

## IN THE MISSISSIPPI SUPREME COURT

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EMJ CORPORATION,  
APPELLANT

v.

CAUSE NO.: 2010-CA-01076 **E**

CONTRACT STEEL CONSTRUCTION, INC.,  
APPELLEE

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**CERTIFICATE OF INTERESTED PERSONS**

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The undersigned counsel of record certifies that the following persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court may evaluate possible disqualification or recusal.

1. EMJ Corporation, Appellant;
2. Contract Steel Construction, Inc., Appellee;
3. John Meeker, Plaintiff; and
4. Mary Lou Meeker, Plaintiff.



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## **STATEMENT OF THE ISSUES**

- I. Whether the trial court properly granted summary judgment in favor of Contract Steel Construction, Inc. on the Plaintiffs' claims where the undisputed evidence establishes that Contract Steel had completed all of the work it had contractually agreed to perform on the ladder, that EMJ had accepted and approved that work, and that EMJ had control of the ladder prior to John Meeker's fall.**
- II. Whether the trial court properly granted summary judgment in favor of Contract Steel Construction, Inc. on EMJ's Cross-Claim where the undisputed evidence establishes that Contract Steel completed all of the work it contractually agreed to perform on the ladder.**

## **STATEMENT OF THE CASE**

### **A. Procedural Background**

On April 24, 2008, the underlying Plaintiffs, John and Mary Lou Meeker, filed the underlying Complaint for injuries arising out of John Meeker's fall on April 30, 2005, from a ship's ladder (the "ladder") on the site of construction of a J.C. Penney store in Southaven, Mississippi. (R. at 20–24.) In their Complaint, the Plaintiffs asserted that the ladder was defective and/or unreasonably dangerous, defects in the ladder proximately caused them injuries, and that the Defendants were liable for those injuries. (R. at 20–24.) The Defendants included J.C. Penney (JCP) (the project owner), J. Howard Nudell Architects, Inc. d/b/a Nudell Architects ("Nudell") (the architect), Harrell's Metal Works, Inc. ("Harrell's") (the fabricator of the ship's ladder), Hart, Gaugler and Associates, Inc. ("HGA") (the engineers on the project who approved the drawings of the ship's ladder), and Accurate & Precise Drafting ("A&P") and Alan Pelletier of A&P ("Pelletier") (the drafters of the plans for the ship's ladder), as well as EMJ Corporation ("EMJ") (the general contractor on the project), and Contract Steel Construction Inc. ("Contract Steel") (the steel erector who installed the ladder). (R. at 20–24.)

During the underlying litigation, JCP filed a Motion for Summary Judgment which the trial court granted by JCP Summary Judgment Order dated February 26, 2009 (R. at 133–48; 540–44). EMJ did not appeal the grant of summary judgment in favor of JCP. The Plaintiffs voluntarily dismissed Defendants Nudell, Harrell's, HGA, A&P, and Pelletier. Significantly, Plaintiffs withdrew their appeal against Contract Steel on May 17, 2011 and have dismissed their claims against Contract Steel.

On June 3, 2008, EMJ filed a Cross-Claim against Contract Steel alleging that the Plaintiffs' injuries, damages and claims, "if any, arise out of and/or result from the acts and/or omissions of [Contract Steel]," seeking indemnity from Contract Steel for EMJ's expenses arising out of the Plaintiffs' Complaint, and stating that Contract Steel breached its contract with EMJ. (R. at 50–55.) EMJ also filed cross-claims against HGA, Nudell, A&P, and Pelletier on the same grounds, and these cross-claims have been dismissed. (R. at 103–06.)

On October 20, 2009, Contract Steel filed a Motion for Summary Judgment on the Plaintiffs' claims and EMJ's Cross-Claim. (R. at 545–46; 556–926.) In its Response to the Motion, EMJ admitted that it was not entitled to indemnification for its own negligence and stated that it was only seeking indemnification for Contract Steel's alleged negligence and recovery for alleged violations of the contract between Contract Steel and EMJ. (R. at 1034.) After hearing oral arguments on the Motion, the trial court entered an Order Granting Summary Judgment in favor of Contract Steel on December 17, 2009. (R. at 1183–88.)

In its Order Granting Summary Judgment in favor of Contract Steel, the trial court specifically held that it was undisputed "that the ladder was approved for final installation and Contract [Steel] was not asked to make any corrections to the ladder,"

as EMJ failed to put forth any evidence that someone without the authority to do so had approved the ladder. (R. at 1186.) The trial court further held that the contract between Contract Steel and EMJ was ambiguous, as it required Contract steel to do all “steel erection work including but not limited to work specified in” various sections of the Contract, including Section 05500, which included duties relating to both “metal fabrications and installation of the fabrications.” (R. at 1186.) Accordingly, the trial court held that the testimony of EMJ’s project manager, who testified under oath that Contract Steel was not responsible for applying the non-slip surface to the ladder and that EMJ had never requested Contract Steel apply that surface or pay for the application thereof, removed any genuine issue of material fact by establishing that Contract Steel was not, in fact, the party responsible for that application. (R. at 1186–87.) The trial court therefore granted summary judgment in favor of Contract Steel. (R. at 1188.) The trial court entered an Order Directing Entry of a Final Judgment In Favor of Contract Steel on June 22, 2010. (R. at 1274.)

EMJ filed its notice of appeal on June 22, 2010. (R. at 1275.) The Plaintiffs filed their notice of appeal on July 22, 2010. (R. at 1289.) Significantly, on May 17, 2011, this Court granted the Rule 42(b) Motion of Appellants John and Mary Meeker to Dismiss Plaintiffs’ Appeal as to Defendant Contract Steel, Inc.

#### **B. Statement of Facts**

In the instant lawsuit, the Plaintiffs seek damages arising out of a fall Plaintiff John Meeker sustained while descending a ship’s ladder following his inspection of a roof canopy at a J.C. Penney store which was under construction in Southaven, Mississippi (the “JCP store”). (R. at 20–24.) With regard to EMJ and Contract Steel, the Plaintiffs alleged that their “negligence, gross negligence, and breaches of contract .

. . . resulted in the defective ship's ladder being erected at the Project which created [a] non-conforming and dangerous condition." (R. at 23.) Defendant EMJ was the General Contractor for construction of the JCP Store. (R. at 22; 121.) The contract between dismissed defendant JCP and EMJ stated that EMJ was to "give constant supervision to the Project both at the site and in the fabricating shops"; was "solely responsible for the construction of the Project"; that EMJ would "take whatever precautions for the safety of, and [] provide whatever protection as may be necessary to prevent damage, injury or loss to: . . . Persons engaged in the Work or who may be affected thereby"; and that EMJ would "designate its superintendent, or . . . some other responsible member of Contractor's organization who is present at the Site, whose duty shall be the prevention of accidents." (R. at 158, 159, 164, 165.) Randy Hartline, EMJ's job superintendent, was responsible for safety on the JCP job site. (R. at 267.)

On January 11, 2005, EMJ and Contract Steel entered into a subcontract agreement under which Contract Steel was to perform "[a]ll **steel erection work**" as specified in certain sections of the subcontract agreement, including Section 05500. (R. at 1037(emphasis added).) The unambiguous language of the contract between EMJ and Contract Steel did not require Contract Steel to perform any design, drawing, manufacture, or fabrication work. (R. at 1037–44.) Although Section 05500 includes a paragraph which provides for the application of "a non-slip surface" on top of the rungs of the ladder, EMJ's project manager, John Hall, confirmed the unambiguous language of the contract by testifying under oath Contract Steel would only have been responsible for whatever steel erection work included in Section 05500, and that Contract Steel was not responsible for application of a non-slip surface to the ladder. (R. at 1123–1135.)



Rather, Harrell's was responsible for applying the non-skid surface to the ladder. (R. at 1135.)

On or about April 15, 2005, the ship's ladder was delivered to the job site. (R. at 1232.) Curtis Walden of Contract Steel noticed that the ladder was several inches too short. (R. at 1232.) Walden and Mason Hitchens of Contract Steel tack welded the ship's ladder temporarily into position, as this would allow EMJ to inspect the ladder and determine whether the installation was acceptable or decide to reject or alter the ladder before final installation. (R. at 426–27.)

After tack welding the ladder, Curtis Walden showed the ladder to Randy Hartline and possibly another person. (R. at 1233.) While EMJ asserted in its opposition to Contract Steel's Motion for Summary Judgment that the "other individual" involved in this review of the ladder was a JCP representative, it admitted that the trial court found that JCP's involvement was too speculative (R. at 1234), and EMJ did not appeal this finding or the trial court's grant of summary judgment in favor of JCP. EMJ has admitted that at the time of this inspection, it **knew that the ladder treads were not perfectly parallel to the floor.** (R. at 1234.)

Further, it is **undisputed** that Hartline reviewed the temporarily installed ladder with treads that were not parallel to the floor and that, during this review, Walden and Hitchens were instructed, by Hartline and possibly the same "other individual" mentioned above, to permanently install the ladder "as is" and that EMJ knew that Contract Steel was erecting the ladder. (R. at 1233; Br. of Appellant at 11.) Specifically, EMJ has admitted that, during Hartline's inspection of the ladder, the "unknown individual" whom EMJ asserts was a JCP representative "stated that the ladder looked great and should not be reinstalled or removed" because it was an

“access ladder not an ‘easy access ladder’ so the alleged deficiencies need not be cured.” (R. at 384.) EMJ admits that Walden and Hitchens “completed the welding” on the ladder after getting this approval. (R. at 1234.) By April 16, 2005, Contract Steel had “completed all of its work on the ladder” and had “turned the ladder over to EMJ.” (R. at 1137.)

After Contract Steel completed the welding and turned the ladder over to EMJ, EMJ took control of the ladder and poured the concrete floor poured around the ladder which covered Contract Steel's welds. (R. 285–87). EMJ put the ladder into service and never requested Contract Steel perform any further work on it. (R. at 826; 633; 1137.)

On April 30, 2005, a full two weeks after EMJ had completed all its work on the ladder and turned the ladder over to EMJ, Plaintiff John Meeker conducted an inspection at the JCP job site. (R. at 22; 633.) During this inspection, EMJ directed Meeker to use the ship's ladder to access the roof for his inspection of the roof canopy without seeking permission from Contract Steel to do so. (R. at 633.) After the inspection, Meeker fell from the ladder while descending and sustained bodily injuries. (R. at 22.)

EMJ's project manager, John Hall, testified under oath that Contract Steel had no obligation to apply a non-slip surface to the ladder, was never asked by EMJ to do so, and in fact was not the subcontractor who ultimately applied the coating to the ladder treads or who was charged for that application. (R. at 1123–35.) Rather, EMJ had the non-slip surface applied and issued a field work order and deductive change order whereby EMJ deducted \$560.00 from the amount paid to Harrell's as a result of EMJ's cost in coating the treads of the ship's ladder with anti-slip epoxy. (R. at 1128–31.) No

such field work order or deductive change order was ever issued to Contract Steel. (R. at 1137.) Contract Steel was paid in full, including retainage, for the work it performed under its contract with EMJ. (R. at 1137.) Moreover, the ladder remains as installed by Contract Steel with the exception that it now has non-slip coating that EMJ applied and for which EMJ reduced its payment to Harrell's. (R. at 1138, 1128–31.)

### **SUMMARY OF THE ARGUMENT**

The trial court correctly held that Contract Steel was entitled to summary judgment on the Plaintiffs' claims and EMJ's cross-claim. At the time of the incident underlying this lawsuit, the undisputed evidence establishes that Contract Steel had completed all of the work that it had contractually agreed to perform on the ladder and that EMJ had accepted and approved Contract Steel's work and was in control of the ladder. As such, EMJ was the only party with any duty regarding the ladder under well-established Mississippi law, Contract Steel did not breach its contract with EMJ, and no genuine issue of material fact remains.

First, Contract Steel had completed all work it had contractually agreed to perform on the ladder and EMJ had taken control of the ladder at the time of John Meeker's fall. The contract between EMJ and Contract Steel was unambiguous and required Contract Steel to perform "steel erection work" as specified in certain sections of the contract. (R. at 1037.) EMJ does not dispute that a Contract Steel employee notified it that the ladder was too short, that EMJ was a party to approving the ladder for permanent installation when it knew that the treads of the ladder were not parallel to the ground, that Contract Steel "completed all welding" on the ladder, and that Contract Steel permanently installed the ladder which had rungs that were not perfectly parallel to the ground, all with the approval of EMJ. (R. at 1233–34; Br. of Appellant at 11.)

Contract Steel performed all of its duties regarding the safety of the ladder by informing EMJ of that the ladder was too short and giving EMJ the opportunity to inspect the ladder and have any fabrication errors in the ladder corrected.

Application of a non-slip surface is not "steel erection work," and Contract Steel was not responsible for correcting any deficiencies in the manufacture, drawing, design or fabrication of the ladder. (R. at 1121–35, 1037, 1042.) No deficiency in Contract Steel's installation or welding of the ladder have been identified or asserted by EMJ. The ladder remains as installed by Contract Steel with the exception that it now has the non-slip coating which EMJ applied and for which it reduced the amount it paid Harrell's. (R. at 1038, 1128–31.) Accordingly, Contract Steel completed all of the work it contractually agreed to perform on the ladder prior to John Meeker's fall.

Moreover, to the extent that the contract between Contract Steel could be construed as ambiguous in that one of the subsections which specifies the "steel erection work" Contract Steel was to perform under the contract included a metal fabrication specification providing for the application of a non-slip surface to the ladder, that ambiguity must be construed against EMJ, a representative of EMJ clarified Contract Steel's duties through his testimony, and no genuine issue of material fact remains regarding the interpretation of the contract. Specifically, EMJ's project manager, John Hall, testified under oath that Contract Steel had no obligation under the contract between EMJ and Contract Steel to apply the non-slip surface, was never asked by EMJ to do so, and was not the sub-contractor who ultimately applied the coating to the ladder. (R. at 1121–35.) Rather, EMJ applied the non-slip surface and issued a field work order and deductive change order to the fabricator, Harrell's Metal Works, whereby EMJ deducted \$560.00 from the amount paid to Harrells as a result of

EMJ's cost in coating the treads of the ship's ladder with anti-slip epoxy. (R. at 1129.) No such field work order or deductive change order was ever issued to Contract Steel. (R. at 1137.) Contract Steel was paid in full for its work. (R. at 1137.)

Additionally, the undisputed evidence establishes that EMJ had accepted and approved Contract Steel's installation of the ladder prior to John Meeker's fall. At the time the ladder was inspected by EMJ's job superintendent Randy Hartline and an "unknown individual" whom EMJ asserts was a JCP representative, EMJ knew the treads of the ladder were not parallel to the floor. (R. at 1234.) The ladder was approved by and permanently installed at the directive of Hartline and an "unknown individual" whom EMJ asserts was a JCP representative who inspected the ladder with Hartline. (R. at 384.) Specifically, EMJ has admitted that during Hartline's inspection of the ladder, the "unknown individual" whom EMJ asserts was a JCP representative "stated that the ladder looked great and should not be reinstalled or removed" because it was an "'access ladder not an 'easy access ladder' so the alleged deficiencies need not be cured.'" (R. at 384.) Randy Hartline was responsible for safety on the project and was, at a minimum, a party to this approval. (R. at 267, 384.) EMJ accepted the ladder and poured the concrete floor around the welds. (R. 285–87). Accordingly, EMJ accepted and approved Contract Steel's installation of the ladder with rungs that were not perfectly parallel to the floor.

No genuine issue of material fact remains, as the undisputed evidence establishes that Contract Steel had completed its work on the ladder and that EMJ had accepted and approved that work at the time of John Meeker's fall. As such, under well-established Mississippi law, EMJ had control of the ladder. Moreover, EMJ demonstrated its control over the ladder on the day of the incident underlying this

lawsuit by directing John Meeker to use the ladder without seeking permission from Contract Steel. Thus, the undisputed evidence establishes that Contract Steel has no liability for this lawsuit under Mississippi law and that Contract Steel fulfilled the duties it agreed to perform in its contract with EMJ. Contract Steel, therefore, respectfully requests that this Court affirm the trial court's grant of summary judgment in its favor.

### **ARGUMENT**

The trial court correctly granted summary judgment in favor of Contract Steel on both the Plaintiffs' claims and EMJ's Cross-Claim, as no genuine issue of material fact remains and the undisputed evidence establishes that Contract Steel had completed all of the duties it had contractually agreed to perform on the ladder with EMJ's approval and EMJ had taken control of the ladder prior to John Meeker's fall.

This Court employs a de novo standard of review to a trial court's grant or denial of summary judgment. Williamson v. Keith, 786 So. 2d 390, 393 (Miss. 2001). Miss. R. Civ. P. 56(b) provides that "a party against whom a claim . . . is asserted . . . may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof." The well-settled standard under Rule 56 is that summary judgment shall be granted where "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 and that the moving party is entitled to a judgment as a matter of law." Miss. R. Civ. P. 56(c); see City of Starkville v. 4-County Elec. Power Ass'n, 819 So. 2d 1216 (Miss. 2002). A party seeking to avoid entry of summary judgment must "establish a genuine issue of material fact by the means available under the rule." Lowery v. Guar. Bank and Trust Co., 592 So. 2d 79, 81 (Miss. 1991).

**I. EMJ does not have standing to appeal the trial court's grant of summary judgment in favor of Contract Steel on the Plaintiffs' claims.**

EMJ does not have standing to appeal the trial court's grant of summary judgment in favor of Contract Steel on the Plaintiffs' claims. "'Standing' is a jurisdictional issue which may be raised by any party or the Court at any time." City of Madison v. Bryan, 763 So. 2d 162, 166 (Miss. 2000). It is hornbook law that a party may only appeal judgments which affect its own interests, and not the interests of a co-party. Morrison-Knudsen Co. v. CHG Intern'l, Inc., 811 F.2d 1209, 1214 (9th Cir. Cal. 1987). An indirect financial stake in another party's claims is insufficient to create standing on appeal. Id. In other words, a party may not appeal a judgment unless he retains a personal stake in the outcome of the appeal and is "aggrieved" by the judgment. Myatt v. Peco Foods, 22 So. 3d 334, 337 (Miss. 2009). EMJ can have no tort liability for Contract Steel's alleged negligence, and EMJ has not established that it retains a personal stake in the outcome of the Plaintiffs' claims against Contract Steel or is somehow "aggrieved" by the trial court's entry of summary judgment on the Plaintiffs' claims against Contract Steel. As such, EMJ's appeal of the Plaintiffs' claims should be dismissed. See id. (holding that a defendant did not have standing to appeal a trial court's entry of a final summary judgment in favor of a co-defendant under Rule 54(b) as he had not shown the court what prejudice he would suffer under that judgment).

**II. Alternatively, the trial court correctly granted summary judgment in favor of Contract Steel Construction, Inc. on the Plaintiffs' claims, as the undisputed evidence establishes that Contract Steel had completed all of the work it had contractually agreed to perform on the ladder, that EMJ had accepted that work, and that EMJ had control of the ladder prior to John Meeker's fall.**

Alternatively, should this Court determine that EMJ has standing to appeal the trial court's grant of summary judgment in favor of Contract Steel on the Plaintiffs'

claims, this Court should affirm the trial court's grant of summary judgment in favor of Contract Steel on those claims. Contract Steel had no duty to the Plaintiffs regarding the ladder under Mississippi law at the time of John Meeker's fall because Contract Steel had completed its work on the ladder, EMJ had accepted and approved Contract Steel's installation of the ladder with rungs that were not perfectly parallel to the floor, and EMJ had control over the ladder at the time of the Plaintiff's fall.

Under Mississippi law, where a general contractor has control over the details of work and acts of employees of subcontractors and other persons on the job site, the general contractor has a duty to furnish employees of subcontractors with a safe place to work and warn of any hazards. See, eg., Miss. Power Co. v. Brooks, 309 So. 2d 863, 863 (Miss. 1975); Ingalls Shipbuilding Corp. v. McDougald, 228 So. 2d 365, 367 (Miss. 1969). While a general contractor is not generally liable for the negligence of an independent sub-contractor, the general contractor is, of course, liable for its own negligence. Brooks, 309 So.2d at 866 (noting that a contractor has the obligation to furnish the employees of the subcontractor a reasonably safe place to work). The general contractor controls the work site, and has the duty to exercise reasonable care to furnish a safe work place, and the duty to warn a subcontractor, such as Meeker, of any dangerous conditions it is aware of at the site. Id.; Ingalls, 228 So. 2d at 367.

The determination of whether a party has a duty is a question of law, and therefore is properly addressed in a motion for summary judgment. See Rein v. Benchmark Constr. Co., 865 So. 2d 1134, 1143-44 (Miss. 2004). Where a dangerous or unsafe condition allegedly caused damages, the party with control over the alleged unsafe condition is the party charged with the duty to warn regarding the condition. See



Ray v. Blockbuster, Inc., 9 So. 3d 422, 425 (Miss. App. 2008) <sup>1</sup>; Intern'l Paper Co. v. Townsend, 961 So. 2d 741, 741 (Miss. App. 2007) (the party with control over work performed by a sub-contractor has a duty to furnish a reasonably safe workplace with respect to this work, and to warn of any unsafe conditions of which it has knowledge). Accordingly, the key determination as to whether a party has a duty with respect to an unsafe condition is whether the party had control over the alleged condition, and whether the party knew or should have known about the condition. Id.

Once a sub-contractor completes work for its general contractor and the general contractor approves and accepts the work, the subcontractor has turned over control of the work (and any conditions of the work known to the general contractor) to the general contractor. Fischbach & Moore, Inc. v. Foxworth, 152 So. 2d 714, 715-17 (Miss. 1963). Further, after the sub-contractor turns over control, it no longer has a duty to a party injured as a result of conditions of the work performed by the sub-contractor. Id. Specifically, once such work is accepted, the general contractor “is substituted as the party responsible for existing defects” and the sub-contractor is relieved from any liability. Id. at 716. “The reason for the substitution of liability is found in the general

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<sup>1</sup> EMJ incorrectly cites Ray v. Blockbuster as support for its assertion that questions regarding whether work has been accepted and completed and what party is in control of the work are questions of fact reserved for a jury on pages 7 and 11 of its brief. This statement is not an accurate interpretation of that case. In fact, the Ray case did not involve any question regarding completion and acceptance of work, and neither of those words is even mentioned in the opinion. See, generally, Ray v. Blockbuster, Inc., 9 So. 3d 422 (Miss. App. 2008). Rather, the Ray case involved a question of whether a lessee or lessor controlled the subject property. Id. at 423–24. Moreover, while the Ray court found that the plaintiff **had presented sufficient evidence** to create an issue of fact over whether a defendant had control over the condition at issue, and therefore reversed the trial court’s grant of summary judgment in favor of that defendant, id. at 425–26, it **never stated or even implied that questions of control are “generally reserved for the jury.”** Further, the Ray court **acknowledged the general principle that where a party does not have control over a condition, no duty exists and there is no cause of action.** Id. at 425. In the instant case, EMJ has neither asserted nor set forth any evidence that Contract Steel maintained control over the ladder.

doctrine that an action for negligence will not lie unless the defendant was under some duty, which he has omitted to perform, to the injured party at the time and place where the injury occurred." Id. As such, once a contractor has completed its work and the general contractor has accepted it, the "contractor is not bound to see that the subject matter of the work remains free from dangerous conditions, unless such a duty is imposed by an express agreement or by statute." Id. at 716. This rule applies even where an injury to a third person results from the sub-contractor's failure to properly carry out its contract, because the key fact is the acceptance and approval of the completed work by the general contractor. Id. This rule is well-established under Mississippi law. See, e.g., Couch v. City of D'Iberville, 656 So. 2d 146, 151–52 (Miss. 1995) (upholding directed verdict in favor of subcontractor where his work had been accepted and approved); Williams v. Sullivan, 209 So. 2d 618, 621 (Miss. 1968) (affirming trial judge's decision to enter a judgment notwithstanding the verdict and enter judgment for subcontractor because subcontractor had no duty after completion and acceptance of his work); Fischbach, 152 So. 2d at 715-17 (fully analyzed below); Vicksburg v. Holmes, 63 So. 454, 455 (1913) (stating that it is the general rule that when a contractor has completed its work and that work has been accepted by the proprietor, the contractor has no further liability for that work, as all such liability is shifted to the proprietor).

In Fischbach, the Mississippi Supreme Court concluded that an electrical sub-contractor did not have any duty with respect to a general contractor's employee's injuries sustained by electrical shock because the sub-contractor completed its work and the general contractor approved and accepted the work. Id. at 717. The court noted that an independent contractor, such as the electrical sub-contractor hired to

perform electrical work, could not be held liable for injuries occurring to a third person after the sub-contractor had completed its work and turned it over to the general contractor and the general contractor had accepted that work. Id. at 716.

A. The undisputed evidence establishes that Contract Steel had completed all of its work on the ladder at the time of John Meeker's fall.

The undisputed evidence establishes that Contract Steel had completed all of the work it contractually agreed to perform on the ladder at the time of John Meeker's fall. "Where a contract is clear and unambiguous, its meaning and effect are matters of law which may be determined by the court." Dennis v. Searle, 457 So. 2d 941, 945 (Miss. 1984). Under the contract between EMJ and Contract Steel, Contract Steel was to perform "[a]ll steel erection work" as specified in certain sections of the subcontract agreement and correct any defects in that work. (R. at 1037, 1042.) Accordingly, the unambiguous language of the subcontract agreement between EMJ and Contract Steel did **not** require Contract Steel to perform any drawing, design, manufacture, or fabrication work and only required Contract Steel to correct deficiencies in its steel erection work. Moreover, the undisputed evidence establishes that Contract Steel had complied with all of the safety provisions of the contract with regard to its installation of the ladder. Contract Steel had, therefore, completed all work it had contractually agreed to perform on the ladder as soon as it permanently installed the ladder on April 16, 2005, which it did with EMJ's approval.

1. No genuine issue of material fact remains regarding responsibility for application of the non-slip surface to the ladder.

The unambiguous language of the contract and the undisputed evidence in the record establish that Contract Steel was not responsible for application of a non-slip surface on the ladder. Specifically, the testimony of EMJ's project manager makes it

clear that application of this non-slip surface was fabrication work, while the unambiguous language of the contract establishes that Contract Steel was only responsible for steel erection work. (R. at 1121–35, 1037).

Moreover, to the extent that the contract between EMJ and Contract Steel could be construed as ambiguous regarding the responsibility for application of a non-slip surface to the rungs of the ladder, that ambiguity must be construed against EMJ, the party who drafted the contract.<sup>2</sup> Henry v. Moore, 9 So. 3d 1146, 1153 (Miss. Ct. App. 2008). Accordingly, any ambiguity as to whether Contract Steel was responsible for applying the non-slip surface must be determined against EMJ and the contract must be construed as not requiring Contract Steel to apply that surface. Further, the testimony of EMJ's project manager and other undisputed evidence establishes that Contract Steel was not responsible for that application. While the "interpretation of an unclear contract generally involves questions of fact" such that trial is required, the Mississippi Supreme Court has made it clear that a summary judgment may be granted where a party's testimony removes any genuine issue of material fact. See id. at 947 (holding that where the contract at issue contained numerous ambiguities and the party's testimony did not completely remove all genuine issues of material fact, the court was not able to say that **"on [that] limited record"** that summary judgment was appropriate).

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<sup>2</sup> EMJ asserts that it was error for the trial court to consider the contract between EMJ and Harrell's in finding ambiguity in the contract between EMJ and Contract Steel. The trial court, however, only referenced the contract between EMJ and Harrell's after noting that the contract requires Contract Steel to perform only "steel erection work" as set forth in various subsections, including Section 05500, but Section 05500 "includes duties related to metal fabrications and installation of the fabrications." (R. at 1186.) Accordingly the trial court only considered the contract between EMJ and Harrell's after determining that the contract between EMJ and Contract Steel was ambiguous, as it was able to do under Mississippi law. Henry v. Moore, 9 So. 3d 1146, 1153 (Miss. Ct. App. 2008) (stating that, if a contract is ambiguous, "the court should examine extrinsic or parol evidence").

In the instant case, the record is replete with evidence that Contract Steel was not responsible for the application of the non-slip surface on the rungs of the ladder. Specifically, EMJ's own project manager, John Hall, expressly testified under oath that application of this surface was fabrication work and therefore not work within Contract Steel's obligations under the contract, as Contract Steel would only have been responsible for whatever steel erection work was included in Section 05500. (R. at 1133–334.) EMJ's project manager John Hall further testified that application of the non-slip surface to the ladder was the responsibility of the fabricator, Harrell's, that Contract Steel was never asked by EMJ to do apply the non-slip surface, and that EMJ applied the non-slip surface and issued a field work order and deductive change order to the fabricator, Harrell's Metal Works, whereby EMJ deducted \$560.00 from the amount paid to Harrell's as a result of EMJ's cost in coating the treads of the ship's ladder with anti-slip epoxy. (R. at 1121–1135.) No such field work order or change order was ever issued to Contract Steel. (R. at 1137.) Contract Steel was paid in full for its work. (R. at 1137.)

Accordingly, no genuine issue of material fact remains with regard to interpretation of the contract, and summary judgment was appropriate on this issue.

2. Contract Steel was only responsible for correcting errors in its steel erection work under the plain language of the contract.

The plain language of the contract only required Contract Steel to perform "steel erection work," and provided that Contract Steel would "promptly make good by replacement or correction, at its sole expense, any defective Work, any defect in materials or workmanship, or any work or material which does not meet the obligations of this Subcontract . . . ." (R. at 1037, 1042.) The language and context of the contract

unambiguously establish that this "replacement or correction" provision only applied to the steel erection work Contract Steel had agreed to perform. Moreover, while Attachment 1 to the contract listed unit costs for correction of fabrication errors, Contract Steel never agreed to correct fabrication errors or omissions, and this Attachment merely lists the costs EMJ would pay to Contract Steel if EMJ requested such additional work and issued a written change order for that work. (R. at 1039.) No such work was ever requested by EMJ from Contract Steel related to the ship's ladder. (R. at 1137.) As such, EMJ's assertion that Contract Steel had not completed its work on the ladder at the time of John Meeker's fall because the contract between EMJ and Contract Steel required Contract Steel to "correct any errors in the construction of the ladder" (emphasis added) is unsupported by the record and the language of the contract.

While Contract Steel would have been obligated to correct any deficiencies in its **erection** of the ladder, Contract Steel was not required to correct any deficiencies in the design, drawing, manufacture, and/or fabrication of the ladder caused by other subcontractors. The only relevant alleged deficiencies in the ladder include the fact that it was too short and did not have non-slip surface applied to its rungs before EMJ put it into use and directed John Meeker to use it. Although the fact that the ladder was too short required Contract Steel to install it at an angle, **Contract Steel only did so at EMJ's direction after notifying EMJ of that deficiency**, and no deficiency in the work Contract Steel performed in installing the ladder has been identified or asserted by EMJ. Contract Steel could not have "corrected" its installation of the ladder with rungs that were not parallel to the ground and were not coated with a non-slip surface, which it only performed at the direction of EMJ and with the knowledge that EMJ had notice that the ladder was too short, without altering the design, drawing, manufacture, and/or

fabrication of the ladder. Contract Steel did not contractually agree to perform any work with regard to the design, drawing, manufacture, or fabrication of the ladder. The relevant alleged deficiencies in the ladder were not part of the "steel erection work" Contract Steel agreed to perform relative to the ladder. All of the steel erection work Contract Steel performed on the ladder was done only at the direction and with the approval of EMJ. Contract Steel, therefore, had no duty or obligation to correct any deficiencies in the ladder.

It appears that EMJ is attempting to assert that the provision of the contract which required Contract Steel to make good any defect in workmanship or materials means that Contract Steel was required to correct any defect in all work and all materials. In other words, under EMJ's convenient interpretation of this provision of the contract, Contract Steel was responsible for correcting any and all deficiencies in the design, drawing, fabrication, and manufacture of the ladder, even though Contract Steel did not, and had not agreed to, perform any work regarding the design, drawing, fabrication, or manufacture of the ladder. Taken to its logical end, EMJ's misinterpretation of the contract would mean that Contract Steel was responsible at its own expense for making good, by replacement or correction, any defective work or materials provided by others and used in **any** aspect of the project. This assertion is not supported by the language of the contract and is insufficient to create any genuine issue of material fact regarding Contract Steel's duties regarding the ladder.

3. Contract Steel complied with all of the safety provisions of the contract.

EMJ's assertion that Contract Steel's work on the ladder was not complete because Contract Steel was responsible for the safety of the ladder is untenable under Mississippi law and contradicted by the plain language of the contract and the

undisputed evidence. The undisputed evidence establishes that Contract Steel complied with the contract by taking all reasonable safety precautions with regard to its work on the ladder by bringing the fact that the ladder was short to EMJ's attention before EMJ directed Contract Steel to permanently install it and before the ladder was put into use. Moreover, Contract Steel had completed its work on the ladder in accordance with EMJ's direction, EMJ had accepted that work on the ladder, and EMJ had control of the ladder at the time of John Meeker's fall. Thus, EMJ was the only party with any duty to John Meeker regarding the safety of the ladder on the date of the accident under Mississippi law.

EMJ asserts that the contract between EMJ and Contract Steel required Contract Steel to "be responsible for the safety of all work and materials incorporated into the project, including the ladder." (Br. of Appellant at 15.) This assertion, however, is not supported by the language of the contract. First, the contract states that Contract Steel would "initiate, maintain and supervise all safety precautions with respect to **its Work**." (R. at 1041 (emphasis added).) As set forth above, the plain language of the contract establishes that Contract Steel was only responsible for **steel erection work**, and not the drawing, design, manufacture, or fabrication of the ladder. (R. at 1037 (emphasis added).) As Contract Steel's steel erection work on the ladder was complete at the time of the underlying incident, this provision is not relevant to the instant case.

Moreover, while the contract also states that Contract Steel would "take all necessary and reasonable precautions for the safety of all its employees and other persons that the Work might affect for the safety of all Work and all material incorporated by it into the project . . .", the undisputed evidence establishes that Contract Steel complied with this provision. Specifically, Contract Steel brought the fact



that the ladder was too short to EMJ's attention and EMJ, despite knowing the ladder was too short, directed Contract Steel to permanently install the ladder and knew that Contract Steel was permanently installing the ladder. It is unreasonable to assert that Contract Steel should have taken any further precautions, as Contract Steel was only responsible for the steel erection work on the project and performed all of that work at the direction of EMJ and with EMJ's knowledge.

Accordingly, any defective or unsafe condition of the ladder resulted from EMJ's decision to direct Contract Steel to install the short ladder and/or failure to ensure that the fabricator applied the non-slip surface to the ladder after the ladder was erected and before EMJ put the ladder into use and directed John Meeker to use it. No defect in Contract Steel's work in erecting the ladder has been identified or asserted by EMJ.

The cases cited by EMJ in support of its argument that Contract Steel retained responsibility for the safety of the ladder are inapposite to this case, as EMJ, not Contract Steel, assumed responsibility for the entire job site, including the safety thereof, and EMJ has not set forth any evidence to show that Contract Steel retained control over or responsibility for the ladder after Contract Steel had erected it. See Hobson v. Waggoner, 878 So. 2d 68 (Miss. App. 2003) (recognizing that the Mississippi Supreme Court has held that a contractor who has contractually assumed responsibility for an entire job site is impliedly responsible for supervising the safety of the job site, but finding that the contractor at issue had not assumed such responsibility under the subject contract); Hudgins v. Pensacola Constr. Co., 630 So. 2d 992 (Miss. 1994) (finding that there was a question of fact based upon the affidavits and evidence produced regarding whether the subcontractor was responsible for all safety on the job site or just air traffic safety); and Hopton Bldg. Maint. v. United Parcel Serv., 559 So. 2d

1012 (Miss. 1990) (addressing the application of an indemnity clause to a claim filed against a janitorial service and UPS).

Further, EMJ admits that it had a duty to exercise reasonable care to furnish a safe work place to employees of subcontractors, but argues that Contract Steel is still liable for its own acts of negligence. This argument, however, ignores the well-established rule in Mississippi that once a sub-contractor completes its work for its general contractor and the general contractor approves and accepts the work, the general contractor has control of that work and the subcontractor no longer has a duty to a party injured as a result of conditions of the work performed by the sub-contractor. Fischbach & Moore, Inc. v. Foxworth, 152 So. 2d 714, 715-17 (Miss. 1963).

Both of the cases EMJ cites in support of its argument that Contract Steel may still be held responsible for its own negligence are substantively distinguishable from the instant case, as they do not involve cases where the subcontractor had completed its work and the general contractor had accepted that work. Ainsworth v. Capform, Inc., 784 So. 2d 1008 (Miss. 2001); Lloyd G. Oliphant & Sons Paint Co. v. Logan, 12 So. 3d 614 (Miss. App. 2001).

As set forth above, the steel erection work Contract Steel had contractually agreed to perform on the ladder was complete at all times relevant to this action. Also, as set forth more fully *infra* in section B., the undisputed evidence establishes that EMJ had approved the ladder "as is" and directed Contract Steel to permanently install it despite knowing of the alleged deficiencies. The contract between EMJ and Contract Steel did not require that Contract Steel continue to ensure that any of the items it used in its work were free of defects after Contract Steel had completed its work on the item, and Contract Steel, therefore, was not obligated to do so under Mississippi law.

Fischbach & Moore, Inc. v. Foxworth, 152 So. 2d 714, 716 (Miss. 1963) (holding that once a contractor has completed its work and the general contractor has accepted it, the “contractor is not bound to see that the subject matter of the work remains free from dangerous conditions, unless such a duty is imposed by an express agreement or by statute.”) Thus, under Mississippi law, EMJ had control of the ladder, and only the party who has control over the dangerous condition has any duty with regard to that condition. Id. at 715–17.

Accordingly, the undisputed evidence in the record establishes that Contract Steel had completed all the work it had contractually agreed to perform on the ladder at the time of the Plaintiff’s fall.

B. The undisputed evidence establishes that EMJ had accepted and approved Contract Steel’s work on the ladder prior to John Meeker’s fall

There is no genuine question of material fact regarding whether the ladder’s installation with non-parallel rungs was accepted and approved by EMJ prior to the incident at issue. EMJ has admitted that the ladder was approved for final installation with treads that were not perfectly parallel to the floor by its job superintendent Randy Hartline and a JCP representative who was inspecting the ladder with Hartline. Specifically, EMJ states in its brief that “[t]he facts demonstrate that Contract Steel erected the ladder with EMJ’s knowledge and with the consent of EMJ or J.C. Penney.” (Brief of Appellant at 11.) As such, EMJ was, at a minimum, a party to this approval, and it is worth noting that EMJ admits that the trial court found that JCP’s involvement was too speculative (R. at 1234) and EMJ has not appealed this finding or the Court’s grant of summary judgment in favor of JCP. Moreover, while Contract Steel’s “permanent installation” of the ladder occurred after this approval and acceptance, **EMJ**

**knew at the time of this inspection and approval of installation that the treads of the ladder were not parallel to the floor. (R. at 1234.) Thus, EMJ approved and accepted Contract Steel's installation of the ladder with rungs that were not parallel to the ground and did not have non-slip surface applied.**

Contract Steel was not asked to and did not perform any work on the ladder after it turned the ladder over to EMJ on April 16, 2005, a full two weeks before the Plaintiff's fall. (R. at 1037.) Moreover, the ladder remains as installed by Contract Steel with the exception that it now has the non-slip coating which EMJ applied and for which EMJ reduced the amount it paid Harrell's. (R. at 1038, 1128–31.) Accordingly, it is undisputed that EMJ accepted and approved Contract Steel's installation of the ladder with rungs that were not parallel to the floor and did not have non-slip surface applied prior to John Meeker's fall.

**C. The undisputed evidence establishes that EMJ had control over the ladder at the time of John Meeker's fall**

As set forth above, the undisputed evidence establishes that Contract Steel had completed all of the work it had contractually agreed to perform on the ladder and that EMJ had accepted and approved that work. Accordingly, under well-established Mississippi law, Contract Steel had no liability for any injury or damages to anyone resulting from that work. See, e.g., Couch v. City of D'Iberville, 656 So. 2d 146, 151–52 (Miss. 1995); Williams v. Sullivan, 209 So. 2d 618, 621 (Miss. 1968); Fischbach & Moore, Inc. v. Foxworth, 152 So. 2d 714, 715-17 (Miss. 1963); Vicksburg v. Holmes, 63 So. 454, 455 (1913). Moreover, the record further establishes EMJ's control over the ladder through the facts underlying John Meeker's fall, as Hartline directed Meeker to

use the ship's ladder without seeking permission from Contract Steel to do so. (R. at 633.)

EMJ was the party responsible for job site safety. EMJ knowingly accepted the ladder which was too short, approved Contract Steel's permanent installation of the ladder with knowledge that the ladder had rungs that were not perfectly parallel to the floor, put the ladder into use, and directed John Meeker to use the ladder despite the fact that no non-slip surface had been applied to the rungs. Accordingly, EMJ was the only party who had any duty to John Meeker with regard to the ladder, and Contract Steel is therefore entitled to summary judgment.

**III. As the undisputed evidence establishes that Contract Steel completed all of the work it contractually agreed to perform and EMJ had control of the ladder of the time of the accident, the trial court properly granted summary judgment in favor of Contract Steel on EMJ's Cross-Claim.**

In its Cross-Claim, EMJ seeks damages for Contract Steel's alleged breach of contract. In its brief, EMJ clarifies that it is seeking damages for Contract Steel's alleged failure to complete its work on the ladder, specifically citing Contract Steel's alleged failure to complete its work on the ladder by not applying the non-slip surface to the rung, as well as Contract Steel's alleged failure to comply with the provisions of the contract regarding the correction of deficiencies in its work and the safety requirements. However, as set forth *supra* in section II, which Contract Steel hereby incorporates by reference as if fully set forth verbatim here, the undisputed evidence establishes that Contract Steel completed its "steel erection work" on the ladder, that Contract Steel was not responsible for application of the non-slip surface to the ladder, and that EMJ accepted and approved Contract Steel's permanent installation of the ladder with rungs that were not perfectly parallel to the floor and were not coated with non-slip surface.

Moreover, the plain language of the contract establishes that Contract Steel had no responsibility for correcting any deficiencies in the drawing, design, manufacture, or fabrication of the ladder, and the undisputed evidence in the record establishes that Contract Steel complied with all safety provisions in the contract. Contract Steel was paid in full for its work performed under the contract. (R. at 1137.) Accordingly, the trial court properly granted summary judgment in favor of Contract Steel on EMJ's Cross-Claim for breach of contract.

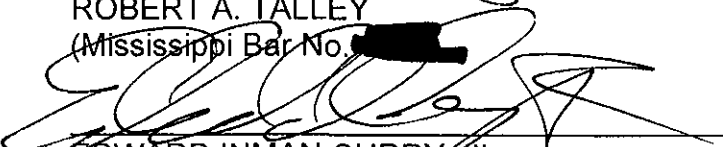
### **CONCLUSION**

For the reasons set forth above, Contract Steel requests this Court affirm the trial court's grant of summary judgment in its favor.

Respectfully submitted,  
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**Certificate of Filing**

The undersigned hereby certifies that four copies of the Brief for Appellee, Contract Steel Construction, Inc., have been deposited in the United States mail first class with postage prepaid this the 12 day of July, 2011. <sup>by FedEx</sup>

A handwritten signature in black ink, appearing to read "Robert A. ...", is written over a horizontal line. The signature is stylized and cursive.

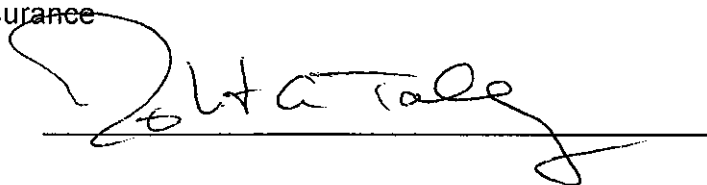
**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing was served via regular U.S. Mail, postage prepaid, this the 12 day of July, 2011, upon the following:

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