in which the ladder was set up at the time of the accident are accepted, and contrary information is provided for background only.

As such, plaintiffs' claims against Louisville were properly dismissed on Louisville's motion for judgment.

Sometime before the accident, Richard told Brian that two outdoor vents [hereinafter "louvers"] on the back of Richard's house needed to be painted, and Brian was painting those louvers when his accident happened. 3T241:17 – 3T241:21; 7T17:24 – 7T18:1; 7T18:14 – 7T18:18. The first louver was on the right side of the back of the house (facing it from behind) on an exterior wall above a wooden deck. 3T232:15 – 3T233:10; 7T18:14 – 7T18:18; Pa423. The second was on the left side of the back of the house (again viewed from behind) on an exterior wall above what Brian described as a flowerbed. 3T232:15-3T232:10; 4T179:25 – 4T180:8; 7T18:14 – 7T18:18; Pa568. No one was outside with Brian when he worked on these louvers.[4] 5T14:22 – 5T15:3.

Brian used a sixteen-foot aluminum Louisville extension ladder to access the louvers. 3T230:15 – 3T230:25. While plaintiffs argued that Brian was not an experienced ladder user, see 3T32:20 – 3T32:22, Brian began using extension ladders as a teenager, and used one (not the accident ladder) as a teenager to paint his grandfather's house. 4T193:20 – 4T194:11. Family members taught teen-aged

[4] In a statement given several weeks after the accident, Brian said that Sheri was outside at the time of the accident. See 5T15:4 – 5T20:13. Sheri denies this, and Brian later claimed that he meant that Sheri came outside after he fell. Id.; 5T79:18 – 5T81:19. For purposes of Louisville's motion and this appeal, Brian's inconsistent statement is irrelevant, and Louisville presumed that Brian was outside alone.

Brian how to use and set up a ladder, and he understood a proper set-up required the ladder to be "sturdy", meaning it did not move and it was set up on a solid surface. 4T194:15 – 4T197:13; 4T233:4 – 4T234:12. Brian's general practice was not to read warnings and instructions on products that he was familiar with, even though he knew that warnings and instructions provided important information relating to his safety. 4T213:21 – 4T214:3; 4T215:23 – 4T216:12. This practice created a fact question as to whether Brian read the warnings or instructions on the accident ladder[5], as Richard purchased that ladder for use at his first shore house many years after Brian learned to use a ladder. 7T5:15 – 7T7:4. However, Brian admits that, even if he read Louisville's warnings and instructions, he never changed the way he used the accident ladder based on those warnings and instructions. 4T215:18 – 4T215:22.

In the seven years that Richard owned his second shore house before Brian's accident, Brian used the accident ladder four or five times to change outdoor spotlights, and he helped Richard straighten the vinyl siding under the eaves. 3T231:1 – 3T231:22; 4T179:12 – 4T179:17; 7T13:5 – 7T14:10. He never noticed any damage to the ladder any time before his accident. 3T231:10 – 3T231:12. Richard denied that there was any damage to or material missing from the ladder

[5] This fact question is irrelevant to Louisville's motion and this appeal because plaintiffs withdrew Brian's failure to warn claim.

when it was purchased, and he estimated that he used the ladder without Brian on six occasions. 7T15:8 – 7T15:13; 7T28:3 – 7T28:20. He never had any problems with the ladder, and he never noticed any damage to the ladder. 7T15:14 – 7T15:21.

On the date of his accident, Brian painted the right louver first by setting the ladder feet up on the surface of the wooden deck, raising the fly section[6] a couple of rungs, then climbing the ladder and painting the louver. 3T241:22 – 3T242:12; 3T242:22 – 3T243:13; 4T183:21 – 4T185:3. Brian climbed to the first or second rung on the fly section and painted the louver for ten to fifteen minutes, during which time the ladder held his weight, never buckling or falling. 4T185:1 – 4T186:1; 4T221:3 – 4T225:9. He used a standard paint brush to paint this louver. 5T30:7 – 5T30:9; 5T52:9 – 5T52:14.

Brian then set up to paint the left louver, which required a different ladder set-up and a higher climbing height since the ground in the flowerbed was several feet below the wooden deck. 3T243:15 – 3T244:6; 4T220:19 – 4T221:2. He stood the ladder up with the feet against the house and extended the fly section adjacent to the right side of the louver; although he could not recall how many rungs he extended the fly section, he recalled the top of the ladder near the second piece of vinyl siding below the roofline. 3T246:19 – 3T248:1; 4T216:13 – 4T217:18; 4T235:11 –

[6] The fly section of an extension ladder is the top section that can be extended to make the ladder taller. See 4T212:22 – 4T212:25.

4T236:17; 4T236:21 – 4T236:25; 5T10:11 – 5T10:14; 5T11:8 – 5T11:11; DLA046. He then pulled the base of the ladder away from the wall so that it was angled to climb and stepped on the bottom rung to ensure that the ladder was sturdy. 4T217:19 – 4T220:1. Because the ground in the flowerbed was a sandy clay, Brian smoothed out the dirt[7] to the right of three items in the flowerbed that Brian called "stumps", then set the feet up on a painted piece of plywood so the ladder's feet were on a stable surface[8]. 3T237:22 – 3T238:3; 3T244:7 - 3T245:1; 3T252:12 - 3T252:23;

---

[7] The ground in the flowerbed angled downhill towards the right (or the deck) based on Brian's setup of the ladder such that a rock was used to level the board that the ladder was placed on when the accident set-up was re-created at an expert inspection. See 4T243:4 – 4T244:3; 5T33:8 – 5T34:10; DLA067. Brian did not use a rock or other item to level the board at the time of his accident; he testified at trial that he smoothed rather than leveled the dirt, and he did not know the height of the soil in the flowerbed at the time of his accident or whether it had changed between his accident and the post-accident expert inspection. See 4T181:6 – 4T182:17. Before trial, Brian never mentioned smoothing or leveling this soil in his deposition testimony or to Richard. See 4T237:1 – 4T243:3; 5T63:6 – 5T63:14; 7T57:13 – 7T58:4; 7T69:6 – 7T71:13.

[8] A post-accident statement given by Brian and referenced at trial described setting up the ladder and did not mention using a board under the ladder's feet. See 4T226:10 – 4T228:16; 4T232:2 – 4T233:3. Richard's answers to interrogatories also made no mention of the ladder being set up on a board. See 7T49:12 – 7T52:3. Brian did not need to use a board to set the ladder up safely, as the ladder's feet contained a spike that could be used to anchor the ladder into soft ground. See 3T260:23 – 3T261:17; DLA050. For purposes of Louisville's motion and plaintiff's appeal, Louisville assumed that the ladder was set up on a board as Brian contends. However, the evidence that the ground in the landscape bed was not level set forth in footnote 7, supra, creates a legitimate factual inference that the board and the ladder leaned to the right during Brian's use with or without Brian's use of the plywood. See 4T234:13 – 4T235:10.

DLA051.[9] While wearing Crocs,[10] Brian climbed the ladder to an unknown point below the top but higher than the rung from which he painted the right louver. 4T225:10 – 4T225:16; 5T10:15 – 5T10:21. He then started painting the bottom right corner[11] of the left louver with a different paint brush than he used on the right louver; this brush was a three-foot long handle with the bristles angled at the end so

---

[9] This manner of setting up the ladder is inconsistent with Louisville's instructions, which describe multiple set-up techniques, each of which ensures that the ladder is set up as a safe angle. See 3T258:25 – 3T260:5; 4T208:20 – 4T210:1; DLA048. While Louisville was prepared to offer evidence that Brian improperly set up the ladder at a different location than he described, for purposes of Louisville's motion and this appeal Louisville assumes the ladder was set up both in the manner and the location that Brian described.

[10] Crocs are slip-on plastic shoes with an open back, an enclosed front, and holes in the material to allow water to flow through. See 4T191:9 – 4T192:2. They contain a strap that can be rotated to multiple positions, including behind the heel to provide a barrier against the foot backing out of the shoe. See 4T192:3 – 4T193:1. Brian did not recall the position of this strap at the time of his accident, but the photographs of Brian on the way to the hospital (which were displayed to the jury) show the strap on his left Croc on top of the shoe, which meant there was no barrier for his heel at the back of the shoe. See 4T193:2 – 4T193:19; DLA053.

[11] The left louver does not appear to have been painted as Brian described. Brian did not remember painting any part of the left side of this louver. 5T11:4 – 5T11:7; 5T12:13 – 5T12:16. Photographs of the louver suggest that his memory was flawed, as the left side of both the top and bottom of the louver and the top half of the left side appear to be painted. See DLA052. The louver was approximately two feet across, so Brian could have easily painted these areas with the brush described, infra. 5T11:20 – 5T12:7. Brian did not know of any work done on the louver after his accident, so the evidence of the louver's condition accurately showed the louver's condition at the time of Brian's accident. See 4T183:8 - 4T183:20. However, for purposes of Louisville's motion and this appeal, Louisville presumed that Brian painted the louver as he described.

the brush looked like a hockey stick. 3T233:11 – 3T233:20; 3T248:6 – 3T248:14; 3T249:24-3T250:7; 4T220:13 – 4T220:18; 5T10:22 – 5T11:7; 5T29:23 – 5T30:13. When Brian's descent from the ladder reached a point eight to ten feet above the ground, he claims he felt a jolt, then heard a snap, then the ladder fell to his right (towards the deck). 3T250:8-3T250:17; 3T273:2 – 3T273:24; 3T274:2 – 3T274:24; 3T277:16 – 3T278:6; 4T119:23 – 4T120:13; 4T225:17 – 4T226:4; 5T20:14 – 5T20:21. Brian told Sheri that he knew the ladder was falling toward the deck, and he was afraid of hitting the deck, so he took evasive action. 5T82:16 – 5T82:24; 5T118:24 – 5T120:8. He pushed off the ladder and landed in an area covered with landscape stone on the opposite side of a sidewalk from the flowerbed. 3T250:8 – 3T250:17; 3T252:3 – 3T252:10; 3T277:12 – 3T277:15; 3T278:7 – 3T278:8; 4T120:14 – 4T120:15; 5T24:13 – 5T26:10. He saw the ladder fall to the right, landing between the house and the railing for the stairs leading onto the deck. 3T250:20-3T251:16; 3T275:11 – 3T277:7; 4T120:16 – 4T120:22. He then noticed that the bottom of both siderails were bent. 3T278:9 – 3T278:16; 4T120:16 – 4T121:2; DLA041.

Brian did not know what caused the ladder to go to the right. 5T20:23 – 5T21:24. However, because he saw the ladder's legs broken after the fall, he assumed that they broke and caused him to fall as opposed to being damaged in the fall. 5T21:25 – 5T22:20. This assumption was baseless, as Brian did not know the

forces required to bend the legs in the manner observed or the forces associated with his use of the ladder. 5T31:2 – 5T31:23. When plaintiffs concluded their proofs, they had not offered evidence from any source of the forces and stresses required for the ladder to fail under Brian's weight[12].

It is unclear who cleaned up the ladder after the accident or whether the ladder's condition changed after the accident. Brian initially claimed that Sheri cleaned up the ladder. 5T28:19 – 5T29:15. Sheri denied cleaning up after the accident, as did her mother (who was also present), and Brian ultimately testified that he did not know who cleaned up the ladder, brush, or paint. 5T28:19 – 5T29:22; 5T87:5 – 5T87:9; 5T141:1- 5T141:17. Brian and Sheri's son also did not clean up the ladder. 5T141:18 – 5T141:22. However, when Richard returned to his house

[12] Joint metallurgical testing conducted on the accident ladder by plaintiffs' first metallurgist and Louisville's experts determined that the stresses required for the accident ladder to permanently deform and fail exceeded 40,000 pounds per square inch. See Pa360-Pa361; Pa414. However, plaintiffs did not offer any evidence of these test results, see 5T203:10 – 5T260:23, and while Louisville referenced these results in its opening statement, see 3T47:1 – 3T49:4, it did not offer evidence of these results because plaintiffs' case was dismissed before Louisville began its case in chief. Plaintiffs neither determined the stress imposed on the accident ladder by Brian's weight nor offered evidence thereof. See 5T203:10 – 5T260:23. Louisville's experts ran tests to measure the stresses imparted to the ladder by 400 to 600 pounds of force (nearly two to three times Brian's weight) applied at the approximate location on the ladder Brian described falling from, and the results showed that the largest stress generated was 2,700 pounds per square inch (or approximately 5% of the stress required for the accident ladder to fail), so the accident ladder could not have failed under Brian's weight. See 3T49:5 – 3T49:19. Louisville also referenced this information in opening statements, but it did not offer this evidence because the dismissal preceded Louisville's case in chief. Id.

approximately two weeks after the accident, he found the ladder laying on the ground on the side of the house to the left of where Brian was working. 7T20:22 – 7T21:13; 7T52:21 – 7T53:15. After his motion for summary judgment was granted, Richard also located the brush in his garage, and it had been cleaned. 7T62:12 – 7T62:24. How either item got to its respective location remains unknown.

To establish a defect in Louisville's ladder, plaintiffs called Mark Bell [hereinafter "Bell"], a metallurgical engineer from San Diego, California. 5T203:13 – 5T203:23. Bell was not plaintiffs' original metallurgist; he was retained after plaintiffs' original metallurgist passed away. 5T32:17 – 5T32:24; 5T217:23 – 5T218:5. As such, Bell was not present for the first expert's inspection of the accident scene or for the joint metallurgical testing; he first inspected the ladder when he arrived at trial, although he had previously seen the microscopic images sampled for metallurgical evaluation. 5T31:24 – 5T32:16; 5T222:7 – 5T222:17. He opined that the ladder's right siderail bent first, then broke, while the ladder's left siderail bent at some point after the right siderail but did not fracture. 5T223:24 – 5T224:8. However, he did not opine that these legs bent or broke due to a defect in the ladder.

Bell's testimony on product defect focused exclusively on a manufacturing defect theory. He opined that the ladder was sold with a crack at the edge (the area where the ladder had the least amount of material) that propagated through the right

siderail. 5T247:6 – 5T250:1. He believed this crack resulted from delamination caused by a flaw in the extruding process, although he could not identify the process flaw that caused the delamination. 5T250:4 – 5T251:10. More importantly, Bell could not opine that the purported delamination and corresponding crack caused the ladder to fail. When he was first asked about the causal relationship between these claimed flaws and the alleged ladder failure, he said the flaws were consistent with the ladder failing, but he could not say that they were the reason the ladder failed. 5T252:23 – 5T254:7. When he was asked a second time whether the delamination and crack caused the ladder failure, Bell answered "no" and went on to say that they were revealed by the failure, but they were not the cause of the failure. 5T256:24 – 5T257:23. When he was asked a third time whether flaws in the ladder's metallurgy caused the ladder to fail, Bell replied:

> I think it's – I – I want to be precise in my answer. And I know that – I know that the whole microstructure processing of this is a problem. That flaw was revealed as a result of the fracture. Whether it caused the fracture or not, I – I really can't – I don't want to say because the – it's just an indication of the entire problem with the manufacturing and the microstructure.

5T259:17 – 5T260:15. Giving this testimony the benefit of all reasonable inferences, Bell opined that the ladder in question left Louisville's control with a manufacturing defect, but not that the defect caused Brian's accident. Since Bell's testimony never addressed design defect or failure to warn issues, and he did not opine that the

manufacturing defect he identified caused Brian's accident, Louisville did not cross-examine Bell. 5T262:24 – 5T263:4.

As is set forth, supra, plaintiffs conceded their lack of evidence on the design defect and failure to warn claims, and the trial court found Bell's testimony inadequate to prove a prima facie case on plaintiffs' manufacturing defect claim. The trial court's decision was correct. Without expert testimony, there was no basis for a jury to conclude that any defect in the ladder's microstructure caused Brian's accident, as reaching such a conclusion on a sophisticated technical issue without expert assistance is beyond a lay jury's ability. The expert testimony plaintiffs' offered could not assist the jury in determining that a manufacturing defect caused Brian's accident because plaintiffs' expert never reached that conclusion. The trial court properly dismissed the case to prevent the jury from impermissibly speculating on the cause of Brian's accident. Plaintiffs' appeal is without merit, and the judgment in favor of Louisville should be affirmed.

POINT I

THE TRIAL COURT PROPERLY GRANTED LOUISVILLE'S MOTION FOR JUDGMENT AT THE END OF PLAINTIFFS' CASE IN CHIEF BECAUSE PLAINTIFFS DID NOT PROVIDE THE EXPERT TESTIMONY NEEDED TO PROVE THAT A MANUFACTURING DEFECT EXISTING IN THE ACCIDENT LADDER BEFORE IT LEFT LOUISVILLE'S CONTROL PROXIMATELY CAUSED BRIAN'S ACCIDENT.

Louisville's motion for judgment at the end of plaintiffs' case was properly granted as plaintiffs failed to prove that a defect in the accident ladder was a proximate cause of Brian's accident. To prove a prima facie case against Louisville, plaintiffs had to prove that the ladder in question was defective, that the defect existed when the ladder left Louisville's control, and that the defect caused injury to a reasonably foreseeable ladder user. See, e.g. Becker v. Baron Bros., 138 N.J. 145, 151 (1994). Plaintiffs' expert testified that there was a problem with the ladder's extrusion process that caused a crack in the siderail. 5T250:4 – 5T251:10. However, neither this vague allegation of a defect nor the fact that the accident occurred supports an inference that the alleged defect caused Brian's accident. Rose Enterprises v. Henny Penny, 317 N.J. Super. 477, 490 (App. Div. 1999). Plaintiffs had to prove that the alleged defect was both a cause-in-fact (otherwise referred to as "but for" causation) and a proximate cause of Brian's accident and injuries. Cruz-Mendez v. ISU/Insurance Services of San Francisco, 156 N.J. 556, 574 (1999); Coffman v. Keene Corp., 133 N.J. 581, 594 (1993). The proofs plaintiffs offered failed to meet this burden of proof on either form of causation.

A. Plaintiffs required expert testimony to prove that a defect in Louisville's ladder caused Brian's accident.

Plaintiffs needed an expert to establish that Brian's accident would not have occurred but for a metallurgical defect in Louisville's product since the average juror cannot evaluate metallurgical issues without expert assistance. Expert testimony is required when a subject is so esoteric that jurors of common knowledge and experience cannot be expected to form a valid conclusion on the subject matter without the assistance of expert testimony. Butler v. Acme Supermarkets, Inc., 89 N.J. 270, 283 (1982). In a product liability action, a lay witness's pre- and post-accident observations of the product cannot lead to a conclusion that the accident did or did not occur due to a product defect unless expert testimony is offered to support that conclusion. See Wyatt by Caldwell v. Wyatt, 217 N.J. Super. 580, 591-92 (App. Div. 1987). The Wyatt court held that, in a product liability action involving allegedly defective brakes, evidence of a brake fluid leak and a worn brake pad was inadmissible without an expert to discern whether those conditions caused the sudden brake failure alleged or were caused by either the accident or by post-accident vehicle use. Id. This legal principle moots plaintiffs' trial evidence without expert testimony on causation. The ladder's post-accident condition could be construed as either causing the accident or having been caused by the accident, and technical and/or scientific evidence is needed for a jury to distinguish between these two options. Plaintiffs relied on metallurgy to supply this technological link, but

metallurgical principles are sufficiently esoteric that an expert is required to explain them to a jury. See Macri v. Ames McDonough Co., 211 N.J. Super. 636, 643 (App. Div. 1986)(expert needed to inform the jury on the risks of a hammer chipping). Furthermore, when esoteric principles impact causation, the expert must address the scientific principles specific to the case at bar. Thompson v. Merrell Dow Pharmaceuticals, 229 N.J. Super. 230, 250-51 (App. Div. 1988). Thus, plaintiffs needed an expert to explain both the alleged defect and the causal link between the ladder's metallurgy and Brian's accident for the jury to decide these issues.

B. Plaintiff's expert failed to prove a prima facie case on causation because he offered no opinion that a defect in Louisville's product caused Brian's accident.

There can be no reasonable dispute that plaintiffs failed to offer the expert testimony required to prove a prima facie case on causation. Plaintiffs' expert was first asked whether the metallurgical flaw he identified "is . . . the reason that this ladder failed." 5T254:2 – 5T254:3. He responded "[i]t was – it's a delamination. It's consistent with the ladder failing. I think it – I don't know if it's – if that's the reason…." 5T254:4 – 5T254:6 (emphasis added). He was asked a second time whether the alleged metallurgical flaw caused the accident through a series of questions the generated the same fundamental response:

> Q: When he comes down, he comes down the center of the ladder, correct? Brian.
>
> A: Brian, did that.

Q: And the – and the right leg cracked, you said?

A: Yes.

Q: And then the – the ladder went to the right and the right and the left leg bent, correct?

A: That's correct.

Q: So you have one broken leg and one bent leg.

A: That's correct.

Q: And that happened because of this pre-existing crack from the factory. To a reasonable degree of metallurgical probability –

. . .

A: You're asking me did this delamination cause the failure.

Q: Yeah.

A: No. Even though you – it was revealed by the failure, it didn't – it's an indication of the microstructure.

5T256:24 – 5T257:23 (emphasis added). The third and final time plaintiffs' expert was asked if the defect caused the failure, he testified as follows:

Q: And to a reasonable degree of metallurgical probability that flaw caused the ladder to fail?

. . .

A: And I know that . . . I know that - the whole microstructure processing of this is a problem. That flaw was revealed as a result of the fracture. Whether it caused the fracture or not, I – I really can't – I don't want to say because the – it's just an indication of the entire problem with the manufacturing and the microstructure.

5T259:23 – 5T260:15 (emphasis added). Three times plaintiffs' expert was asked if the metallurgical defect he identified in the ladder caused Brian's accident. Three time he said no. These answers make clear that he failed to offer any causal link between the alleged defect and the accident.

Plaintiffs' argument that their expert opined that Brian's accident was caused by a manufacturing defect is unsupported by the record. They first contend that their expert provided the causal link to the accident by testifying in connection with plaintiffs' demonstrative animation that the ladder's right leg broke first, then the left leg bent to the right. See Pb6. While there is no dispute that plaintiffs' expert testified that this is how the ladder failed, this testimony never addressed why the ladder failed. By failing to address the relationship between the ladder's metallurgy and failure mode, this testimony ignored the causation issue. See Thompson, 229 N.J. Super. at 250-51.

The expert was then asked why the video contained these images, and he said it was because of pre-existing flaws in the metal extrusion. See 5T228:12- 5T228:22; Pb6. As plaintiffs appear to concede, the only flaw their expert identified was the delamination on one of the siderails and a corresponding microscopic crack. See 5T247:6 – 5T251:10; Pb6-7. However, as the testimony outlined supra demonstrates, the expert was asked three times whether these flaws caused Brian's accident, and three times he stated that he could not offer such an opinion within a

reasonable degree of metallurgical probability. Plaintiffs concede that, because the expert could not say that the defect he identified in the ladder caused its failure, his opinions on causation are "at odds with" his prior testimony discussing the video. See Pb20. Where, as here, an expert provides subsequent testimony that is clearly and unequivocally at odds with the expert's prior testimony, the force of the first statement is destroyed. Ritondo by Ritondo v. Pekala, 275 N.J. Super. 109, 116 (App. Div. 1994) certif. denied 139 N.J. 186 (1995). The trial judge applied this legal principle and found that any opinions plaintiffs' expert offered on causation in connection with the animation were negated by his repudiation of that testimony three separate times, holding that the expert was "backing off of, fundamentally, saying [the defect] was the cause . . . ." See 6T39:20 – 6T40:5. Ultimately, the expert offered no testimony that a defect in the ladder proximately caused Brian's accident, and the court recognized this deficiency.

C. Plaintiffs' concurrent cause argument fails as plaintiffs offered no expert testimony that a defect in Louisville's ladder caused Brian's accident.

Plaintiffs' concurrent proximate cause argument (see Pb18 – Pb20) misstates both Louisville's position and the record. It is well established that a product defect does not need to be the sole proximate cause of an accident to provide a basis for liability; if the defect is a concurrent proximate cause, that will suffice. See, e.g., Perez v. Wyeth Laboratories, Inc., 161 N.J. 1, 27 (1999). However, for concurrent

causation to exist, there must be more than one party whose conduct or product is implicated in causing a plaintiff's accident. Freund v. Cellofilm Properties, Inc., 87 N.J. 229, 247, 248 n.5 (1981). Therefore, to raise a concurrent causation issue, plaintiffs must offer evidence showing that the product defect was a cause of the accident in question and that there was some other cause. Dawson v. Bunker Hill Plaza Associates, 289 N.J. Super. 309, 326 (App. Div.) certif. denied 146 N.J. 569 (1996).

Plaintiffs' reliance on Butler v. PPG Industries, Inc., 201 N.J. Super. 558 (App. Div.) certif. denied 102 N.J. 298 (1985) to support a concurrent cause argument is misplaced. The Butler holding is based on testimony that the product defect at issue was a proximate cause of the accident along with the conduct of the user or the user's employer. Id. at 563-64. In contrast, plaintiffs' expert in this case has not identified any defect in Louisville's ladder as a proximate cause of Brian's accident. There can be no cause of Brian's accident acting concurrently with a product defect is the product defect itself is not identified as causing the accident; such a position is a non sequitur.

Rather than Butler, the Dawson case is instructive on this point and directly parallel to the facts of this case. In Dawson, plaintiffs were injured when prefabricated wood trusses collapsed during installation. Id. at 315. One of the defendants allegedly supplied defective lumber for use in the trusses. Id. at 325.

However, plaintiff's timber expert did not opine that any defective lumber caused the trusses to collapse. Id. at 326. In the absence of expert testimony implicating the allegedly defective lumber, the court found no evidence that any defective lumber was a substantial factor in the trusses' collapse and dismissed the claims against the lumber supplier. Id. Similarly, in this case, the plaintiffs' expert failed to opine that a defect in Louisville's ladder caused the ladder to collapse at the time of Brian's accident. In the absence of that testimony, there was no evidence that a defect in the ladder was a proximate cause of the accident, and the claims against Louisville were properly dismissed.

D. Plaintiffs' circumstantial defect argument, which was not raised in response to Louisville's motion, fails since there is neither circumstantial proof of a defect nor proof that any such defect caused Brian's accident.

Finally, plaintiffs' reliance on cases allowing proof of a product defect by circumstantial means[13] ignores the undeniable reality that this is not a circumstantial defect case. Plaintiffs failed to advance a circumstantial evidence argument in response to Louisville's motion for judgment, so this court would be within its right to refuse to consider this argument. See, e.g., Nieder v. Royal Indemnity Ins. Co., 62 N.J. 229, 234 (1973). However, assuming, arguendo, that the court chooses to address the issue, plaintiffs' argument is without merit.

[13] Specifically Moraca v. Ford Motor Company, 66 N.J. 454 (1975) (see Pb19) and Sabloff v. Yamaha Motor Co., 59 N.J. 365 (1971)(see Pb19-20).

Plaintiffs circumstantial evidence argument fails because the facts do not permit an inference that Brian's accident arose from a ladder defect. In appropriate cases, New Jersey law allows plaintiffs to prove product defect by evidence permitting an inference that a dangerous condition existed prior to sale. Scanlon v. General Motors Corp., 65 N.J. 582, 592-93 (1974). However, proving a defect by circumstantial evidence requires the totality of the evidence to support a conclusion that in the normal course of human experience an injury would not have occurred at the given point in the product's life span without a defect attributable to the manufacturer. Id. at 593. The mere happening of an accident is not enough to support a circumstantial defect claim; evidence of proper use, handling, or operation of the product, and the nature of the malfunction is required. Id. at 591. Examples of circumstantial evidence cases are a new car's steering failing six months after sale, see Moraca, 66 N.J. at 460, or the front wheel of a motorcycle failing to turn during use two days after purchase. See Sabloff v. Yamaha Motor Co., 113 N.J. Super. 279, 281-83 (App. Div.) aff'd 59 N.J. 365 (1971).

Against these examples, the evidence offered at trial failed to satisfy the circumstantial evidence standard. The accident ladder was manufactured in October, 2005, so it was nearly twelve years old at the time of the accident. See DLA057. In the twelve years since its manufacture, Brian used the accident ladder four or five times, and Richard used the ladder another six times, all without incident. 3T231:1

– 3T231:22; 4T179:12 – 4T179:17; 7T13:5 – 7T14:10; 7T15:8 – 7T15:13. Where a product has operated safely without fail for a period of years, it would be mere guesswork for the jury to conclude that a subsequent accident occurred due to a defect that existed at the time of manufacture, and the alleged failure is not circumstantial evidence of a defect. Rose Enterprises, 317 N.J. Super. at 492. Plaintiffs had to offer some proof of the ladder's ability to withstand the forces Brian imparted for a jury to infer that a latent defect emerged on the date of the accident, and plaintiffs failed to offer these proofs. This leaves no inference of a circumstantial defect to be drawn since the only inferences plaintiffs are entitled to are those that can be reasonably and legitimately deduced from the evidence. Holm, 252 N.J. at 400.

Furthermore, plaintiffs' circumstantial defect argument still ignores the need to prove causation. To prove causation by circumstantial evidence, plaintiffs must introduce evidence affording a reasonable conclusion that more likely than not a defect in Louisville's product caused Brian's accident. Townsend v. Pierre, 221 N.J. 36, 60 (2015). If the proofs provide for a mere possibility of this causal link, if the probabilities are equally balanced, or if the matter remains one of speculation and conjecture, the court's duty is to direct a verdict and not to allow the case to reach the jury. Id. at 60-61. Accepting Brian's testimony as true, the most a jury can do is speculate that a defect in Louisville's product caused his accident. His testimony

established that he did not set the ladder up in the manner Louisville instructed and that the ground on which the ladder was set up pitched in the direction that the ladder fell. See 3T258:25 – 3T260:1; 4T181:6 – 4T182:17; 4T208:20 – 4T210:1; 4T226:10 – 4T233:3; 4T234:13 – 4T235:10; 4T237:1 – 4T244:3; 5T33:8 – 5T34:10; 5T63:6 – 5T63:14; 7T49:12 – 7T52:3; 7T57:13 – 7T58:4; 7T69:6 – 7T71:13; DLA048; DLA067. Brian then climbed the ladder wearing shoes with no back that he could inadvertently step out of. See 4T191:9 – 4T193:19; DLA053. He claims that, while descending the ladder, he felt a jolt, then heard a snap, then the ladder fell to his right. 3T250:8-3T250:17; 3T273:2 – 3T273:24; 3T274:2 – 3T274:24; 3T277:16 – 3T278:6; 4T119:23 – 4T120:13; 4T225:17 – 4T226:4; 5T20:14 – 5T20:21. However, he does not know what caused anything he heard or felt. 5T20:23 – 5T21:24. He concluded that the ladder legs failed and caused him to fall because he saw the ladder legs broken after the fall. 5T21:25 – 5T22:17. However, he has no basis to eliminate the equally (if not more) likely possibility that the legs were damaged in the fall. For this reason, the post-accident condition of a product does not establish that the product was defective at the time of sale. See McDermott v. Tendun Constructors, 211 N.J. Super. 196, 208-11 (App. Div.) certif. denied 107 N.J. 43 (1986). Plaintiffs also offered no evidence to eliminate the equally likely possibilities that the ladder fell because Brian failed to follow the set-up instructions, due to the pitch of the ground, or due to a misstep. Given that these are reasonable

inferences from the evidence that plaintiffs offered, it was impossible for a reasonable factfinder to conclude that an injury would not have occurred at this point in the ladder's life without a defect therein. Therefore, the trial judge correctly found that, in the absence of expert testimony, there was no reasonable way for a jury to determine whether the alleged defect caused the accident or whether the accident happened without regard to the alleged defect. See 6T36:2 – 6T38:7.

E. Louisville's motion was properly granted since plaintiffs did not offer sufficient evidence for a reasonable factfinder to conclude that plaintiffs proved a prima facie case.

In light of the foregoing, Louisville's motion for judgment at the end of plaintiffs' case was properly granted. Louisville's motion should only have been denied if, accepting as true all of the evidence supporting plaintiffs' position, and affording plaintiffs the benefit of all inferences that can be reasonably and legitimately deduced from the evidence, reasonable minds could differ on the validity of plaintiff's position. Holm, 252 N.J. at 400. Giving plaintiffs the benefit of all reasonable inferences that can be drawn from the proofs, the factfinder is left to speculate on whether a defect in Louisville's ladder caused Brian's accident. Plaintiffs needed an expert to eliminate jury speculation, and their expert failed to supply the necessary opinion on causation. Where expert testimony is required to prove an element of plaintiffs' prima facie case, and no such testimony is provided, dismissal at the close of plaintiffs' case is proper. See Hubbard ex rel. Hubbard v.

Reed, 168 N.J. 387, 397 (2001); Ritondo, 275 N.J. Super. at 116; Hearon v. Burdette Tomlin Memorial Hospital, 213 N.J. Super. 98, 104 (App. Div. 1986). The trial judge recognized this legal principle and properly granted Louisville's motion for judgment. His ruling should be affirmed.

POINT II

ASSUMING, ARGUENDO, THAT THE TRIAL COURT'S JUDGMENT OF NO CAUSE FOR ACTION IN FAVOR OF LOUISVILLE IS AFFIRMED AND THE TRIAL COURT'S SUMMARY JUDGMENT OF NO CAUSE FOR ACTION IN FAVOR OF RICHARD IS REVERSED, RICHARD HAS NO RIGHT TO PURSUE CROSSCLAIMS AGAINST LOUISVILLE AS HE HAS NOT CROSS-APPEALED SEEKING THE RIGHT TO DO SO.

As it indicated, supra, Louisville maintains that the judgment of no cause for action in its favor should be affirmed, and it takes no position on plaintiffs' appeal from the summary judgment entered in favor of Richard. Clearly, if plaintiffs fail to prevail on their appeal against either defendant, this matter will be fully and finally resolved. However, if plaintiffs prevail on their appeal against Richard but not against Louisville, then the remand of the issues between plaintiffs and Richard will not involve Louisville because Richard accepted the benefit of a judgment that mooted its crossclaims against Louisville and he has not cross-appealed from the judgment Louisville won at trial.

Richard's procedural positions below prevent him from appealing the judgment in favor of Louisville to the extent that it impacts his crossclaims. All

respondents, including Richard, are entitled to oppose an appeal from the judgment that they obtained by arguing for any alternative basis for partial or full affirmance of that judgment. Reich v. Ft. Lee Zoning Bd., 414 N.J. Super. 483, 499 n. 9 (App. Div. 2010); O'Brien (Newark) Cogeneration, Inc. v. Automatic Sprinkler Corp. of America, 361 N.J. Super. 264, 271 (App. Div. 2003) certif. denied 178 N.J. 452 (2004). However, on collateral issues, a respondent must be aggrieved by a judgment to appeal from it. Ellison v. Evergreen Cemetery, 266 N.J. Super. 74, 78 (App. Div. 1993). Where a respondent voluntarily accepts the benefits of a judgment in its favor, it is not aggrieved, and it is estopped from attacking the collateral impacts of that judgment on appeal. Tassie v Tassie, 140 N.J. Super. 517, 524-25 (App. Div. 1976). Moreover, where a respondent is aggrieved by another judgment or order, it must cross-appeal to obtain relief therefrom, and the court is within its right not to consider any such issue not raised by a cross-appeal. State v. Elkwisni, 190 N.J. 169, 175 (2007); Reich, 414 N.J. Super. 499 n. 9.

Applying these principles, Richard is estopped from contesting the judgment of no cause for action in favor of Louisville because Richard requested and accepted the benefits of a judgment that prevented him from advancing his crossclaims against Louisville. Richard sought and obtained summary judgment before experts evaluated the ladder for defects in design, manufacturing, or warnings and instructions. He had the right to wait and evaluate the ladder before seeking this

relief. He chose not to. In so choosing, he has estopped himself from challenging the judgment in favor of Louisville at any subsequent point.

Even were Richard inclined to assert his crossclaims against Louisville, he has not asked this court for the right to do so. Louisville obtained its judgment of no cause for action years after Richard's summary judgment and in a different order. As such, Richard had to cross-appeal if he wanted to challenge that order. He has not cross-appealed, and his failure to do so waives his right to challenge Louisville's judgment. If the judgment in favor of Louisville is affirmed, the case is over as to Louisville regardless of the outcome of the appeal as to Richard.

CONCLUSION

WHEREFORE, as plaintiffs failed to offer any evidence at trial that a defect in a Louisville product was a proximate cause of Brian's accident, the judgment of no cause for action was properly entered in Louisville's favor at the end of plaintiff's case, and that judgment should be affirmed. As Richard sought summary judgment on the claims against him before discovery was completed on the claims against Louisville, and he accepted the benefits of that summary judgment since June, 2020, Richard is estopped from contesting crossclaims against Louisville if the summary

judgment he obtained is reversed, and the case against Louisville should end regardless of the outcome of plaintiffs' appeal against Richard.

Respectfully Submitted,

s/Joseph DiRienzo
JOSEPH DI RIENZO

WILSON, ELSER MOSKOWITZ EDELMAN & DICKER, LLP
Robert C. Neff, Jr., Esq. (Attorney ID No. 003571992)
7 Giralda Farms, Suites 100/110
Madison, New Jersey 07940
973-735-5766/Fax: 973-364-0808
Robert.NeffJr@wilsonelser.com
Attorneys for Defendant/Respondent,
Richard Moleen

BRIAN MOLEEN and SHERI MOLEEN, Plaintiffs/Appellants, v. RICHARD MOLEEN; LOUISVILLE LADDER, INC.; XYZ CORPORATION 1-10 (FICTITIOUS DESIGNATIONS), AND JOHN DOE 1-10 (FICTITIOUS DESIGNATIONS), Defendants/Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-003624-23 SAT BELOW: HON. DANIEL R. LINDEMANN, J.S.C.; HON. THOMAS J. WALSH, J.S.C. SUPERIOR COURT OF NEW JERSEY LAW DIVISION: UNION COUNTY DOCKET NO. UNN-L-1240-18 Civil Action

BRIEF OF DEFENDANT RICHARD MOLEEN IN OPPOSITION TO PLAINTIFFS' APPEAL

Of Counsel and On the Brief: Robert C. Neff, Jr.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

PRELIMINARY STATEMENT

This is a case in which an adult son, who did maintenance work on his father's shore home as someone who enjoyed using it, was injured while using his father's ladder. The claim against the father, defendant Richard Moleen ("Richard"), was properly dismissed on summary judgment when the evidence failed to establish any basis for a negligence claim again Richard, who had no reason to conclude that the ladder was dangerous, and who retained no control over the performance of the project being performed by his son, plaintiff Brian Moleen ("Brian" or "plaintiff").

Plaintiff on appeal now improperly attempts to introduce evidence that his expert, after Richard's motion for summary judgment was heard and decided below, issued a report that said the expert saw rust on the ladder. However, plaintiff fails to explain why the expert's observations, which revealed nothing new that was not already in the factual record, make any difference. Rust or no rust, the court below properly granted summary judgment on the basis that Richard breached no duty to his son to have ferreted out and warned about an unknown weakness in the ladder, when both men had the same opportunity to observe and inspect the ladder.

In short, the facts as they existed at the time of the motion for summary judgment were not, and could not be, changed by the expert's report.

The undisputed facts and law mandate affirmance of the Court's holding below and the entry of summary judgment in defendant Richard Moleen's favor on all claims and cross claims.

PROCEDURAL HISTORY

Plaintiff's explanation of the procedural history is accurate as far as it goes. We would add only the following.

Richard's motion for summary judgment was granted on June 5, 2020. (Pa50). The Court's decision found plaintiff unable to satisfy the elements of a negligence claim. (1T at 27-28). The decision explicitly rejected plaintiff's and codefendant Louisville Ladder, Inc.'s ("Louisville") arguments that the motion was premature because expert discovery using a microscope could possibly alter that decision. (1T at 28/4-7).

Following the grant of summary judgment dismissing all claims against Richard, the case continued as against defendant Louisville only, and plaintiff apparently served an expert report on March 5, 2021 (after the motion for summary judgment was granted as to Richard Moleen) to support his product liability claims against Louisville. (Pa402). Despite now arguing, on appeal, that the expert report somehow substantiates plaintiff's argument below, plaintiff never, at the trial court level, made a motion to reconsider the grant of summary judgment.

The case proceeded to trial in June 2024, with the trial court entering a verdict of no cause for action in favor of Louisville at the close of plaintiff's case on June 17, 2024 (Pa52), or more than three years after the service of the expert report, and more than four

years after the summary judgment motion was granted in favor of defendant Richard Moleen.

Plaintiff then filed this appeal as against both defendants.

STATEMENT OF FACTS

Again, plaintiff's Statement of Facts is accurate as far as it goes. Richard would add only the following.

Plaintiff and his family frequently visited his father's beach house, where he moored and stored his fishing boat year-round, and where he assisted his father, Richard, with minor repairs and chores. (Pa10, Pa96, Pa120, Pa190). Richard did not need to ask Brian to assist with chores, Brian would just do them; Brian was not a handyman, and did not work for a construction company or painting company. (Pa202, Pa234). On the day of the accident, and in fact that entire weekend, Richard was not at the beach house. (Pa200, Pa201).

On the day of the accident, Plaintiff decided to paint two exterior attic louvers, using the 16' aluminum extension ladder manufactured by defendant Louisville and owned by his father, which was stored in the garage. After completing the first louver without incident, he began painting the second one. In the course of doing so, he fell from the ladder when it slid sideways. (Pa104, Pa107).

Richard did not generally supervise or manage the means and methods of his son's chores around the house, and was obviously not doing so at the time of the accident. (Pa121, Pa208).

Prior to the accident, Richard and Brian only discussed what type of paint Brian would use for the job. (Pa121). Richard never told his son how to use the ladder or how to perform the painting chore. (Pa121, Pa200, Pa208, and Pa209).

Richard did not know, nor did he have reason to know, of any damage to the ladder, or whether the ladder stored in the garage at his beach house was in any way defective or dangerous. (Pa194, Pa195, Pa218). Prior to the accident, Richard had never noticed bent legs or other damage to the ladder. (Pa218) There had never before been an accident involving the ladder. (Pa194)

STANDARD OF REVIEW

The Appellate Division reviews a summary judgment decision *de novo*, applying the same standard applied by the trial court as set forth at R. 4:46-2. That is, the Appellate Division first decides whether there is a genuine, material issue of fact. If there is no material factual issue, the Appellate Division then decides whether the lower court's ruling on the law was correct. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J.Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998).

New Jersey Court Rule 4:46-2 states, in pertinent part, that a motion for summary judgment shall be granted:

> [I]f the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to judgment or order as a matter of law.

The opposing party cannot merely rely on allegations in pleadings and on facts that are "insubstantial" in nature to the resolution of the motion. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 75 (1955). There, the Supreme Court held that "the standards are to be applied with discriminating care so as not to defeat a summary judgment if the movant is justly entitled to one." Id. at 74; Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 533 (1995) (equating the test as similar to the one for a motion for involuntary dismissal under R. 4:37-2(b)).

LEGAL ARGUMENT

POINT I

THE COURT BELOW CORRECTLY HELD THAT AWAITING EXPERT EXAMINATION OF THE LADDER WAS UNWARRANTED, AND PROPERLY GRANTED SUMMARY JUDGMENT (Pa50; 1T at 27-28)

The Amended Complaint alleges that Richard was responsible for supervision of use of the ladder and management of the project, and for keeping a dangerous condition (the ladder) on his property. (Pa18)

In fact, he had no obligation to – and did not - supervise the use of the ladder or manage the project, and as the court below held, breached no duty in allowing plaintiff to use the ladder.

Further, the new expert report plaintiff submits for the first time here does not change the facts, nor call into question the holding in the court below, contrary to the short argument plaintiff makes at Point One of his brief.

In order to prevail in a negligence matter, a plaintiff has the burden of proving, by a preponderance of the evidence, each of the three components of the claim: 1) that the defendant owed plaintiff a duty of care; 2) that the duty was breached; and 3), that the breach caused plaintiff to be injured. The first component, the existence of a duty of care, is a matter for the court's determination, and not the jury's. Pfenninger v. Hunterdon Central, 167 N.J. 230, 240 (2001); Robinson v. Vivirito, 217 N.J. 199, 208 (2014).

In cases where a dangerous condition is alleged to have caused the injury, a property owner has a duty to warn social guests only of dangerous conditions known to him and unknown to the guest. Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 433-34 (1993); see also Parks v. Rogers, 176 N.J. 491, 494 (2003) (a homeowner has a duty "to warn the unwary social guest of a condition of the premises that the homeowner knows or has reason to know creates an unreasonable risk of injury…except when the guest is aware of the condition or by reasonable use of [his faculties] would observe it."); Berger v. Shapiro, 30 N.J. 89, 99 (1959) (holding that if "the guest is aware of the dangerous condition or by a reasonable use of his faculties would observe it, the host is not liable" because of the guest's failure to use due care).

Accordingly, the Court below, after properly noting that fact discovery was over, and finding that Brian was a social guest, held:

> The record of the fact discovery in this case that defendant Moleen stored his ladder, as counsel's been arguing this morning, in the garage in Forked River, with the – and there's, of course, like garages, there's some chemicals in there. The Forked River property is close to the ocean. The father answered when asked about corrosion, and I guote, "Well, when you're by a

> saltwater area, there's corrosion on everything. We all know from living in New Jersey, everybody's been down the shore, that of course, you see the – if you own a house or your rent a house, you go to a hotel, you see that there's usually some effect on the metal of the property by – by the salt – salt air corrosion."
>
> That's a very common thing. Whether that led the father to believe that there was a dangerous condition, there's no indication that the father knew of a dangerous condition or failed to warn his son. And counsel argues Longo again to me, if – if there – if there were any damage to the ladder, it would've been as noticeable by the son as it would've been by the father.
>
> I frankly, don't see how the expert's report are going to change what we already know as far as – as far as anything was evident to the son or the father. I can't find that the father, based on that, breached any duty to the son. And therefore, I cannot find that there would be negligence in this case. So, I find that summary judgment is appropriate as to the father in this case.

1T at 27/7 – 28/9.

Plaintiff's argument now, for the first time on appeal - that his after-served expert report supports his argument below that the summary judgment motion was premature - is incorrect. In fact, the report supports the trial court's observation that nothing an expert could find would change what was, or was not, evident to Richard or his son – which is a factual circumstance that no expert testimony could change. As is clear from the record set forth above and in plaintiff's brief, Richard was clear that he did not observe any dangerous condition of the ladder, that he had not had any prior incidents involving the ladder, and that he was in no better position than his son to know of any danger involving the ladder, or make any observations of any dangerous condition.

And his son, of course, was equally able to make those observations, and saw no damage to the ladder. (Pa124) In fact, Brian had used this very ladder four or five times

previously without incident. (Pa117). Brian expressly testified that he could not testify to any observation that his father could have made that Brian could not have made. (Pa125). Brian testified that he did not believe his father could have known of any problem with the ladder, and that his father would have inspected the ladder "just like" Brian would have inspected it. (Pa124-125). And Brian "looked the ladder up and down" and found no damage; he saw that it was "not rotted" and he concluded that everything looked to be "in good order." (Pa115).

First, it is black letter law that an expert report cannot alter the facts in the record. Townsend v. Pierre, 221 N.J. 36, 58-61 (2015) (an expert's opinion that overgrown shrubbery was a proximate cause of an accident is unavailing in the face of fact testimony to the contrary). The relevant facts were known at the time of the summary judgment motion (at which time fact discovery had concluded), and the report adds nothing new. In fact, the court below acknowledged the testimony about Richard's knowledge of corrosion at the shore, as set forth above. The report does not, and could not, contradict the sworn testimony of both the plaintiff and defendant as to what was seen (or not seen) on the ladder prior to the incident.[1]

[1] In fact, a review of the post-accident photos attached to the report, which the expert describes as showing rust, actually confirms the lack of something that might be seen by a layman as posing anything near a safety hazard. (Pa429 – Pa441). Even if the minor marks shown in just some of those photos were rust, they were obviously not identified as such by either Richard Moleen or Brian Moleen, and if they were, they certainly weren't identified as suggesting a structural defect that would cause a leg to bend or crack.

Second, if plaintiff truly believed that the report constituted new evidence supporting plaintiff's claims against Richard, he would have filed – and was required to file – a motion for reconsideration. A trial court can reconsider interlocutory orders at any time prior to the entry of final judgment. Johnson v. Cyklop Strapping Corp., 220 N.J.Super. 250, 257 (App. Div. 1987), certif. denied, 110 N.J. 196 (1988). See also R. 4:42-2, which provides that any order "which adjudicates fewer than all the claims as to all the parties shall not terminate the action as to any of the claims, and it shall be subject to revision at any time before the entry of final judgment in the sound discretion of the court in the interest of justice." R. 1:7-4(b) (motions for reconsideration of interlocutory orders shall be determined pursuant to R. 4:42-2).

Plaintiff failed to file such a motion. There is, therefore, nothing for the Appellate Division to review – the trial court was never presented with, and therefore never ruled on, plaintiff's argument that subsequent expert discovery required reconsideration and reversal of the Court's grant of summary judgment. In New Jersey, "appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available 'unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.'" Nieder v. Royal Indemnity Ins. Co., 62 N.J. 229, 234 (1973) (quoting Reynolds Offset Co., Inc. v. Summer, 38 N.J.Super. 542, 548 (App. Div. 1959)).

Here, an opportunity was more than available to have moved for reconsideration: the court's order granting summary judgment was entered on June 5, 2020 (Pa50), the

expert report was served by letter dated March 5, 2021 (Pa402), trial against Louisville did not commence until June 10, 2024, and final judgment was not entered until June 17, 2024 (Pa52). In other words, plaintiff had more than four years after summary judgment was entered, and more than three years after serving the expert report, to have filed a motion for reconsideration. Having failed to do so, plaintiff is barred from raising the issue here for the first time.

Even so, and even if the Appellate Division were to consider the report, the subsequently-issued report describing the expert's own observation of rust on the ladder is of no moment because it does not change the undisputed facts surrounding the ladder, observations made by both plaintiff and defendant, and the lack of knowledge of any defect or deficiency in the ladder, for the reasons set forth above.[2]

Plaintiff cites only to Josephson, which stands for the basic principle that, when a party opposes a summary judgment motion based on incomplete discovery, "that party must establish that there is a likelihood that further discovery would supply the necessary information." Josephson, Inc. v. Crum & Forster Ins. Co., 293 N.J.Super. 170, 204 (App. Div. 1996) (citing Auster v. Kinoian, 153 N.J.Super. 52 (App. Div. 1977)). Under the

[2] The expert report is confusing, in that it states in the first instance that the inspection attended by plaintiff occurred after the motion on 7/29/20 (Pa409), and in the second instance that a ladder inspection attended by plaintiff occurred before the motion was filed on 7/29/19. (Pa410). If the second date is correct, plaintiff's expert could easily have prepared a certification attesting to his observations for provision to counsel in opposition to the motion. In either case, however, plaintiff's expert would have had the opportunity to view photos of the ladder prior to the motion, but did not submit anything in opposition to the motion below.

circumstances set forth above, the new report actually serves to confirm that further discovery was of no moment, and that the motion below was properly granted.

POINT II

THE COURT BELOW PROPERLY FOUND THAT DEFENDANT RICHARD MOLEEN BREACHED NO DUTY TO HIS SON, PLAINTIFF KEVIN MOLEEN (Pa50; 1T at 27-28)

Preliminarily, it is not clear how the argument at Point II of plaintiff's brief differs from his argument in Point I – both seem to argue that the after-served expert report, never put before the trial court on a motion to reconsider, should somehow change the facts considered by the court below on defendant's motion for summary judgment. As set forth above, it does not, and cannot, change the facts of the case.

Put differently, the mere fact that plaintiff's expert observed rust on the ladder does not change what both plaintiff and defendant could – and couldn't – see at the time of the accident. And neither one - rust or no rust - saw or was aware of a dangerous condition in the ladder, which is unchanged by the report. Importantly, the report, to state the obvious, does not find fault with anything defendant Richard Moleen did or failed to do, and does not attribute the cause of the accident to anything Richard did or failed to do.

To recap, as set forth above, plaintiff himself testified that, prior to using the ladder, he looked it up and down to make sure it looked good, that it was sturdy, that there were no holes, and that it was not rotted; it appeared to be "in order." Brian testified that the legs of the ladder were not bent, and that he did not see any visible damage to the ladder prior to the accident.

Similarly, Richard Moleen could not recall any damage to the ladder prior to his son's accident. The ladder had not been involved in any prior accidents. Richard had not noticed whether either of the legs on the ladder were bent prior to the incident (there was no evidence that they were).

In short, there is no evidence whatsoever that Richard had any reason to believe that the ladder was deficient or would fail.

Given that testimony, plaintiff's allegation of negligence fails, and the court below properly so held. See Longo v. Aprile, 374 N.J.Super. 469 (2005); Tighe v. Peterson, 175 N.J. 240 (2002).

Augmenting the case law set forth in Point I on social guest liability, the Longo decision is on point. There, plaintiff sued for injuries when he fell from a neighbor's roof while power-washing the aluminum siding. The Court affirmed the grant of defendants' summary judgment motion, and held that the defendants did not breach a duty under the circumstances. As here, the neighbors routinely assisted one another in household projects, without compensation, and the defendants did not supervise the plaintiff's power-washing. Id.

The state Supreme Court in Longo reasoned that the dangers inherent with working alone on a roof, eight feet above the ground, together with those associated with the configuration of the roof, including its narrow corner and drip ledge, were self-evident. Id. There was nothing, the Court held, to establish that the drip ledge or the roof as it

existed on the day in question qualified as a danger posing an unreasonable risk of harm to the plaintiff. Id.

As in Longo, Brian Moleen routinely performed household chores at his father's beach house, because he stayed at the house most weekends, and brought his family and friends there. Brian did not receive monetary compensation. And Richard Moleen was not aware of a defective or dangerous condition with the ladder.

That plaintiff's expert now points out rust on the ladder does not mean that Richard was "willfully ignorant" (Pb15) of it prior to the accident, just as Richard's general awareness that salt air can be corrosive does not constitute knowledge of a structural defect, or even the possibility of a structural defect, in the ladder. Again, put simply, Richard did not testify, and there is no evidence to support the proposition, that salt air had corroded this ladder to the point that any layman would conclude it was unsafe. In fact, as set forth above, the photos that plaintiff's expert provides with his report establish the opposite – that there was nothing about the ladder suggesting to a layperson that it was structurally unsound or might fail during use.

The Appellate Division applied the Longo reasoning in Rubessa v. Warner, A-4904-10T3, 2012 N.J.Super. Unpub. LEXIS 951 (April 30, 2012). (Pa527). There, the plaintiff, a long-time friend of the homeowner, came to oversee renovations on the defendant's house. The plaintiff climbed up a ladder leaning against the house, and as he came back down the ladder, it slid to the left and plaintiff fell and sustained injuries. In

Rubessa, the Court affirmed the grant of summary judgment to the defendant, finding no knowledge of any dangerous condition.

The lone case plaintiff cites, without exposition, is Bagnana v. Wolfinger, 358 N.J.Super. 1, 4 (App. Div. 2006). There, plaintiff claimed injury while "double jumping" on the defendant homeowner's trampoline (jumping with others on the trampoline at the same time). The trial court granted summary judgment to the homeowner, but the Appellate Division reversed, finding that the defendant had read the warnings on the trampoline against double jumping, but removed warning labels on the trampoline and allowed the plaintiff to double jump without warning him of the dangers of doing so.

Clearly, that is not the case here. Mr. Moleen did not remove any labels, and certainly knew of no dangers associated with the condition of the ladder. The expert's observation of rust does not in any way suggest that a layman observing the rust would conclude that it somehow meant the ladder would fail. And clearly plaintiff, who had the same opportunity to view the ladder and looked the ladder up and down, reached that very conclusion.

Under those circumstances, and even assuming that the rust was a "dangerous condition" (and even if so, it could only have been a latent condition, since a layman would not recognize it as posing a danger) summary judgment was properly granted here. Parks v. Rogers, 176 N.J. 491, 494 (2003) (a homeowner has a duty "to warn the unwary social guest of a condition of the premises that the homeowner knows or has reason to know creates an unreasonable risk of injury … except when the guest is aware of the

condition or by reasonable use of [his faculties] would observe it.") A landowner "is not required to provide greater safety on his premises for a social guest than he would for himself. For example, the landowner does not have a duty to scour the premises to discover latent defects." Id. at 498.

Similarly, plaintiff's citation to Endrew v. Arnold, 300 N.J.Super. 136 (App. Div. 1997), is unavailing, except for the unremarkable proposition that a homeowner has no duty to warn a social guest of an open and obvious condition, in that case an obviously defective stairway that the decedent could only have been aware of. Id. at 143. So too here, certainly Brian Moleen had the same opportunity as his father to have seen any rust condition and drawn his own conclusion as to whether it posed a danger – and admittedly look it up and down and saw no holes or rot, and concluded that it was in 'good order,' as set forth above.

To be clear, plaintiff's brief does not appear to challenge the accurate conclusion of the Court below that the social guest duty of care applies here. For the reasons set forth above and in this Point, the court correctly concluded that there were no facts to support a claim that Richard Moleen breached that duty.

Moreover, even had Brian been considered a contractor, which he was not, Richard owed Brian no duty of care, and the decision below should be affirmed for that reason as well.

Landowners who invite independent contractors to come upon their premises are "under a duty to exercise ordinary care to render reasonably safe the areas in which the

contractor might reasonably expect to be working." Sanna v. National Sponge Co., 209 N.J.Super 60, 66 (App. Div. 1986). However, the courts in New Jersey consistently recognize the general principle that a landowner is under no duty to protect an independent contractor from the very hazard created by the doing of the contract work, provided the landowner does not retain control over the means and methods of the execution of the project. Muhammad v. New Jersey Transit, 176 N.J. 185, 198 (2003); Mavrikidis v. Petullo, 153 N.J. 117 (1998); Majestic Realty Assoc. Inc. v Toti Contracting Co., Inc., 30 N.J. 425, 431 (1959).

Here, as set forth above, it is undisputed that Brian's father was not at the beach house on the weekend of the accident, and that he had not previously given Brian instructions on how to go about completing the project beyond discussing the type of paint. (Pa121)

Moreover, Brian testified he was not paid for performing the painting of the attic vent on his father's beach house. The small painting chore was not a project which required a building permit or a professional contractor, and Richard testified that Brian did not work for a construction or painting company, and was not a handyman or contractor. (Pa23)

Nor is there any evidence that, if he had supervised the project, he would have seen anything about the ladder that would have suggested a structural weakness – particularly after plaintiff painted the first louver without incident.

Brian was unable below – as now - to carry his burden to prove that Richard was liable to Brian under a social guest theory of liability. Nor can he establish facts (and did not try to do so here, on appeal) that would establish that Richard exercised any control over the work, or owed a duty to do so. Accordingly, again, the Court below properly granted summary judgment.

The decision below must be affirmed.

CONCLUSION

For the foregoing reasons, the Appellate Division should affirm the grant of summary judgment in favor of defendant Richard Moleen, and affirm the dismissal of all claims and cross claims.

Respectfully submitted,

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP
Attorneys for Defendant Richard Moleen

By: */s/Robert C. Neff, Jr.*
Robert C. Neff, Jr.

Dated: December 5, 2024