

IN THE  
COURT OF APPEALS  
FOR THE STATE OF MISSISSIPPI

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DOCKET NO. 2010-CA-01076-COA

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EMJ CORPORATION,  
Appellant,

v.

CONTRACT STEEL CONSTRUCTION, INC.,  
Appellee.

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Appeal from the Circuit Court of Desoto County, Mississippi

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**REPLY BRIEF FOR APPELLANT, EMJ CORPORATION**

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Ronald L. Harper, *Pro Hac Vice*  
Charles R. Patrick, MS Bar No. [REDACTED]  
*Attorneys for Appellant, EMJ Corp.*  
80 Monroe Avenue, Suite 800  
Memphis, Tennessee 38103  
(901) 527-0214  
[ron.harper@leitnerfirm.com](mailto:ron.harper@leitnerfirm.com)  
[charlie.patrick@leitnerfirm.com](mailto:charlie.patrick@leitnerfirm.com)

**ORAL ARGUMENT REQUESTED**

## Certificate of Interested Persons

EMJ CORPORATION,

Appellant,

v.


No. 2010-CA-01076

CONTRACT STEEL CONSTRUCTION,  
INC.,

Appellee.

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals 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.



Ronald L. Harper, *Pro Hac Vice*  
Charles R. Patrick, MS Bar No. [REDACTED]  
*Attorneys for Appellant, EMJ Corp.*  
80 Monroe Avenue, Suite 800  
Memphis, Tennessee 38103  
(901) 527-0214  
[ron.harper@leitnerfirm.com](mailto:ron.harper@leitnerfirm.com)  
[charlie.patrick@leitnerfirm.com](mailto:charlie.patrick@leitnerfirm.com)

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## **Statement of Position Regarding Oral Argument Requested**

The Appellant, EMJ Corporation (“EMJ”), respectfully reiterates its previous request for oral argument pertaining to this matter. This appeal presents complicated facts and legal issues, and oral argument would be beneficial to this Honorable Court and to the parties. EMJ, therefore, respectfully submits that oral argument would be appropriate in this case.

### **Introduction**

EMJ submits this Reply to Appellee’s, Contract Steel Construction, Inc.’s (“Contract Steel”), appellate brief entitled “Brief of Appellee Contract Steel Construction, Inc.” (“Contract Steel’s Brief”). In so doing, EMJ relies upon its own initial appellate brief (“EMJ’s Initial Brief”) previously submitted to support its position on appeal and in reply to certain issues addressed by Contract Steel and to further address all issues of pertinence to this case makes the following arguments.

### **Statement of the Issues**

With relation to the issues on appeal, EMJ relies upon EMJ’s Initial Brief and its statement of the issues as previously submitted to support its position on appeal, but in further reply to certain issues addressed by Contract Steel and to further address all issues of pertinence to this case submits the following issues:

- I. There is no question of EMJ’s standing on appeal of the trial court’s grant of summary judgment to Contract Steel Construction, Inc. with respect to the claims of Plaintiffs and EMJ.**
- II. Whether the Order granting summary judgment in favor of Contract Steel Construction, Inc. should be reversed because there are genuine issues as to material facts concerning Plaintiffs’ claims as related to Contract Steel Construction, Inc.**

## **Summary of the Argument**

EMJ continues to assert that the trial court below incorrectly found that there are no genuine issues of material fact concerning Plaintiffs' claims and EMJ's claims against Contract Steel arising out of Plaintiff John Meeker's ("Mr. Meeker") use of and alleged fall from a ladder on April 30, 2005 at a J.C. Penney store under construction in Southaven, Mississippi for which Mr. Meeker and his wife, Plaintiff Mary Lou Meeker (collectively "Plaintiffs"), seek damages and for which EMJ has filed cross-claim(s) against Contract Steel sounding in both tort and contract. Specifically, the trial court found that Contract Steel completed its work on the ladder and that the ladder was accepted as being complete by EMJ, thus negating Contract Steel's potential liability to either Plaintiffs and/or EMJ for their respective claims against Contract Steel. However, there are genuine issues of material fact regarding whether Contract Steel's work on the ladder in question was complete, whether that ladder was accepted by EMJ, and whether EMJ maintained control over the ladder at or about the time of Plaintiff's alleged fall. The unambiguous provisions of the contract between EMJ and Contract Steel make it clear that Contract Steel's obligations concerning the ladder and work thereon were not completed at the time of Mr. Meeker's fall, raising questions as to the parties' respective liabilities. Further, witness testimony supports EMJ's contentions regarding the issues of contract performance, namely completion of the work, acceptance of the work, and control of the ladder in question, all of which preclude summary judgment at this time in Contract Steel's favor.



For the reasons discussed in EMJ's Initial Brief and for the further reasons discussed herein, EMG respectfully continues to submit that the trial court's Order of summary judgment in favor of Contract Steel should be reversed as genuine issues of material fact exist making summary judgment inappropriate related to Contract Steel's contracted for work and potential liability in this matter.

### **Argument**

#### **Standard of Review**

Without unduly repeating the standards by which this Honorable Court must address the granting of summary judgment to Contract Steel, it is pertinent to bear in mind that not only must this Court apply a de novo standard of review to the trial court's grant of summary judgment, the granting of such is only appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. See Letich v. Miss. Guar. Ass'n, 27 So.3d 396, 398 (Miss. 2010) (citing Miss. Gaming Comm'n v. Treasured Arts, 699 So.2d 936, 938 (Miss. 1997)). In addressing whether summary judgment is appropriate, the "burden of demonstrating that there is no genuine issue of material fact falls upon the [movant]," and all evidence must be viewed in the light most favorable to the non-movant. See Watson Quality Ford, Inc. v. Casanova, 999 So.2d 830, 833 (Miss. 2008). If even the "slightest doubt" is present over whether a factual dispute exists, a court should resolve such favor of the non-movant. Id.

#### **Applicable Law**

A general contractor typically has a duty to exercise reasonable care to furnish a safe work place to employees of subcontractors. Miss. Power Co. v Brooks, 309 So.2d

863, 866 (Miss. 1975). The duty to exercise reasonable care does not, however, absolve a subcontractor from liability for its own acts of negligence that causes harm or injury to employees of other subcontractors. Lloyd G. Oliphant & Sons Paint Co. Inc. v. Logan, 12 So.3d 614, 618 (Miss. App. 2009); Ainsworth v. Capform, Inc., 784 So.2d 1008, 1011 (Miss. App. 2001). However, it is generally the case that a subcontractor who completes work for a general contractor that is then accepted by the general contractor can no longer be held liable for the work performed. Fischbach & Moore, Inc. v. Foxworth, 152 So.2d 714, 715-17 (Miss. 1963). There must, of course, be completion of the work in question and acceptance of same. See Id. at 715; see also, e.g., Couch v. City of D'Iberville, 656 So.2d 146 (Miss. 1995); May v. Ralph L. Dickerson Const. Corp., 560 So.2d 729 (Miss. 1990); McKay By and Through McKay v. Boyd Const. Co., Inc., 571 So.2d 916 (Miss. 1990); First Baptist Church of Corinth, Trustees of v. McElroy, 78 So.2d 138 (Miss. 1955); Higginbotham v. U.S. Indus., Inc., 584 F.Supp. 1273 (S.D. Miss. 1982).

The questions of completion of work and the acceptance of same are often tied to the terms of the contract(s) between the parties, which outline relative rights and responsibilities, including those rights or responsibilities assumed. See, e.g., Hobson v. Waggoner Engineering, Inc., 878 So.2d 68, 69-76 (Miss. App. 2003) (while noting the general proposition of law that general contractors typically have a duty to exercise reasonable care to furnish a safe workplace for persons on a construction site, addressing whether an engineering firm could be held responsible for the wrongful death of a subcontractor's employee on a failure to warn theory by addressing the contractual terms involving the engineering firm); Hudgins v. Pensacola Const. Co., Inc., 630 So.2d 992,

993-94 (Miss. 1994) (finding summary judgment improperly granted in favor of a party involved in a construction project where an excavator was used to dredge and remove sand, gravel, and fill dirt from a previously undredged water area and where there was a question as to which party involved in the construction retained responsibility for the safety aspects of the job that allegedly have resulted in a wrongful death); see also Hopton Building Maintenance, Inc. v. United Parcel Service, Inc., 559 So.2d 1012, 1012-1014 (Miss. 1990) (addressing the extent of plaintiff maintenance company's assumption of responsibility under a services contract with the owner of a business). When a dispute arises regarding contractual terms, the legal purpose and intent of the parties must be determined upon an objective reading of the words employed in the contract to the exclusion of "parol" or extrinsic evidence; in other words, the courts must review the "four corners" of the contract to determine the parties' intent. Belager-Price v. Lingle, 28 So.3d 706, 711 (Miss. App. 2010) (citing One South, Inc. v. Hollowell, 963 So.2d 1156, 1162 (Miss. 2007)). Extrinsic evidence is to be used only if the contract is ambiguous. Belager-Price, 28 So.3d at 711; see also Kendrix v Huckaby, 955 So. 2d 950, 952 (Miss. App. 2007). Whether a contract is ambiguous is a question of law. In re Dissolution of Marriage of Wood, 35 So.3d 507, 513 (Miss. 2010) (citing Harris v. Harris, 988 So.2d 376, 378 (Miss. 2008)). The subsequent interpretation of the ambiguous contractual terms, however, is a finding of fact that must be determined by a jury. Royer Homes of Miss., Inc. v. Chandeleur Homes, Inc., 857 So.2d 748, 752 (Miss. 2003); see also Hicks v. North American Co. for Life and Health Ins., 47 So.3d 181, 185 (Miss. App. 2010). This principle of law is consistent with the overarching idea that that when performance

of a contract(s) is in dispute, the dispute in question is generally to be resolved by a jury. See, e.g., Dickey v. Carothers & Carothers Const. Co., 230 So.2d 813, 813-15 (Miss. 1970); Hall Engineering and Const. Co., Inc. v. C.T. Jones, Jr., 186 So.2d 773, 774-75 (Miss. 1966).

The questions of completion of work and the acceptance of same can also be tied to the issue of control over an alleged implement or condition that has caused an alleged injury. Control is a prerequisite element of addressing whether a particular party has a duty to exercise reasonable care and to addressing whether that duty of care has been breached. Ray v. Blockbuster, 9 So.3d 422, 425-26 (Miss. App. 2008). A question of control can be raised in a particular case, resulting in a factual question for resolution by a jury. Id. Exercise of reasonable care is likewise a jury question. Accu-Fab & Const., Inc. v. Ladner ex rel. Ladner, 970 So.2d 1276, 1287 (Miss. App. 2000).

**I. There is no question of EMJ's standing on appeal of the trial court's grant of summary judgment to Contract Steel Construction, Inc. with respect to the claims of Plaintiffs and EMJ.**

As a threshold matter, in Contract Steel's brief, Contract Steel raises a standing question related to EMJ's ability to proceed with its appeal given the trial court's granting of summary judgment in favor of Contract Steel as relates to Plaintiffs' claims against Contract Steel. (Contract Steel's Brief at p. 1). However, the trial court granted summary judgment in favor of Contract Steel related to not only Plaintiffs' direct claims against Contract Steel but also with relation to EMG's cross-claims sounding in sounding in both tort and contract, many of said claims involving overlapping factual and legal issues.

(EMJ's Initial Brief at pp. 2, 3, and 5); (Contract Steel's Brief at p. 2, 7). Contract Steel's standing argument is inapplicable to this appellate proceeding.

**II. Whether the Order granting summary judgment in favor of Contract Steel Construction, Inc. should be reversed because there are genuine issues as to material facts concerning Plaintiffs' claims as related to Contract Steel Construction, Inc.**

**A. There is a genuine issue of material fact regarding the issue of whether Contract Steel's work on the ladder was incomplete, raising a question regarding Contract Steel's potential liability in this case.**

In Contract Steel's Brief, Contract Steel argues that it completed all work on the ladder that allegedly caused Mr. Meeker's fall that resulted in Plaintiffs' damages, thus negating its potential liability for any claims of any parties related to same. (Contract Steel's Brief at pp. 15-23). This argument essentially parrots the trial court's finding that Contract Steel had completed work on the ladder, which EMJ had accepted prior to Mr. Meeker's fall and thus negates Contract Steel's liability. (R. 1183-1188). The trial court's finding that Contract Steel was not responsible for Plaintiffs' claims or those of EMJ was based in part on a purported contractual ambiguity in the agreement between EMJ and Contract Steel that was said to negate Contract Steel's liability that was actually based not on the parties' contract itself but on a contract between EMJ and another defendant at the time, Harrell's Metal Works, Inc., that the court found created a question of responsibility for the potential dangerous condition of the ladder at the time of Mr. Meeker's accident, if any. (*Id.*). In its brief and in support of its argument, Contract Steel also points to the deposition testimony of John Hall, Project Manager for EMJ on this project, who gave his personal opinion that Contract Steel was not responsible for applying any non-skid surface to the ladder at or about the time of Mr. Meeker's injury.

(R. 1130-1131); (Contract Steel's Brief at p. 17). Further, Contract Steel asserts in support of its contention that its work was complete, thus negating its potential liability arising out of the use of the ladder in question, that it was only responsible for the correction of erection errors pursuant to its contract with EMJ. (Contract Steel's Brief at pp. 17-19). More specifically, it is Contract Steel's position that the alleged defects, if any, with regard to the ladder in question that allegedly caused Plaintiffs' injuries, including that the ladder did not have non-slip surfaces applied to its rungs, related to design, drawing, manufacturing, and/or fabrication and not Contract Steel's erection of same at an angle, which Contract Steel contends it did only after bringing perceived deficiencies to EMJ's attention and receiving EMJ's approval of installation. (Id. at pp. 18-19). Contract Steel asserts that EMJ instructed the subcontractor to install the ladder "as is." (Id. at p. 22). Contract Steel moreover asserts that it complied with all safety provisions of the parties' contract, evidencing completion of its work. (Id. at pp. 19-22).

EMJ did contract with various subcontractors, including Contract Steel, to perform diverse aspects of the construction job in question where Plaintiff John Meeker has alleged injury. (R. 1028). Contract Steel's contractual obligations specifically included "[a]ll steel erection work including but not limited to work specified in Divisions 0, 1 and Sections 5120, 5210, 5310 and 5500," including the area of Mr. Meeker's injury and including the ladder in question in this case. (R. 1028; 1037-1054). More specifically, EMJ and Contract Steel's agreement specifically required Contract Steel to: (1) install a roof ladder; (2) apply a non-skid surface to said ladder; (3) correct any errors in construction of the ladder; and (4) accept responsibility for the safety of all work and

materials incorporated into the project, including the ladder. (R. 1028; 1037-1064). Concerning the non-slip surface issue specifically, parties' agreement stated that Contract Steel must "[p]rovide non-slip surface on the top of each rung, either by coating the rung with aluminum oxide granules set in epoxy resin adhesive, or by using a type of manufactured rung which is filled with aluminum oxide grout." (R. 1028; 1058). Randy Hartline, EMJ's Project Superintendent responsible for day-to-day operations, testified that at the time of Meeker's alleged accident, the project, including the ladder, was not complete, (R. 1029; 1065-66); the ladder could not have been completed because Contract Steel had not yet applied the non-skid surface as it was contractually required. (R. 1028; 1058). Mr. Hartline did not testify that he was informed by anyone with Contract Steel that the ladder was deficient in any respect, including that it did not have non-slip surfaces applied to its rungs. (Contract Steel's Brief at pp. 18-19). Moreover, he did not testify that deficiencies were brought to his attention or that there was a need to install the ladder in question at an angle. (*Id.*). Furthermore, he did not agree that he instructed Contract Steel to install the ladder "as is." (*Id.* at p. 22). In fact, Mr. Hartline could not recall any conversations with Contract Steel prior to Mr. Meeker's alleged fall from the ladder in question. (R. 630). Ultimately, someone else besides a representative of EMJ, including possibly a J.C. Penney representative, could have made the final decision concerning installation of the allegedly defective ladder. (R. 1029; 1067-73; 1102-03). With regard to the issue of safety provisions related to the contract between EMJ and Contract Steel, not only was EMJ responsible for job site safety but all subcontractors were likewise responsible for job safety, including Contract Steel pursuant

to the parties' contract, (R. 1028; 1037-1064), which position EMJ has consistently asserted throughout these proceedings, (R. 1097-1098). Indeed, Mr. John Hall, EMJ's Project Manager, has testified that all subcontractors were required to have their own superintendent on-site to ensure safety compliance throughout the construction project. (R. 1135).

The parties dispute whether at the time of Mr. Meeker's accident Contract Steel's work on the subject ladder was complete, so summary judgment in Contract Steel's favor was and is inappropriate. See Letich, 27 So.3d at 398 (citing Treasured Arts, 699 So.2d at 938). In this case, the trial court first inappropriately considered matters outside of the contractual agreement between EMJ and Contract Steel regarding the implement or condition that allegedly resulted in injury to Plaintiffs, i.e., the ladder in question. Specifically, the trial court relied on a contract between EMJ and another defendant at the time, Harrell's Metal Works, Inc., in determining an ambiguity in the contract between Contract Steel and EMJ to create a question of responsibility for the condition of the ladder at the time of Mr. Meeker's accident. (R. 1183-1188). As Contract Steel also points out, the trial court may have relied on the deposition testimony of John Hall, Project Manager for EMJ on this project, regarding his personal opinion that Contract Steel was not responsible for applying any non-skid surface to the ladder at or about the time of Plaintiff's injury. (R. 1130-1131); (Contract Steel's Brief at p. 17). While the trial court certainly had the right to analyze the parties' contract for ambiguity, See In re Dissolution of Marriage of Wood, 35 So.3d at 513 (citing Harris, 988 So.2d at 378), because nothing about the contract between EMJ and Contract Steel was or is ambiguous,



the trial court's inadvertent failure to confine its review of the parties' contract to the "four corners" of such was in error and improper as violative of the parol evidence rule. See Belager-Price, 28 So.3d at 711 (citing Hollowell, 963 So.2d at 1162); Kendrix, 955 So.2d at 952. Putting aside those facts considered by the trial court that violate the parol evidence rule, it is clear that Contract Steel was required to provide a non-slip surface on the rungs of the ladder in question, and at the time of Plaintiff John Meeker's fall, Contract Steel had not completed this contractual obligation; thusly, its work on the ladder was not complete. (R. 1028-1029; 1037-1066). The issue of completion is further amplified by the fact that despite Contract Steel's contentions that supposed deficiencies were noted with relation to the ladder, which deficiencies were purportedly brought to EMJ's attention prior to an installation purportedly approved by EMJ, Mr. Randy Hartline, EMJ's Project Superintendent responsible for day-to-day operations, did not testify that he was informed of any perceived deficiencies or any plan for installation, and he, moreover, did not testify that he instructed Contract Steel to install the ladder "as is." (Contract Steel's Brief at pp. 18-19, 22). In fact, Mr. Hartline could not recall any conversations with Contract Steel prior to Mr. Meeker's alleged fall from the ladder in question. (R. 630). Ultimately, all that can be said with any certainty at this phase of litigation is that someone, including possibly a representative of EMJ or even a representative of J.C. Penney, made the final decision concerning installation of the allegedly defective ladder. (R. 1029; 1067-73; 1102-03). Moreover, with regard to the issue of safety provisions related to the contract between EMJ and Contract Steel as pertinent to the issue of completion of Contract Steel's contracted for work, all

subcontractors, including Contract Steel, were responsible for job safety pursuant to the parties' contract, (R. 1028; 1037-1064), which position EMJ has consistently asserted throughout these proceedings, (R. 1097-1098). Indeed, Mr. John Hall, EMJ's Project Manager on this project, has testified that all subcontractors were required to have their own superintendent on-site to ensure safety compliance throughout the construction project. (R. 1135).

The parties dispute whether at the time of Mr. Meeker's accident Contract Steel's work on the subject ladder was complete, so summary judgment in Contract Steel's favor was inappropriate on this ground. See Letich, 27 So.3d at 398 (citing Treasured Arts, 699 So.2d at 938). At the very least, genuine issues of material fact exists regarding the issue of completion, particularly when the above facts are viewed in the light most favor to EMJ, See Watson, 999 So.2d at 833, creating questions to be answered by a jury upon the trial of this case, See Dickey, 230 So.2d at 813-15; C.T. Jones, Jr., 186 So.2d at 774-75; see also Royer Homes of Miss., Inc., 857 So. 2d at 752; Hicks, 47 So.3d at 185; Hobson, 878 So.2d at 69-76; Hudgins, 630 So. 2d at 993-94; Hopton Building Maintenance, Inc., 559 So.2d at 1012-1014.

**B. There is a genuine issue of material fact regarding the issue of whether EMJ accepted Contract Steel's work on the ladder, raising a question regarding Contract Steel's potential liability in this case.**

In Contract Steel's Brief, Contract Steel argues that after it completed all work on the ladder that allegedly caused Mr. Meeker's fall that resulted in Plaintiffs' damages, EMJ accepted its work, thus negating its potential liability for any claims related to same. (Contract Steel's Brief at pp. 23-24). Contract Steel's primary contention in this regard is

related to assertion that any perceived deficiencies in the ladder as erected were brought to EMJ's attention, and it received EMJ's approval for installation of the ladder "as is." (Id. at pp. 18-19, 22-24). Contract Steel's contentions are based at least in part on the deposition testimony of Mason Hitchens, a Contract Steel employee, who testified that he noticed a problem with the length of the ladder and notified an EMJ representative and others. (R. 1029; 1067-73). Mr. Hitchens, however, was not actually present for any discussion regarding acceptance of Contract Steel's work with respect to the ladder. (R. 1071). He recalls that it was his opinion that the perceived problems were addressed, although he could not testify to any resolution of same. (Id.). No witness has to date testified to the turnover of the ladder by Contract Steel or acceptance of the ladder by EMJ. (R. 1234-1235). In fact, Mr. Hartline could not recall any conversations with Contract Steel prior to Mr. Meeker's alleged fall from the ladder in question. (R. 630). Ultimately, someone, possibly either a representative of J.C. Penney or a representative of EMJ, was believed to have made a final decision regarding the installation of the ladder. (R. 1029; 1067-73; 1102-03).

The parties dispute whether at the time of Mr. Meeker's accident Contract Steel's work on the subject ladder was accepted, so summary judgment in Contract Steel's favor was and is inappropriate. See Letich, 27 So.3d at 398 (citing Treasured Arts, 699 So.2d at 938). There is also no evidence that EMJ accepted the ladder prior to Mr. Meeker's alleged accident. (R. 1234-1235). Indeed, there is a question concerning the identity and affiliation of the individual who allegedly ordered the ladder to be permanently installed. (R. 1029; 1067-73; 1102-03). In fact, Mr. Hartline could not recall any conversations

with Contract Steel prior to Mr. Meeker's alleged fall from the ladder in question. (R. 630). At the very least, genuine issues of material fact exists regarding the issue of acceptance, particularly when the above facts are viewed in the light most favor to EMJ, See Watson, 999 So.2d at 833, creating questions to be answered by a jury upon the trial of this case, See Dickey, 230 So.2d at 813-15; C.T. Jones, Jr., 186 So.2d at 774-75; see also Royer Homes of Miss., Inc., 857 So. 2d at 752; Hicks, 47 So.3d at 185; Hobson, 878 So.2d at 69-76; Hudgins, 630 So. 2d at 993-94; Hopton Building Maintenance, Inc., 559 So.2d at 1012-1014.

**C. There is a genuine issue of material fact regarding the issue of whether EMJ had complete control over the ladder, raising a question regarding Contract Steel's potential liability in this case.**

After addressing the issues of completion of work and acceptance of same, Contract Steel argues that EMJ solely controlled the ladder, i.e., the implement or dangerous condition, that allegedly caused Mr. Meeker's fall and Plaintiffs' damages such that its potential liability for any claims related to same are negated. (Contract Steel's Brief at pp. 24-25). Ultimately, EMJ and Contract Steel's agreement specifically required Contract Steel to: (1) install a roof ladder; (2) apply a non-skid surface to said ladder; (3) correct any errors in construction of the ladder; and (4) accept responsibility for the safety of all work and materials incorporated into the project, including the ladder. (R. 1028; 1037-1064). Randy Hartline, EMJ's Project Superintendent, testified that at the time of Meeker's alleged accident, the project, including the ladder, was not complete, (R. 1029; 1065-66); the ladder specifically could not be complete because Contract Steel had not yet applied the non-skid surface as it was contractually required to apply. (R.

1028; 1058). Mr. Hartline did not testify that he was informed by anyone with Contract Steel that the ladder was deficient, particularly because it did not have non-slip surfaces applied to its rungs. (Contract Steel's Brief at pp. 18-19). Moreover, he did not testify that deficiencies were brought to his attention or that there was a need to install the ladder in question at an angle. (Id.). He also did not agree that he instructed Contract Steel to install the ladder "as is." (Id. at p. 22). In fact, Mr. Hartline could not recall any conversations with Contract Steel prior to Mr. Meeker's alleged fall from the ladder in question. (R. 630).

The issue of control over the supposed implement or condition that allegedly caused Plaintiffs' damages remains in question in this case, which impacts issues related to any party's duty to exercise reasonable care and whether any such duty has been breached. See Ray, 9 So.3d at 425-26. This disputed issue also makes summary judgment in favor of Contract Steel inappropriate in this case. See Letich, 27 So.3d at 398 (citing Treasured Arts, 699 So.2d at 938). EMJ's duty to exercise reasonable care to furnish a safe work place to employees of subcontractors, including Mr. Meeker, See Brooks, 309 So.2d at 866, does not absolve Contract Steel from liability for its own potential acts of negligence in this case under the current facts. See Logan, 12 So.3d at 618; Ainsworth, 784 So.2d at 1011. This is particularly true where questions remain regarding completion of Contract Steel's work for EMJ and EMJ's acceptance of that work. See Foxworth, 152 So.2d at 715-17; see also, e.g., Couch, 656 So.2d 146; May, 560 So.2d 729; Boyd Const. Co., Inc., 571 So.2d 916; McElroy, 78 So.2d 138; Higginbotham, 584 F.Supp. 1273 (S.D. Miss. 1982). At the very least, genuine issues of

material fact exists regarding the issue of control over the supposed implement or condition that allegedly caused Plaintiffs' damages, particularly when all of facts are viewed in the light most favor to EMJ, See Watson, 999 So.2d at 833, which question along with the potential question of Contract Steel's reasonable care is appropriately answered by a jury upon the trial of this case. See Ray, 9 So.3d at 425-26; Logan, 12 So.3d at 618; Ainsworth, 784 So.2d at 1011; Ladner ex rel. Ladner, 970 So.2d at 1287.

### **Conclusion**

The trial court's Order granting summary judgment in favor of Contract Steel should be reversed based on outstanding issues related to Contract Steel's potential liability in this case based on tort and/or contract. Specifically, the trial court found that Contract Steel completed its work on the implement or condition alleged to have caused Plaintiffs' injuries and damages in this case and that such was accepted as being complete by EMJ, thus negating Contract Steel's potential liability to either Plaintiffs and/or EMJ for their respective claims. However, there are genuine issues of material fact regarding whether Contract Steel's work on the ladder in question was complete, whether that ladder was accepted by EMJ, and whether EMJ maintained control over the ladder at or about the time of Mr. Meeker's alleged fall as demonstrated by the unambiguous provisions of the contract between EMJ and Contract Steel and accompanying witness testimony that demonstrates Contract Steel's obligations concerning the implement or condition were not complete at the times pertinent to this matter. Summary judgment at this time in Contract Steel's favor is thusly precluded.

Wherefore, EMJ respectfully requests that the ruling of the lower court be reversed and that it be granted any and all further relief to which it may be entitled in this cause.



Ronald L. Harper, *Pro Hac Vice*

Charles R. Patrick, MS Bar No. [REDACTED]

*Attorneys for Appellant, EMJ Corp.*

80 Monroe Avenue, Suite 800

Memphis, Tennessee 38103

(901) 527-0214

[ron.harper@leitnerfirm.com](mailto:ron.harper@leitnerfirm.com)

[charlie.patrick@leitnerfirm.com](mailto:charlie.patrick@leitnerfirm.com)

### Certificate of Service

I, Charles R. Patrick, attorney for appellant, EMJ Corporation, certify that I have this day served a copy of this Reply Brief for Appellant by United States mail with postage prepaid on the following persons at these addresses:

Charles M. Merkel, Jr., Esq.  
Merkel & Cocke  
P.O. Box 1388  
30 Delta Avenue  
Clarksdale, MS 38614  
Attorney for John and Mary Meeker

Edward I. Curry, III, Esq.  
Shuttleworth Williams, PLLC  
P.O. Box 3020  
Memphis, TN 38173-0020  
Attorney for Contract Steel Construction, Inc.

Sherry S. Fernandez, Esq.  
Zurich American Insurance Company  
8245 Tournament Drive, Ste. 220  
Memphis, TN 38125  
Attorney for Zurich American Insurance Company

The Honorable Robert Chamberlain  
DeSoto County Circuit Court Judge  
P.O. Box 280  
Hernando, MS 38632

This the 25<sup>th</sup> day of August, 2011.

  
CHARLES R. PATRICK



### **Certificate of Filing**

I, Charles R. Patrick, attorney for Appellant, EMJ Corporation, certify that I have this day deposited in the United States mail first class with postage prepaid and addressed to the Clerk four copies of the Reply Brief for Appellant.

This the 25<sup>th</sup> day of August, 2011.

  
CHARLES R. PATRICK