PRELIMINARY STATEMENT

This is a products liability case wherein at the time of the injury, plaintiff John Veres was transporting a large tempered plate glass window pane in a dolly for installation in a store front. All witnesses testified that while in careful transport, the pane, without warning, provocation or impact with any object, the glass simply exploded, causing Mr. Veres severe lacerations. Both plaintiff and defendant expert witnesses testified this phenomenon of tempered glass exploding suddenly and without warning is termed, "spontaneous breakage."

______Both experts testified unequivocally that anytime a tempered glass window pane spontaneously breaks, it is without exception in and of itself a defect as tempered glass is not designed to spontaneously break. Plaintiff's expert opines the specific cause of the defect is either an inclusion in the glass, a crack in the edge of the glass or a mistempering. Defendant's expert testified the defect is caused by either an inclusion in the glass or a crack in the edge of the glass. It is of no legal consequence that without examining the actual glass fragments, the specific cause of the defect can not be pinpointed because New Jersey products liability imposes no such requirement. Since both experts agree that spontaneous breakage is without exception a defect, and there is no question of fact the glass spontaneously broke, plaintiff is entitled to partial summary judgment on liability.

RESPONSE TO DEFENDANT'S STATEMENT OF MATERIAL FACTS

1. Admitted.

2. Admitted

3. Objection. Paragraph contains multiple factual assertions. Both experts agree that tempered flat glass that spontaneously breaks is in and of itself defective glass. All witnesses essentially testified the glass spontaneously broke.

4. Denied. Paragraph contains multiple factual and legal assertions and is argumentative in contravention of R. 4:46-2. The testimony of witnesses and the physical injuries of the plaintiff, among other things, are sufficient evidence to support plaintiff expert's opinion.

5. Denied. Paragraph contains multiple factual and legal assertions and is argumentative in violation of R. 4:46-2. Plaintiff expert concluded with certainty the glass spontaneously broke, as all witnesses so testified. Both experts agree that tempered flat glass that spontaneously breaks is in and of itself defective glass.

6. Denied. Paragraph contains multiple factual and legal assertions in violation of R. 4:46-2.

7. Denied. Paragraph contains multiple factual and legal assertions and is argumentative in violation of R. 4:46-2. Defense expert testified that anytime a piece of tempered flat glass spontaneously breaks it is due to either a nickle sulfide inclusion in the glass or a crack in the edge of the glass. (Exhibit E, Kepple dep. at 137, 148, 149). Defense expert is disingenuous and intellectually dishonest when he asserts there is "no evidence" the glass was defective; he himself admitted glass that spontaneously breaks is by definition defective. Defense expert's opinion that it did not spontaneously break is a net opinion which reeks of defense advocacy because every witness testified it did so break.

STATEMENT OF FACTS IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY

1. This is a products liability case. The accident occurred on or about August 1, 1996 at the Willowbrook Mall in Wayne, New Jersey.

2. At the time of the accident plaintiff John Veres was employed by Academy Glass ("Academy") which is in the business of installing glass windows and doors in commercial buildings and storefronts. In this case Academy had been hired by a clothing store in the Willowbrook Mall to install its new storefront windows. In accordance with that agreement, Academy placed an order for about 10, 12 ft. by 5 ft. tempered glass[1] window panes from defendant Colonial Mirror and Glass Corporation ("Colonial"). Colonial is in the business of manufacturing such tempered glass. (Exhibit A, Veres dep. at 38-85)

3. On August 1, 1996, Academy went to the Colonial plant to pick up this order for transport and installation to the clothing store at the Mall. Plaintiff John Veres was one of approximately 7 men hired by Academy to unload the glass panes from the Academy truck, place it on dollys and wheel it to the clothing store for final installation. (Exhibit A, Veres dep. at 38-85)

4. The following were eye witnesses to the accident: plaintiff John Veres, Rafael Ortiz (President of Academy), Michael Anderson, Paul Layng, and Anthony Chiampi. (Exhibit A, Veres dep.) (Exhibit B, Oritz dep at 22-23) (Exhibit C, Anderson dep.) (Exhibit D- Layng dep at 8-10).

5. The accident happened at about 12:00 noon as follows: Prior to placing the glass in the

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[1]Tempered glass is flat glass created through a particular manufacturing process which results in a pressurized product. Tempered glass, also referred to as safety glass, is desirable because it is stronger than non-tempered glass and when it breaks, it shatters into many non-jagged pieces. As such, it is most commonly used in large window panes, car windows and doors. (Exhibit E, Kepple dep. at 72)

storefront window, the glass was lifted off the Academy truck and placed on a dolly. The dolly had a soft rug base and two padded support arms which hold the glass upright, on an angle. Once on the dolly, approximately four men were used to wheel the dolly into the Mall and store. When the men were about 125 feet from the Mall entrance, suddenly, and without warning, a poof was heard and the top section of the pane fell, struck plaintiff in the wrist and then the entire pane shattered into countless pieces and fell to the ground. Nothing hit the glass to cause the explosion. (Exhibit A, Veres dep. at 78-79) (Exhibit B, Ortiz dep. at 30-35, 41-42) (Exhibit C, Anderson dep at 14-24) (Exhibit D, Layng dep. at 11-21)

6. John Veres testified the glass did not vibrate or move on the dolly prior to the explosion and nothing unusual occurred in the seconds before the explosion (Exhibit A, Veres Dep. at 78-79)

7. Michael Anderson testified that as the glass was being wheeled, it just blew without anything hitting it. (Exhibit C, Anderson dep. at 22-23)

8. Paul Layng testified that as the glass was being rolled on the flat cement ground, with no warning it "just exploded." (Exhibit D, Layng dep. at 13, 18-19).

9. Anthony Champi, an innocent bystander, certified that as he was heading towards the entrance of the arcade "Fun And Games" to play video games, he looked over and saw about three or four men transporting a large piece of glass on a dolly on flat, concrete ground. The men were walking slowly with the glass. All of a sudden, out of nowhere, he heard a "pop" and then the glass just shattered into a million pieces and fell to the ground. He was shocked this occurred because he did not see anything to indicate the glass was being mishandled. (Exhibit G, Certification of Anthony Chiampi).

10. Shortly thereafter the glass was picked up by Mall security and discarded. (Exhibit A,

Veres dep.).

Oritz- pres of Academy.

11. John Veres suffered serious lacerations and permanent nerve damage as a result.(Exhibit A, Veres dep.).

12. All eyewitnesses essentially testified that the glass broke suddenly, without warning or provocation; they testified it just broke. (Supra., paras. 5-9).

13. The phenomenon of tempered flat glass breaking suddenly, without warning or provocation, i.e., "just breaking" is termed, "*spontaneous breakage*." (Exhibit E, Kepple dep. at 67, 137-140, 150). "Spontaneous breakage" is breakage without any appearance of force applied. (Exhibit E, Kepple dep. at 67).

14. Tempered flat glass is not designed to, and is not supposed to, spontaneously break. (Exhibit E, Kepple dep.)

15. Tempered flat glass that spontaneous breaks is always defective glass. (Exhibit E, Kepple dep. at 66, 141-42)

16. Spontaneous breakage is a defect well known in the glass industry. (Exhibit E, Kepple dep.) (Exhibit F, Adams dep.).

17. The problem resulted in office windows in Boston and New York suddenly and without warning exploding in the 1970s. (Exhibit E, Kepple dep. at 65-66) (Exhibit F, Adams dep. at 75-77).

18. Defense expert John Kepple testified that anytime a piece of tempered flat glass spontaneously breaks it is due to either a nickle sulfide inclusion in the glass or a crack in the edge of the glass. (Exhibit E, Kepple dep. at 137, 148, 149)

DISCUSSION

I. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE BOTH EXPERTS AGREE THAT TEMPERED FLAT GLASS THAT SPONTANEOUS BREAKS IS BY DEFINITION A DEFECT AND NEW JERSEY PRODUCTS LIABILITY LAW DOES NOT REQUIRE PLAINTIFF TO PROVE THE SPECIFIC CAUSE OF THE DEFECT; PLAINTIFF EXPERT'S CONCLUSION OF A DEFECT, WITHOUT PINPOINTING THE SPECIFIC CAUSE OF THE DEFECT IS NOT A NET OPINION;

Generally speaking, in a product liability case, plaintiff is obligated to prove that a manufacturing defect caused an injury to a plaintiff who was a foreseeable user of the product. Michalko v. Cooke Color & Chem. Corp., 91 N.J. 386, 394, 451 A.2d 179 (1982). The latter element of proof known as "causation-in-fact is ordinarily an indispensable ingredient of a prima facie case." Shackil v. Lederle Laboratories, 116 N.J. 155, 163, 561 A.2d 511 (1989). A duty is imposed on a manufacturer to ensure that its products as placed into the stream of commerce are suitably safe for their intended uses or reasonably foreseeable uses. Brown v. United States Stove Co., 98 N.J. 155, 165, 484 A.2d 1234 (1984); Suter, 81 N.J. at 169, 406 A.2d 140. If a manufacturer fails to meet that duty, it will be held strictly liable for damages caused by its defective products. Michalko v. Cooke Color & Chem. Corp., 91 N.J. 386, 394, 451 A.2d 179 (1982). A defect in a strict liability case can arise from a manufacturing flaw, design defect or inadequate warning. Feldman v. Lederle Labs, 97 N.J. 429, 449, 479 A.2d 374 (1984). A manufacturer will be held strictly liable for damages resulting from its product when put to its intended uses or reasonably foreseeable uses. Brown, 98 N.J. at 165, 484 A.2d 1234.

In the instant matter, after the glass spontaneously exploded, the fragments were cleaned up by mall security and discarded. Therefore, the fragments were unavailable for testing by the parties' experts. Nevertheless, plaintiff's expert, P. Bruce Adams, was able to conclude in his report, based

on the testimony of witnesses as to how the glass broke that the glass was defective. (Exhibit H, Adams report). Mr. Adams begins his report by stating the materials he reviewed included the sworn deposition testimony of eyewitnesses. Based on these witnesses, Mr. Adams points out there is no indication the glass broke from being impacted with an object and that it spontaneously broke. (Exhibit H, Adams report at 2). He explains that it is well known in the science of glass that anytime tempered flat glass spontaneously breaks, it is due to one of three specific causes: a nickle sulfide inclusion, a crack in the edge or a mistempering. (Id. at 2-4). He cites to Tooley, an authority in the field of glass, in support of this conclusion. (Id. at 3).

While it is true that Mr. Adams states the cause is one of these three possibilities, he does conclude *with a high degree of engineering certainty*, that the glass was indeed defective. (Id at 3-4). Defense argues that since the actual cause of the spontaneous breakage defect could not be determined without examining the fragments, that therefore Mr. Adams' conclusion the glass was defective is a net opinion and inadmissible and that defendant is entitled to summary judgment. This assertion by defendant demonstrates a misunderstanding of New Jersey products liability law.

In a products liability case the injured plaintiff is not required to prove a specific manufacturer's defect. Moraca v. Ford Motor Co., 66 N.J. 454, 458, 332 A.2d 599 (1975); *accord* Consalo v. General Motors, 258 N.J.Super. 60, 64, 609 A.2d 75 (App.Div. 1992) (explaining that an "inability to prove a defect by direct evidence is not fatal to a plaintiff's case"); Corcoran v. Sears Roebuck and Co., 312 N.J.Super. 117(App.Div. 1998); Myrlak v. Port Authority, 157 N.J. 84, 723 A.2d 45 (1999). Thus, where direct evidence is unavailable, "a plaintiff may prove a defect either by circumstantial evidence which would permit an inference that a dangerous and defective condition existed prior to sale, or by negating other causes in order to make it reasonable to infer that a

dangerous condition existed while defendant had control of the product." Consalo, *supra*, 258 N.J.Super. at 64, 609 A.2d 75 (citing Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 170, 406 A.2d 140 (1979)).

Additional circumstantial evidence, such as proof of proper use, handling or operation of the product and the nature of the malfunction, may be enough to satisfy the requirement that something was wrong with it. Scanlon v. General Motors Corp., 65 N.J. 582, 591, 326 A.2d 673 (1974). That is, circumstantial evidence, such as proof of proper use, handling, or operation of product and nature of malfunction, may be enough to satisfy the requirement that something was wrong with it. Corcoran v. Sears Roebuck and Co., 312 N.J.Super. 117, 711 A.2d 371 (App.Div.1998). In a products liability case, the circumstantial evidence test requires proof sufficient to support a conclusion that, in the normal course of human experience, injury would not have occurred at this point in the product's life span had there not been a defect attributable to the manufacturer. H.T. Rose Enterprises, Inc. v. Henny Penny Corp., 317 N.J.Super. 477, 722 A.2d 587 (A.D.1999).

While it is clear a plaintiff need not prove a specific defect, in the instant matter plaintiff has in fact done so- in fact defendant's expert himself admitted the product was defective! As explained, all witnesses to the accident testified that the glass broke suddenly, without warning or provocation; they essentially testified it "just broke." The phenomenon of tempered flat glass breaking suddenly, without warning or provocation, i.e., "just breaking" is termed, "*spontaneous breakage*." (Exhibit E, Kepple dep. at 67, 137-140, 150) Tempered flat glass is not designed to, and is not supposed to, spontaneously break. (Exhibit E, Kepple dep. at 141). Therefore, both experts agree that anytime tempered flat glass spontaneously breaks, the glass itself is defective. Indeed, defendant's expert, John Kepple testified as follows:

Q. Tempered glass isn't supposed to spontaneously crack, is it, spontaneously break?
A. No.

Q. That's a defect, isn't it, if that happens in a tempered glass?
A. Without specifying what the cause of the fracture is, I think you could say that it is a defective item somehow or other if it breaks spontaneously...
A. If it's not supposed to spontaneously break and if it does, then *something's wrong somewhere.*

(Exhibit E, Kepple dep. at 141-42) (emphasis added).

Q When those -- when the glass broke in those office windows that you just described, was there something that hit the windows that caused it to break?
A No. It was spontaneous breakage.

Q In those -- in that particular situation you just described, *was that considered a defect in the window glass pane*?
A Yes. I'm sorry, yes.

(Exhibit E, Kepple dep. at 66) (emphasis added). Clearly then, plaintiff's expert, Bruce Adams' conclusion the glass was defective is far from a net opinion. Since the law permits an expert to offer possible defects without pinpointing the specific defect, it logically follows that as in this case, where the specific defect is identified, i.e., the spontaneously breaking glass, that Mr. Adams may properly offer his three possibilities as to the specific cause of the defect. Respectfully, defendant's argument to the contrary suggests confusion as New Jersey products liability law.

Interestingly enough, defendant's expert, Mr. Kepple, also concluded that anytime tempered flat glass spontaneously breaks, it is inevitably due one of two causes: a nickle sulfide inclusion or a crack in the edge of the glass (plaintiff expert, Mr. Adams, offered an additional cause, mistempering). Mr. Kepple testified:

Q Didn't you testify earlier that if a piece of tempered glass spontaneously breaks,

there's really only two possible causes for that. One is a nickel sulfide inclusion and one is a crack in the edge. Isn't that your testimony from earlier?
A I believe that's right, yes.

(Exhibit E, Kepple dep. at 137). He further testified:

Q If a piece of tempered glass breaks spontaneously, then in your expert opinion there's really only one of two causes for that ...-- number one would be a nickel sulfide inclusion and number two, would be a crack in the edge of the glass; isn't that right?

MR. KIRMSER: Objection. Asked and answered at least four or five times.

A I believe that's right. The question has been answered.

Q And the answer is yes, right?
A Yes, again.

Q So if a glass breaks spontaneously, wouldn't that spontaneous breakage be evidence of either a nickel sulfide inclusion or a crack in the edge of the glass?
A That's the same question. It's been answered before.

Q Is the answer yes?
A Again, yes.

(Exhibit E, Kepple dep. at 148-49). Indeed, it is astonishing defendant would argue plaintiff's expert advances a net opinion when defendant's own expert espouses that same opinion.

Accordingly, the opinions of plaintiff's expert, Bruce Adams, are sound. They have solid basis in fact and in science and defense expert even agrees with these opinions. Defendant's motion for summary judgment should be denied.

II. PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY SHOULD BE GRANTED BECAUSE BOTH EXPERTS AGREE SPONTANEOUS BREAKAGE IS ALWAYS A DEFECT AND THERE IS NO QUESTION OF FACT THE GLASS SPONTANEOUSLY BROKE; DEFENSE EXPERT'S OPINION THE GLASS DID NOT SPONTANEOUSLY BREAK IS A NET OPINION WHICH REEKS OF DEFENSE ADVOCACY

As set forth in detail above, both experts agree that spontaneous breaking glass is in and of itself, defective glass. And there is no dispute the breaking glass caused John Veres' injuries in this case. The only apparent obstacle then to the Court granting plaintiff summary judgment on liability is if there is a genuine dispute of fact as to whether the glass did in fact spontaneously break. Defense expert, John Kepple, recognizes this critical scenario. Therefore, in a blatant act of defense advocacy, Mr. Kepple concludes the glass did not spontaneously break. As each eye witness testified to the clear contrary, there is no basis to support Mr. Kepple's opinion in this regard. Therefore, Mr. Kepple's opinion that the glass did not spontaneously break is a net opinion; it should be disregarded and plaintiff should be granted partial summary judgment on liability.

Tempered flat glass is specially made under certain pressures and is designed to withstand great external forces. Since it is stronger than ordinary glass, it is required to be used in cars and store front windows and doors. However when defective, tempered flat glass will spontaneously break- that is, it will break suddenly, without warning or provocation. (Exhibit E, Kepple dep. at 67, 137-140, 150). Spontaneous breakage is breakage without any appearance of force applied. (Exhibit E, Kepple dep. at 67). Mr. Kepple explains:

> Q Well, tell me what happens when a piece of tempered glass spontaneously breaks. What actually happens? There's a piece of tempered glass standing in this room and in two seconds it's going to spontaneously break. What am I going to see?
> A You'll see the glass fall into pieces, fall apart.

Q Anything else?
A No. It breaks into pieces.

Q It just breaks; isn't that right?
A Yes.

(Exhibit E, Kepple dep. at 137-38). And indeed, all the eyewitnesses testified this is exactly what happened.

When the men were about 125 feet from the Mall entrance, suddenly, and without warning, a poof was heard and the top section of the pane fell, struck plaintiff in the wrist and then the entire pane shattered into countless pieces and fell to the ground. Nothing hit the glass to cause the explosion. (Exhibit A, Veres dep. at 78-79) (Exhibit B, Ortiz dep. at 30-35, 41-42) (Exhibit C, Anderson dep at 14-24) (Exhibit D, Layng dep. at 11-21). John Veres testified the glass did not vibrate or move on the dolly prior to the explosion and nothing unusual occurred in the seconds before the explosion (Exhibit A, Veres dep. at 78-79). Michael Anderson testified that as the glass was being wheeled, it just blew without anything hitting it. (Exhibit C, Anderson dep at 22-23) Paul Layng testified that as the glass was being rolled on the flat cement ground, with no warning it "just exploded." (Exhibit D, Layng dep at 13, 18-19).

Anthony Champi, an innocent bystander with no connection to this case, certified that as he was heading towards the entrance of the arcade, he looked over and saw about four men transporting a large piece of glass on a dolly. The men were walking slowly with the glass. All of a sudden, out of nowhere, he heard a "pop" and then the glass just shattered into a million pieces and fell to the ground. He was shocked this occurred because he did not see anything to indicate the glass was being mishandled. (Exhibit G, Certification of Anthony Chiampi).

Despite this clear, undisputed testimony, defense expert maintains there is "no evidence" the

glass spontaneously broke. Mr. Kepple advanced the following net opinion testimony:

Q Based on those depositions and that statement, what is your understanding of how the accident happened?
A Ah, my understanding that the accident happened while the glass was being transported on a dolly from the truck towards the site where it was to be installed. Beyond that, it's a little unclear as to exactly what happened because there are so many conflicting statements about who was where and how many people were there and where they were and what size the glass was. It's a little hard to read all those depositions and sort out exactly what was what in several instances.

Q So as you understand the stories about what happened conflict?
A Oh, yes they do.

Q Well, how does John Veres' version of the story conflict with Tony Chiampi's?
A I'm not sure at this point...

Q I take it you don't know how, if at all, Paul Lang's version of the accident conflict with John Veres'?
A Not without looking at the details of them...

Q Well, you know that many of the witnesses, in fact, all the witnesses said the glass just spontaneously broke, don't you?
A Again, I'm not sure that they all said that.

Q Well, which witness didn't say that?
A I don't know. I'd have to go back and look at the details of what they all said.

Q Isn't that important in writing your report as to what the witnesses said, the people who are actually there?
A I think it's quite possible that the witnesses may not have a clear recollection of what happened.

Q But that's not really my question. My question is isn't it important as to what the witnesses said in writing your report as to how the glass broke?
A I want to know what the witnesses said, but I'm not going to rely exclusively on what the witnesses say...

Q Do you have any reason to believe the witnesses were lying that it spontaneously broke?
A I don't believe the witnesses were lying. I think they may be mistaken.

Q How was John Veres mistaken in his belief that the glass spontaneously broke?
A I think my conclusions in the report spell out that there is no, absent the glass, there is no evidence that supports any argument that there was a defect in the glass either from manufacturing of the glass or from tempering of the glass. ...

(Exhibit E, Kepple dep. at 130-35)

He continues:

> Under those conditions of knowing that there is no sound evidence to support an argument of a defect in either manufacturing or tempering, the most logical conclusion, that there was, in fact, some force placed on the glass...in the form of an impact of some sort.
>
> Q So how is John Veres mistaken in his observation that the glass spontaneously broke?
> A I think he may be mistaken in a sense that he doesn't remember the details of how it happened.
>
> Q Did you happen to read his three or four page handwritten report where he spells out in detail what happened?
> A I think I saw it, yes.
>
> Q Where in that report does he say that he doesn't remember certain facts about how the accident happened?
> A I don't believe he does say that.
>
> Q Now, how is Tony Chiampi mistaken in his observation that the glass spontaneously broke?
> A. I think the answer is the same as the others.

(Exhibit E, Kepple dep. at 130-35)

> Q ...my question to you is do you have any reason to dispute that they did actually testify that it just broke as you sort of described earlier with that two second example?
> A I'm not sure that they all testified that it quote "just broke." I don't remember that they all did testify to that. I'd have to go back and read each of those depositions again at this point. They may have. I just don't remember that they all testified to that point.
>
> Q Well, if they did testify that it essentially did just break, that there were no external forces, you would agree with me then that this would be a spontaneous

break; isn't that right?

A If it did just break, that would be what I would call spontaneous breakage, yes.

(Exhibit E, Kepple dep. at 139-40)

The basic rule is that "an expert's bare conclusions, unsupported by factual evidence, is inadmissible." Buckelew v. Grossbard, 87 N.J. 512, 524, 435 A.2d 1150 (1981). "When an expert's opinion is merely a bare conclusion unsupported by factual evidence, i.e., a 'net opinion,' it is inadmissible. "Expert testimony should not be received if it appears the witness is not in possession of such facts as will enable him to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture." Dawson v. Bunker Hill Plaza Assoc., 289 N.J.Super. 309, 323, 673 A.2d 847 (App.Div.) (*citing* Vuocolo v. Diamond Shamrock Chem. Co., 240 N.J.Super. 289, 292, 573 A.2d 196 (App.Div.1990)). Supporting data and facts are vital to an expert's opinion "when the opinion is seeking to establish a cause and effect relationship." Rubanick v. Witco Chem. Corp., 242 N.J.Super. 36, 49, 576 A.2d 4 (App.Div.1990). In essence, the net opinion requires an expert witness to give the why and wherefore of his expert opinion, not just a mere conclusion." Jimenez v. GNOC, Corp., 286 N.J.Super. 533, 540 (App.Div.1995).

Clearly Mr. Kepple's opinion that the glass did not spontaneously brake and that it broke due to an impact is inadmissible net opinion because all the witnesses testified to the contrary and no witness testified in accordance with this net opinion. Furthermore, there is no question of fact for a jury that the glass was being handled improperly. All witnesses testified that at the time of the explosion, it was being wheeled slowly and no external forces caused the breakage.

Astonishingly, Mr. Kepple not only concluded that the glass did not spontaneously break, but with not even a shred of evidence in support, including not even one vague reference by a witness,

he concluded that it shattered because it was dropped on the ground! Kepple stated:

> Q Do you have any reason to believe that the glass was being handled improperly at the time of the breakage?
> A Inasmuch as I don't know of any reason to believe that it had any particular glass manufacturing or tempering defect in it, I think improper handling could have well been the explanation for why it broke.
> Q Do you know what witness in this case testified it was handled improperly?
> A No.
>
> Q Do you know if any witness testified that way?
> A I don't know of any witness testifying that way.

(Exhibit E, Kepple dep. at 142).

> Q All right. And then the last sentence in your report, paragraph six, it says that in the absence of any evidence of improper tempering or any defect in the glass, it is more likely than not that the edge of the glass sheet impacted a hard surface while being transported on the dolly. Now, again, none of the at least three or four witnesses who were there at the time this glass broke testified to that impact, it hit a hard surface; is that right? Did any witness testify that the glass impacted a hard surface while being transported on the dolly?
> A I think we've been through that, too. No.

(Exhibit E, Kepple dep. at 149).

> Q Do you therefore assume that the glass did not spontaneously break, instead you're assuming that it impacted a hard surface; isn't that correct?
> A I concluded that it impacted a hard surface in the absence of any evidence that shows that it did not do that.

(Exhibit E, Kepple dep. at 155). Mr. Kepple's opinions in this regard are disingenuous, intellectually dishonest and reek of blatant defense advocacy. On the one hand he criticizes Mr. Adams for concluding there was a defect by stating there is no evidence of such (despite his own admission that spontaneous breaking glass is defective glass). Then in the same breath he summarily concludes, despite the absence of any supporting testimony and in the face of overwhelming direct evidence to the contrary, that the glass impacted a hard surface! This is ludicrous. Mr. Kepple's net opinion in

this regard is insufficient to raise a question of fact that the glass spontaneously broke. They should be disregarded and the Court should grant plaintiff partial summary judgment on liability.

III. SUMMARY JUDGMENT STANDARD

It is well-established that a motion for summary judgment is to be granted when the moving party succeeds in showing "that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgement or order as a matter of law." Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995). When faced with a motion for summary judgment, the court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 540. Thus, summary judgment is appropriate where the evidence "is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). This means that a summary judgment motion cannot be defeated if the non-moving party does not "offer any concrete evidence from which a reasonable juror could return a verdict in his favor." Id. at 256.

CONCLUSION

Accordingly, plaintiff respectfully requests this Honorable Court deny defendant's motion for summary judgment and grant plaintiff's cross-motion for partial summary judgment on liability.

Respectfully submitted,

LYNCH ♦ MARTIN ♦ KROLL
Attorneys for Plaintiff

Dated: August 23, 2000

By: ________________________
GERALD H. CLARK

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