

IN THE  
MISSISSIPPI SUPREME COURT  
FOR THE STATE OF MISSISSIPPI

---

DOCKET NO. 2010-CA-01076

---

EMJ CORPORATION,  
Appellant,

v.

CONTRACT STEEL CONSTRUCTION, INC.,  
Appellee.

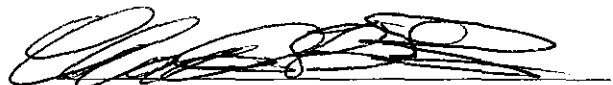
---

Appeal from the Circuit Court of Desoto County, Mississippi

---

**BRIEF FOR APPELLANT, EMJ CORPORATION**

---



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.

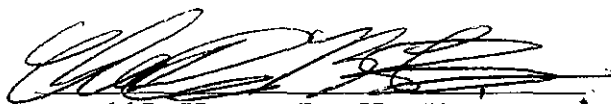
No. 2010-CA-01076

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)

## Table of Contents

Certificate of Interested Persons .....	ii
Table of Contents .....	iii
Table of Citations .....	iv
Statement of Position Regarding Oral Argument Requested.....	1
Statement of Issues .....	1
Statement of the Case .....	1
A.    Proceedings Below .....	1
B.    Statement of the Facts .....	3
Summary of the Argument .....	5
Argument .....	6
I.    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. ....	9
A.    Contract Steel's work on the ladder was incomplete, and Contract Steel did not relinquish control of the ladder prior to Meeker's fall, raising a question regarding Contract Steel's potential liability in this case.....	9
B.    Contract Steel can be held liable for its own negligence.....	11
II.   Whether the Order granting summary judgment in favor of Contract Steel Construction, Inc., should be reversed because the trial court incorrectly found the contractual agreement between Contract Steel Construction, Inc. and EMJ Corporation to be ambiguous and improperly determined issues of fact regarding said contract that were appropriate for jury determination.. ....	12
A.    The contract between EMJ and Contract Steel is not ambiguous...	12

B.	If the contract between EMJ and Contract Steel is ambiguous, said ambiguity must be resolved by the jury.....	14
C.	The trial court failed to consider other pertinent contractual terms.....	14
Conclusion .....		16
Certificate of Service .....		17
Certificate of Filing .....		18

## Table of Citations

### Cases

<u>Accu-Fab &amp; Const., Inc. v. Ladner ex rel. Ladner</u> , 970 So.2d 1276 (Miss. App. 2000).....	7, 11, 12
<u>Ainsworth v. Capform, Inc.</u> , 784 So.2d 1008 (Miss. App. 2001).....	7, 11, 12
<u>Belager-Price v. Lingle</u> , 28 So.3d 706 (Miss. App. 2010).....	9, 13
<u>Couch v. City of D'Iberville</u> , 656 So.2d 146 (Miss. 1995).....	7, 10
<u>First Baptist Church of Corinth, Trustees of v. McElroy</u> , 78 So.2d 138 (Miss. 1955)..	7, 10
<u>Fischbach &amp; Moore, Inc. v. Foxworth</u> , 152 So.2d 714 (Miss. 1963).....	7, 9, 10
<u>Harris v. Harris</u> , 988 So.2d 376 (Miss. 2008).....	9, 13, 14
<u>Hicks v. North American Co. for Life and Health Ins.</u> , 47 So.3d 181 (Miss. App. 2010).....	9, 14
<u>Higginbotham v. U.S. Indus., Inc.</u> , 584 F.Supp. 1273 (S.D. Miss. 1982).....	7, 10
<u>Hobson v. Waggoner Engineering, Inc.</u> , 878 So.2d 68 (Miss. App. 2003).....	8, 15
<u>Hopton Building Maintenance, Inc. v. United Parcel Service, Inc.</u> , 559 So.2d 1012 (Miss. 1990).....	8, 15
<u>Hudgins v. Pensacola Const. Co., Inc.</u> , 630 So.2d 992 (Miss. 1994).....	8, 15
<u>In re Dissolution of Marriage of Wood</u> , 35 So.3d 507 (Miss. 2010).....	9, 13, 14

<u>Kendrix v Huckaby</u> , 955 So. 2d 950 (Miss. App. 2007).....	9, 13
<u>Letich v. Miss. Guar. Ass’n</u> , 27 So.3d 396 (Miss. 2010).....	6
<u>Lloyd G. Oliphant &amp; Sons Paint Co. Inc. v. Logan</u> , 12 So.3d 614 (Miss. App. 2009).....	7, 11, 12
<u>May v. Ralph L. Dickerson Const. Corp.</u> , 560 So.2d 729 (Miss. 1990).....	7, 10
<u>McKay By and Through McKay v. Boyd Const. Co., Inc.</u> , 571 So.2d 916 (Miss. 1990).....	7, 10
<u>Miss. Gaming Comm’n v. Treasured Arts</u> , 699 So.2d 936 (Miss. 1997).....	6
<u>Miss. Power Co. v Brooks</u> , 309 So.2d 863 (Miss. 1975).....	7, 11
<u>One South, Inc. v. Hollowell</u> , 963 So.2d 1156 (Miss. 2007).....	9
<u>Ray v. Blockbuster</u> , 9 So.3d 422 (Miss. App. 2008).....	7, 11
<u>Royer Homes of Miss., Inc. v. Chandeleur Homes, Inc.</u> , 857 So.2d 748 (Miss. 2003).....	9, 14
<u>Watson Quality Ford, Inc. v. Casanova</u> , 999 So.2d 830 (Miss. 2008).....	6, 10

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

The Appellant, EMJ Corporation, respectfully requests oral argument. This appeal presents complicated facts and legal issues, and oral argument would be beneficial to this Honorable Court and to the parties. The Appellant, therefore, respectfully submits that oral argument would be appropriate in this case.

## **Statement of the Issues**

- I. 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.**
- II. Whether the Order granting summary judgment in favor of Contract Steel Construction, Inc., should be reversed because the trial court incorrectly found the contractual agreement between Contract Steel Construction, Inc. and EMJ Corporation to be ambiguous and improperly determined issues of fact regarding said contract that were appropriate for jury determination.**

## **Statement of the Case**

### **A. Proceedings Below**

Plaintiff, John Meeker, alleges that he was injured on April 30, 2005 when he fell from a ladder at a J.C. Penney store under construction in Southaven, Mississippi, while his wife, also a plaintiff in this case (collectively "Plaintiffs"), has alleged damages related to loss of consortium. (R. 20-24). After having initially filed and then nonsuited a claim for this incident in a Tennessee court, Plaintiffs initiated this cause on April 24, 2008 in the Circuit Court of Desoto County, Mississippi against J.C. Penney Company, Inc. ("J.C. Penney"); EMJ Corporation ("EMJ"); Harrell's Metal Works, Inc.; Contract Steel Construction, Inc. ("Contract Steel"); Hart, Gaugler and Associates, Inc.; J. Howard Nudell Architects, Inc. d/b/a Nudell Architects; Accurate & Precise Drafting; and Alan

Peletier (collectively "Defendants"). (R. 20). Plaintiffs' Complaint alleges that Defendants negligently designed, constructed, and installed and failed to warn with regard to a "ships ladder" at the J.C. Penney store under construction and that said negligence rendered the ladder defective and/or unreasonably dangerous. (R. 22-23). As a result of said defective and/or dangerous condition, Mr. Meeker alleges that he fell from the ladder sustaining injuries and damages. (R. 22-24). On June 3, 2008 and October 6, 2008, respectively, EMJ filed a Cross-Claim against Contract Steel sounding in both tort and contract and answered Plaintiffs' Complaint. (R. 50-54; 120-125).

During the course of proceedings in the Circuit Court, Harrell's Metal Works, Inc., Hart, Gaugler and Associates, Inc., J. Howard Nudell Architects, Inc. d/b/a Nudell Architects, Accurate & Precise Drafting, and Alan Peletier were voluntarily dismissed by Plaintiffs. J.C. Penney also filed a motion for summary judgment on October 28, 2008, which was granted on February 26, 2009. (R. 133-36; 540). On October 29, 2009, Contract Steel filed a Motion for Summary Judgment arguing that it owed no duty to Plaintiffs and did not breach its contract with EMJ. (R. 545-47; 556-926) On December 9, 2009, EMJ responded to Contract Steel's Motion for Summary Judgment arguing that genuine issues of fact remained which prevented dismissal of the claims of Plaintiffs against Contract Steel and EMJ against Contract Steel. (R. 1027-1073). After hearing arguments on the motion, the trial court granted Contract Steel's Motion for Summary Judgment on December 17, 2009 finding no genuine issues of material fact with respect to all of the claims against Contract Steel. (R. 1183-1188). The court found that Contract Steel had completed work on the ladder in question, which EMJ had accepted,

thus negating Contract Steel's liability potentially arising from the ladder, if any. (Id.). Further, Contract Steel was not otherwise responsible for the claims in question because of a contractual ambiguity that negated Contract Steel's potential liability found by the court on the basis of a contract between Contract Steel and another defendant, Harrell's Metal Works, Inc., and not on the contract between not Contract Steel and EMJ that the court found created a question of responsibility for the condition of the ladder at the time of Mr. Meeker's accident, if any. (Id.).

Subsequent to the court's ruling, Plaintiffs filed a motion for Order directing entry of final judgment, which was granted on June 22, 2010. (R. 1274). EMJ next filed a timely notice of appeal on June 22, 2010. (R. 1275-76).

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

On April 30, 2005, plaintiff John Meeker conducted an inspection at a J.C. Penney store which was under construction in Southaven, Mississippi. (R. 22). To complete his inspection, Mr. Meeker utilized a ships ladder to access the roof of the building. (R. 22). After completing the inspection, Mr. Meeker fell while descending the ladder and sustained injuries. (R. 22-24). Mr. Meeker alleges that his fall and injuries were caused by defects in the design, construction, fabrication, and installation of the ladder and for failure to warn with regard thereto. (R. 22-24). His wife has made a claim for loss of consortium. (R. 24).

Prior to Plaintiffs' injuries, EMJ was hired by J.C. Penney to construct the J.C. Penney store in question. (R. 1028). EMJ subsequently contracted with various subcontractors, including Contract Steel, to perform diverse aspects of the construction.



(R. 1028). Contract Steel's contractual obligations 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. (R. 1028; 1037-1054). Further, EMJ-Contract Steel contractual agreement specifically required Contract Steel to: (1) install a roof ladder; (2) apply a non-skid surface to the 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, Section 5500, 2.03(5) of the EMJ-Contract Steel agreement concerning the subject ladder states 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).

At the time of Mr. Meeker's accident, it is undisputed that Contract Steel's work on the subject ladder was not complete as the non-slip surface had not been applied to the ships ladder. (R. 1028-29; 1065-66). Randy Hartline, an EMJ employee, 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). There is also no evidence that EMJ took control of the ladder prior to Mr. Meeker's alleged accident. 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). Mason Hitchens, a Contract Steel employee, testified that he noticed

a problem with the length of the ladder and notified an EMJ representative and others. (R. 1029; 1067-73). Ultimately, a J.C. Penney representative or an EMJ representative made the final decision concerning installation of the allegedly defective ladder. (R. 1029; 1067-73).

### **Summary of the Argument**

EMJ asserts 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. Specifically, the 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. However, there is no evidence that the ladder was accepted by EMJ or that Contract Steel's work on the ladder was complete. Instead, 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.

What is more, in determining that summary judgment was appropriate and to overcome the plain language of the contract between EMJ and Contract Steel, the trial court impermissibly ventured "beyond the four corners" of the agreement of EMJ and Contract Steel addressing the possible condition that resulted in Plaintiffs' alleged injuries. The court did not find the terms of the parties' contract to be ambiguous; rather, the trial court examined another contract between EMJ and defendant Harrell's Metal Works, Inc. to create an ambiguity in the contract between EMJ and Contract Steel, which, respectfully, was improper. Additionally, even assuming that the contract

between EMJ and Contract Steel was ambiguous, which EMJ contends is not so, the trial court invaded the province of the finder of fact in resolving said ambiguity as a matter of law. The court also failed to take into account all pertinent provisions of the contract between EMJ and Contract Steel in granting summary judgment to Contract Steel.

For these reasons, EMG respectfully submits 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 completion of its contracted work and potential liability for Plaintiffs' injuries.

### **Argument**

#### **A. Standard of Review.**

This Court applies a de novo standard of review to a trial court's grant of a motion for summary judgment. 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)). Summary judgment may only be granted when there are no genuine issues of material fact, and the defendant is entitled to judgment as a matter of law. Id. All evidence must be viewed in the light most favorable to the non-moving party. Watson Quality Ford, Inc. v. Casanova, 999 So.2d 830, 833 (Miss. 2008). "The burden of demonstrating that there is no genuine issue of material fact falls upon the party requesting the summary judgment." Id. "Where there is the slightest doubt over whether a factual issue exists, the court should resolve in favor of the non-moving party." Id.

## **B. Applicable Law.**

Generally, a sub-contractor who completes work for a general contractor that is 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). However, it must not be overlooked that there must 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). This is consistent with another general proposition of law that 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). Of course, this duty to exercise reasonable care does not absolve a subcontractor from liability for its own acts of negligence that cause 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). Questions concerning completion and acceptance of work as well as control are questions of fact reserved for a jury. Ray v. Blockbuster, 9 So.3d 422, 426 (Miss. App. 2008). 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).

Just as is the case with any other contractual situations, the relative rights and responsibilities of parties involved in construction projects can also be dependent to a certain extent on contracts freely entered into by the entities in question, which can include assumptions of rights or responsibilities. 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). Furthermore, in determining the rights and responsibilities of parties related to a contract, 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 or parol 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 which 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).

**I. 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. Contract Steel's work on the ladder was incomplete, and Contract Steel did not relinquish control of the ladder prior to Meeker's fall, raising a question regarding Contract Steel's potential liability in this case.**

In an effort to absolve itself of liability in this case, Contract Steel cited the above-referenced Foxworth case for the proposition that once a sub-contractor completes work for a general contractor and the work is accepted by the general contractor, the sub-contractor can no longer be held liable for the work performed. See Foxworth, 152 So.2d at 715-17. However, in Foxworth, it was undisputed that the work in question had been completed and accepted by the general contractor prior to the plaintiff's injuries. Id. at

715. The trial court favorably cited Foxworth and several other cases<sup>1</sup> in its Order granting Contract Steel's Motion for Summary Judgment, but a review of those cases reveals that the issues of completion and acceptance were not in dispute. Conversely, in the present case, EMJ submits that the issue of whether the ladder was completed and accepted and who exercised control over the allegedly dangerous condition at the time of the accident is in dispute. Contract Steel avers that upon installation of the ladder it was completed and accepted by EMJ. EMJ maintains that the ladder was not completed upon installation because to the extent the ship's ladder was defective, Contract Steel failed to correct errors in the ladder's construction. It is also undisputed that at the time of Mr. Meeker's accident, work on the ladder was not complete as the non-slip surface, which the parties' contract provided for, had not been applied by Contract Steel. Moreover, there is a dispute regarding whether EMJ accepted the ladder or control thereof from Contract Steel. Installation of the ladder was approved by either a J.C. Penney or EMJ representative, so any definitive determination that the ladder was accepted by EMJ is erroneous. The burden of demonstrating that there are no genuine issues of material fact rests with the movant in this case, Contract Steel, and Contract Steel has not presented any evidence that someone with authority approved the installation of the ladder or that it was accepted by EMJ as being complete. See Casanova, 999 So.2d at 833. Based upon this information, issues of fact concerning the completion and acceptance of the ladder as

---

<sup>1</sup> 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).

well as control thereof remain, which must be resolved by a jury. See Ray, 9 So.3d at 426. Accordingly, summary judgment on this basis should be reversed.

**B. Contract Steel can be held liable for its own negligence.**

Contract Steel also argues that as a general contractor, EMJ had a 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. While EMG does not dispute this proposition of law entirely, EMJ's duty to exercise reasonable care to furnish a safe workplace cannot and does not absolve Contract Steel from liability for its own acts of negligence that cause harm or injury to employees of other subcontractors. See Logan, 12 So.3d at 618; Ainsworth, 784 So.2d at 1011. Contract Steel alleges EMJ alone failed to provide Meeker a safe workplace by allowing the allegedly defective ladder in question to be used. However, the allegedly dangerous condition of the ladder, including the allegedly dangerous installation and failure to apply the non-skid surface, was created by Contract Steel, who had control of the mode and manner of both the installation of the ladder and application of the non-skid surface. See Brooks, 309 So.2d at 866. The facts demonstrate that Contract Steel erected the ladder with EMJ's knowledge and with the consent of EMJ or J.C. Penney. However, because Contract Steel was the entity responsible for the allegedly defective installation and failure to apply the non-skid surface, a question of fact remains as to whether Contract Steel breached its duty to use reasonable care. See Ladner ex rel. Ladner, 970 So.2d at 1287. The jury should be allowed to consider Contract Steel's actions and determine whether said actions were negligent irrespective of EMJ's alleged duty to maintain a safe workplace as the parties'



duties are not mutually exclusive. Id. Given the facts as they are currently, the jury should have the opportunity to determine after appropriate consideration whether Contract Steel is liable for its own negligence in this case. See Logan, 12 So.3d at 618; Ainsworth, 784 So.2d at 1011; Ladner ex rel. Ladner, 970 So.2d at 1287.

**II. Whether the Order granting summary judgment in favor of Contract Steel Construction, Inc., should be reversed because the trial court incorrectly found the contractual agreement between Contract Steel Construction, Inc. and EMJ Corporation to be ambiguous and improperly determined issues of fact regarding said contract that were appropriate for jury determination.**

**A. The contract between EMJ and Contract Steel is not ambiguous.**

Before the trial court one of EMJ's primary arguments in opposition to Contract Steel's Motion for Summary Judgment is that Contract Steel did not complete its work on the subject ladder at the time of Meeker's fall because it had not applied a non-slip coating to the ladder as it was contractually required, ultimately resulting in Plaintiffs' injuries. The contract between EMJ and Contract Steel states, in pertinent part, that Contract Steel was required to do "[a]ll steel erection work including but not limited to work specified in Divisions 0, 1 and Sections 5120, 5210, 5310 and 5500," which included the area of Mr. Meeker's injury. Concerning the non-slip application to the ladder, Section 5500, 2.03(A)(5) states that Contract Steel must "[p]rovide non-slip surface to 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." Nothing about the contract between EMJ and Contract Steel nor the 5500 specifications is ambiguous. Contract Steel was required to provide a non-slip

surface on the rungs of the ladder. At the time of Meeker's fall, Contract Steel had not completed this contractual obligation and thus, its work on the ladder was not complete.

In granting Contract Steel's Motion for Summary Judgment, the trial court, while required to confine its review only to the four corners of the contract between EMJ and Contract Steel, examined another contract between EMJ and defendant Harrell's Metal Works, Inc. to create an ambiguity in the contract between EMJ and Contract Steel and to create a question of who was responsible for the condition of the ladder at the time of Mr. Meeker's accident, which was improper as violative of the parol evidence rule. See Belager-Price, 28 So.3d at 711. Reliance upon any information outside the four corners of the parties' agreement in this specific case was improper in this case, particularly reliance upon an unrelated contract. See Id.; Kendrix, 955 So.2d at 952.

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 (Miss. 2010) (citing Harris, 988 So. 2d at 378), the plain language of the contract between EMJ and Contract Steel, which reveals no ambiguity and requires Contract Steel to apply a non-slip coating to the ladder that at the time of Mr. Meeker's fall it had failed to do, must be applied, See Belager-Price, 28 So.3d at 711; Kendrix, 955 So.2d at 952, and, therefore, the trial court based its Order granting Contract Steel's Motion for Summary Judgment upon an erroneous and improper use of parol evidence, and its decision should be overturned. At the very least, even assuming an ambiguity in the parties' contract, genuine issues of material fact exists concerning whether Contract Steel's met its

contractual obligations and whether it should be absolved of liability in this case, making summary judgment inappropriate.

**B. If the contract between EMJ and Contract Steel is ambiguous, said ambiguity must be resolved by the jury.**

While EMJ respectfully disagrees with the trial court's determination that the contract between EMJ and Contract Steel was ambiguous, whether a contract is ambiguous is a question of law, and EMJ does not fault the trial court for taking up this issue, although it disagrees with the conclusion reached. See In re Dissolution of Marriage of Wood, 35 So.3d at 513 (Miss. 2010) (citing Harris, 988 So.2d at 378). Assuming, arguendo, that the trial court properly found the contract between EMJ and Contract Steel to be ambiguous and this Court agrees, it nonetheless remains true and beyond debate that the subsequent interpretation of the ambiguous contractual terms is a finding of fact which must be determined by the jury. Royer Homes of Miss., Inc., 857 So. 2d at 752; see also Hicks, 47 So.3d at 185. Thus, the trial court's interpretation of the ambiguities contained in the subject contract, if any there be, was improper and the interpretation of the contract must be submitted to the jury for resolution. See Id.

**C. The trial court failed to consider other pertinent contractual terms.**

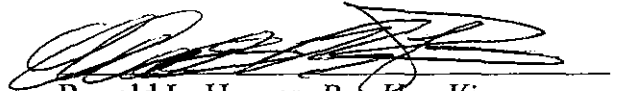
While addressing the contractual issues between EMJ and Contract Steel potentially pertinent to Contract Steel's liability in this case, the trial court also failed to consider other terms of the contract between EMJ and Contract Steel, which create further genuine factual issues concerning Contract Steel's responsibility or potential liability arising out of the ladder and/or condition in question in this case. The subject contract specifically required Contract Steel to (1) correct any errors in the construction

of the ladder and (2) be responsible for the safety of all work and materials incorporated into the project, including the ladder. It is undisputed that the contract between EMJ and Contract Steel required Contract Steel to assume these responsibilities. Just as is the case with any other contractual situations, the relative rights and responsibilities of parties involved in construction projects can also be dependent to a certain extent on contracts freely entered into by the entities in question. See, e.g., Hobson, 878 So.2d at 69-76 (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, 630 So. 2d at 993-94 (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 resulted in a wrongful death); see also Hopton Building Maintenance, Inc., 559 So.2d at 1012-1014 (addressing the extent of plaintiff maintenance company's assumption of responsibility under a services contract with the owner of a business). Because the contractual terms create at the very least a genuine dispute as to which party was responsible for the safety of the ladder, summary judgment in favor of Contract Steel was improperly granted. See Hudgins 630 So. 2d at 993-94.

## 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. First, genuine issues of material fact exists related to whether Contract Steel completed its work on the ladder and whether EMJ accepted said work as being complete. Second, in addressing additional material factual disputes concerning Contract Steel's responsibility for the ladder and its safety at the time of Meeker's fall based on a contract between EMJ and Contract Steel, the trial court improperly utilized parol evidence to find ambiguities in said contract when none existed in a further effort to absolve Contract Steel from liability for the injuries in question alleged by Plaintiffs. This error was compounded when the trial court unintentionally invaded the province of the trier of fact to resolve the purported discovered ambiguities. Further, the trial court failed to address other pertinent terms in the parties' contract potentially impacting Contract Steel's responsibility for the implement or condition that allegedly caused injury to Plaintiffs.

Wherefore, the Appellant, EMJ would, respectfully request 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 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



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 Brief for Appellant.

This the 11<sup>th</sup> day of May, 2011.



CHARLES R. PATRICK

### Certificate of Service

I, Charles R. Patrick, attorney for appellant, EMJ Corporation, certify that I have this 16<sup>th</sup> day of May, 2011 served a copy of this Brief for Appellant by United States mail with postage prepaid on the following persons at these addresses:

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

  
CHARLES R. PATRICK