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LEGAL DISCUSSION

I. Defendant Is Liable for Design Defect (*See also* Model Civil Jury Charge 5.40D)

A manufacturer is liable for a design defect when a "a practical and feasible alternative design existed that would have reduced or prevented [plaintiff's] harm." *Lewis v. Am. Cyanamid Co.*, 155 *N.J.* 544, 560 (1998); *see also Dewey v. R.J. Reynolds Tobacco Co.,* 121 *N.J.* 69, 74 (1990); *Smith v. Keller Ladder Co.,* 275 *N.J.Super.* 280, 284–85 (App.Div.1994); *see also Restatement (Third) of Torts*: Product Liability 2 cmt. f (Proposed Final Draft, 1997) ("To establish a prima facie case of defect, plaintiff must prove the availability of a technologically feasible and practical alternative design that would have reduced or prevented the plaintiff's harm.").

Here, a safe, reasonably feasible alternative exists which - if used - would have prevented the harm to Robert Shenton. Unlike the grooved cap and coupling manufactured and sold by Anvil, a flanged cap would not have shot off the end pipe were one of its bolts loosened while under pressure. (*Exhibit H - Narrative of Theodore Moss* at 12-13) (*Exhibit I - Photographs of Flanged Cap Design*). Instead, once one of the bolts on the flanged cap were loosened, "water [would have] spray[ed] out" of the sides, alerting the worker to the fact that the piping was under pressure. *Ibid.* Indeed, the flanged cap, encompassing an eight nut and bolt system:

> would require the worker to individually remove flange bolts. If the system were under pressure, the flange would begin to leak/spray water as the bolts were loosened. ***This leakage would occur long before the end cap was disengaged, thereby undeniably and unmistakably alerting the worker to the fact that the system was pressurized long before the injury could occur . . . [the end cap] would simply and safely start to leak[,] either relieving residual system pressure or leaking and alerting the worker the system is "live" i.e. still pressurized.***

(*Exhibit J - Narrative of Paul Dreyer, March 15, 2015* at 9-10).

Likewise, a component part manufacturer "is liable for the harm caused by the absence of a safety device . . . when a plaintiff proves, by a preponderance of the evidence, that it was feasible and practical for such safety device to have been installed at the time the component product was within the control of the manufacturer or distributor." *Boyle v. Ford Motor Co.,* 399 *N.J. Super.* 18, 24 (App. Div. 2008) (citing *Zaza v. Marquess & Nell, Inc.,* 144 *N.J.* 34 (1996)); *see also N.J. Model Civ. Jury Charge* 5.40D-2. Here, despite the feasibility, low cost and practicality of providing a simple warning tag with its product stating "DANGER - Under Pressure," Defendant both failed to do so and continues to fail to do so. (*Exhibit P - Deposition of Joseph Beagen* at 72:25-73:1) (testifying that the cost to add a warning tag "wouldn't be much"); *see also* (*Exhibit J - Narrative of Paul Dreyer* at 9) (estimating the cost would be "less than 50 cents [for a warning label] and [the cost of] an attached lanyard warning with pictogram less than a dollar").

Defendant's failure to implement the flanged bolt end cap instead of the grooved cap and

coupling assembly represent design defects and were a proximate cause of the injuries to Robert Shenton. Likewise, Anvil's failure to include a simple warning tag stating "DANGER-Under Pressure" - despite the feasibility, low cost and practicality of same - represents a design defect.

II. **Defendant Is Liable for Failure to Warn (*See also* Model Civil Jury Charge 5.40C)**

Defendant fails to provide an adequate warning, let alone any warning with its product. As such, the Anvil SK-1 cap is defective. *See, N.J.S.A.* 2A:58C-4. A manufacturer who fails to warn of a product's dangers is presumed to have a breached its duty to warn and the fact finder is to consider proximate cause only:

> Defendant . . . opined that no warning was needed because the [product] presented an open and obvious danger . . . Nothing in the [Products Liability] Act or case suggests that the obviousness of danger may not be considered as a factor to establish what is an 'adequate warning' . . . or whether a breach of that duty could be a proximate cause of the accident. *Of course, in the same manner as a protective device, a warning sign is provided to protect the inattentive worker. For that reason, the plaintiff's lack of attention is not an answer to the failure to post a warning sign.*
>
> *Properly posted signs may be an important indication that a duty to warn was discharged . . . However, if there is an absence of signs, defendants must come forward with some indication that the sign would not have been heeded, since there is a presumption that the missing warning, if given, would have been followed.*

Fabian, supra 258 *N.J. Super.* at 278-79 (emphasis added). While defendant claims that it does not have a duty to provide a warning with its product because it is a component part of a complex system, this argument fails.

Anvil's SK-1 Cap is used solely to seal off a sprinkler system that either is, or is not under pressure. (*Exhibit H - Narrative of Theodore Moss* at 8) (*Exhibit F - Pictures of Cap and Coupling*) (*Exhibit L - Schematics of Anvil SK - 1 Cap*). As such, when the cap is in place the system will either be depressurized or pressurized; when the system is pressurized, "[t]he hazard . . . is part of the system . . . components could potentially fly off . . . [and] do a number of things [to harm an individual] and death is definitely one of those possibilities." (*Exhibit P - Deposition of Joseph Beagen* at 46:9-24, 69-70). Aware of this grave risk of injury - Defendant nonetheless fails to provide any warning with its SK-1 Cap.

A. Plaintiff Is Entitled to a Presumption He Would Have Heeded a Warning.

Defendant breached its duty to Plaintiff to provide a safe product and was a proximate cause of the injuries in this case. Since defendant provides no warning whatsoever, it is presumed that had a warning been provided, Plaintiff would have heeded that warning and the incident would not have

occurred. *Coffman v. Keene Corp,* 133 *N.J.* 581 (1993); *see also, Theer v. Phillip Carey Co.,* 133 *N.J.* 610 (1993). Indeed, as noted in the New Jersey Civil Model Jury Charge:

> In *Coffman v. Keene Corp.*, 133 *N.J.* 581 (1993), and *Theer v. Philip Carey Co.*, 133 *N.J.* 610 (l993), the Supreme Court adopted the heeding presumption which applies to all failure to warn and inadequate warning cases and provides plaintiff with a rebuttable presumption on the issue of proximate cause, *i.e.*, if a warning or instruction had been given, such warning or instruction would have been heeded by plaintiff. In such cases, the burden of production on the issue of proximate cause shifts to the defendant to come forward with rebuttal evidence sufficient to demonstrate that a warning would have made known to plaintiff the danger of the product and not withstanding the knowledge imparted by the warning, plaintiff would have proceeded voluntarily and unreasonably to subject himself or herself to the dangerous product.
>
> If the defendant fails to meet this burden of production, the trial judge shall direct a verdict in plaintiff's favor on this issue of proximate cause.
>
> If the defendant presents rebuttal evidence such that reasonable minds could differ as to whether the warning, if given, would have been heeded by the plaintiff, the defendant has satisfied its burden of production and plaintiff loses the benefit of the presumption. The plaintiff must then carry the burden of proof (persuasion) as to this proximate cause. *Sharpe v. Bestop, Inc.*, 314 *N.J. Super.* 54 (App. Div. 1998); 157 *N.J.* 545 (1999).
>
> When the injury is sustained in the work place, the presumption and burden of the defendant is slightly different. There the presumption contains a second tier. The presumption is not only that the employee would have heeded the warning, but additionally that the employer would have heeded the warning and communicated it to the employees and enabled them to take precautions. *Theer v. Philip Carey Co*., 133 *N.J.* at 622. The manufacturer/seller may overcome the presumption by proving that the employee or his or her employer would have disregarded an adequate warning. *Coffman v. Keene Corp.*, 133 *N.J.* at 609. Further, "the manufacturer must prove that had an adequate warning been provided, the plaintiff-employee with meaningful choice would not have heeded the warning." *Id.* A meaningful choice requires that the plaintiff/employee not be in a position where he/she is forced to work with the product or machine or lose their job. *Id* at 604. *See also Facendo v. S.M.S. Concast*, 286 *N.J. Super.* 575 (App. Div. 1996); *Graves v. Church & Dwight Co., Inc.*, 267 *N.J. Super.* 445 (App. Div. 1993) (a non workplace case).

N.J. Model Civil Jury Charge, 5.40C at 7. Here, Plaintiff in no uncertain terms testifies that if Anvil's SK-1 cap contained a warning stating, "**DANGER-Under Pressure," or "warning, contents [are] under pressure,"** he never would have loosened the cap. (*Exhibit T - Deposition of Neil Wu, P.E.* at 60:3-8). As such, Defendant's failure to warn is a proximate cause of the harm to

Robert Shenton.

B. Plaintiff's Alleged Misuse of the Anvil SK-1 Cap Was Foreseeable, Thus Defendant Is Not Absolved of its Liability for Failure to Warn.

While Defendant claims that Plaintiff misused the Anvil SK-1 cap by attempting to disassemble the product while pressurized, this argument fails. Defendant has "a duty to prevent an injury caused by the foreseeable misuse of its product." *Jurado v. W. Gear Works,* 131 *N.J.* 375, 388 (1993); *see also, Ridenour v. Bat Em Out,* 309 *N.J. Super.* 634, 642, 646 (App. Div. 1998) (manufacturers of products to be used on the premises of another have a duty to warn those who will ultimately use the product of any dangers therein and are liable for any injuries occurring as a foreseeable misuse of their product).

Here, there is no dispute the Anvil SK-1 cap is used in a fire sprinkler system to seal off temporary or permanent piping. When used, the cap is either holding back a pressurized system, or a non-pressurized system. It is an entirely foreseeable misuse of the cap that a worker may attempt to loosen the cap not realizing the system is pressurized. Indeed, that is the overriding purpose of warnings in a workplace setting. *See, Fabian, supra* 258 *N.J. Super.* at 279 (a mistake by a worker does not absolve Defendant of its duty to warn since "a warning sign is provided to protect the inattentive worker."). As such, Defendant had a duty to provide a warning with its product to alert Plaintiff of the danger of disassembling the pressurized Anvil SK-1 cap. Plaintiff testified he was not aware the system was pressurized - had Defendant provided a warning to indicate the system was pressurized, Robert would not have loosened the cap and become injured. Defendant is liable for its failure to warn.

III. Defendant Is Not Entitled to a State-of-the-art Defense, Sophisticated User Defense or Defense that Plaintiff and/or his Employer were Comparatively Negligent

While *N.J.S.A.* 2A:58C-3a lists three affirmative statutory defenses to a product's liability design defect claim, none are applicable here. The three defenses are:

> (1) At the time the product left the control of the manufacturer, there was not a practical and technically feasible alternative design that would have prevented the harm without substantially impairing the reasonably anticipated or intended function of the product; or
>
> (2) The characteristics of the product are known to the ordinary consumer or user, and the harm was caused by an unsafe aspect of the product that is an inherent characteristic of the product and that would be recognized by the ordinary person who uses or consumes the product with the ordinary knowledge common to the class of persons for whom the product is intended, except that this paragraph shall not apply to industrial machinery or other equipment used in the workplace and it is not intended to apply to dangers posed by products such as machinery or equipment that can feasibly be

eliminated without impairing the usefulness of the product; or

(3) The harm was caused by an unavoidably unsafe aspect of the product and the product was accompanied by an adequate warning or instruction as defined in section 4 of this act.

Ibid.; *N.J. Model Civ. Jury Charge* 5.40D-1. None of the above are defenses to the claims alleged herein as discussed *infra*.

A. A State-of-the-art Defense ("Everyone Else Is Doing it this Way") Is Inapplicable

The state-of-the-art defense under *N.J.S.A.* 2A:58C-3a(1) does not apply. The state-of-the-art defense or "the very safest product of that type which [an] industry could define at the time of manufacture" is defined as "a product for which there was *no reasonable alternative design*." *Cavanaugh v. Skil Corp.*, 164 *N.J.* 1, 4 (2000) (internal citations omitted) (emphasis added). "A product manufacturer, challenging only the *practicality* of the alternative device and not its *technological feasibility*, has not asserted the state-of-the-art defense." *Id.* at 8 (emphasis added). Indeed:

> a defendant submitting rebuttal evidence or debating risk-utility factors in a design-defect case may be confusingly similar to, but does not necessarily equate with, the assertion of the statutory state-of-the-art defense.
>
> The hazard in giving the state-of-the-art instruction in a case in which the manufacturer challenges only the alternative device's *practicality* is apparent because, as indicated above, the defendant has the attendant burden to "prove" the state-of-the-art when that instruction is given.

Id. at 9. Here, the state-of-the-art defense is inapplicable since as identified above the bolted flange cap design was in existence at the time Defendant manufactured and sold its grooved cap and coupling assembly. As such, there is no dispute the design was technologically feasible, instead, Defendant disputes the designs practicality. Likewise, there is no dispute a simple lanyard and warning tag would have been technically feasible and practical without impairing the reasonably anticipated or intended function of the product. As such, the state-of-the-art defense is inapplicable and should not be permitted as an affirmative defense.

B. Defendant Should be Barred from Pointing its Finger at Plaintiff and/or Plaintiff's Employer

Defendant is not entitled to a defense under the plain language of *N.J.S.A.* 2A:58C-3a(2) that Robert Shenton was a sophisticated user who should have been aware of the dangers of the Anvil SK-1 cap. Likewise, Anvil should not be permitted to blame Plaintiff's employer for failing to inform him the Anvil SK-1 cap was holding back a pressurized sprinkler system. As stated in *Butler v. PPG Industries, Inc.,* 201 *N.J. Super.* 558 (App. Div. 1985):

> The adequacy of a warning is to be evaluated in terms of what the manufacturer actually knew and what it should have known based on information that was reasonably available or obtainable and that should have alerted a reasonably prudent person to act. *Campos*, 98 *N.J.* at 206. Here there appears no dispute that [the manufacturer] had actual knowledge of the risk. Moreover, there is no suggestion that [plaintiff's] use of the product was beyond its intended or reasonably anticipated scope. Thus [manufacturer] had a duty to warn [plaintiff] of all hidden or latent dangers arising out of his use of the product. *Ibid.* The fact that [plaintiff's employer] may have failed, negligently or otherwise, to take steps to remedy the absence of warnings or to protect [plaintiff] from injury resulting therefrom would not exculpate [manufacturer]. The public interest in assuring that defective products are not placed into the channels of trade imposes a duty on the manufacturer to take feasible steps to render his product safe; the manufacturer may not rely on "the haphazard conduct of the ultimate purchaser" to remedy or protect against defects for which he is responsible." *See Bexiga v. Havir Manufacturing Corp.*, 60 *N.J.* 402, 410 (1972); *see also Johnson v. Salem Corp.*, 97 *N.J.* 78, 94 (1984); *Michalko v. Cooke Color & Chem. Corp.*, 91 *N.J.* 386, 397 (1982); *Finnegan v. Havir Manufacturing Corp.*, 60 *N.J.* 413, 423 (1972).
>
> For similar reasons, the proffer that [plaintiff's employer's] alleged negligence was a proximate cause of the accident would not have exculpated [manufacturer]. Where the original defect, although not the sole cause of the accident, constitutes a contributing or concurrent proximate cause in conjunction with the subsequent conduct of the purchaser, the manufacturer remains liable. *Brown v. United States Stove Co.*, 98 *N.J.* 155, 171 (1984). In order to exculpate itself, the manufacturer must prove an intervening superseding cause or perhaps some other ***sole*** proximate cause of the injury. *Ibid*. Where, as here, the allegation is that the purchaser failed to take reasonable steps to protect against the defect created by the manufacturer, a jury will not be permitted to infer that the purchaser's negligence was the exclusive proximate cause of the accident. *See Johnson*, 97 *N.J.* at 95[.]

Id. at 563-64 (emphasis added). Indeed, "[i]t is not disputed that defendant [manufacturer's] duty was not delegable to plaintiff's employer. A manufacturer cannot delegate its duty to provide safety devices or warnings to a down-stream purchaser." *Fabian v. Minister Mach. Co., Inc.,* 258 *N.J. Super.* 261, 275-76 (App. Div. 1992) (citing *Lally v. Printing Mach. Sales,* 240 *N.J. Super.* 181, 184 (App. Div. 1990); *see also, Michalko v. Cooke Color & Chem. Corp.*, 91 *N.J.* 386, 394, 451 *A.*2d 179 (1982); *Suter v. San Angelo Foundry & Machine Co.,* 81 *N.J.* 150 (1979); *Cepeda v. Cumberland Engineering Co., Inc.,* 76 *N.J.* 152 (1978); *Bexiga v. Havir Mfg. Corp.,* 60 *N.J.* 402 (1972).

As the Appellate Division stated in *Fabian*:

> It is undisputed that defendant's defenses of contributory and comparative negligence were properly stricken on the first day of trial. *See Johansen v. Makita USA, Inc*., 128 *N.J.* at 98; *Suter v. San Angelo Foundry & Machine 496 Co.*, 81 *N.J.* at 167–168. Neither

> contributory nor comparative negligence is applicable where an employee is injured at a workplace task. *Ibid.; see also Green v. Sterling Extruder Corp.*, 95 *N.J.* 263, 270–272 (1984); *Tirrell v. Navistar Int'l, Inc.*, 248 *N.J.Super.* 390, 401–402 (App.Div.1991), *certif. denied*, 126 *N.J.* 390 (1991); *Ramos v. Silent Hoist & Crane Co.*, 256 *N.J.Super.* 467, 478–481 (App.Div.1992).

Id. at 277-78.

Next, Defendant cannot claim that Robert Shenton is a "sophisticated user" who was subjectively aware of the dangers of the Anvil SK-1 cap. As stated in the plain language of *N.J.S.A.* 2A:58C-3a(2) it is not a defense that a user was subjectively aware of a product's dangers when the product is "industrial machinery or other equipment used in the workplace." Indeed, as stated in *Coffman*, "[a] plaintiff's mere knowledge of a product's inherent danger or risk will not absolve a manufacturer from its duty to warn." *Coffman, supra* 133 *N.J.* at 603. "We have consistently emphasized that a plaintiff injured in the workplace as a result of a known dangerous product cannot and should not be characterized as someone who has voluntarily and unreasonably encountered a known danger." *Id.* at 604-05. As such, Defendant should not be permitted to rely on a sophisticated user defense.

C. Evidence of Plaintiff's Comparative Negligence Should Be Barred as Should Statements and Reports Stating That Plaintiff Made a "Rookie Mistake" in Unscrewing the Pressurized Anvil Sk-1 Cap.

In a work-place products liability action the defense that a plaintiff was comparatively negligent is not applicable. *See, N.J. Model Civil Jury Charge,* 5.40C at 12 (citing *Ramos v. Silent Hoist and Crane Co.,* 256 *N.J. Super.* 467 (App. Div. 1992)); *see also, Jurado v. W. Gear Works*, 131 *N.J.* 375, 387 (1993) ("[i]n a work-place setting, when, because of a design defect, an employee is injured while using a machine in a reasonably foreseeable manner, the employee's comparative fault is irrelevant."); *see also Rivera v. Westinghouse Elevator Co.,* 107 *N.J.* 256, 260 (1987); *Green v. Sterling Extruder Corp.,* 95 *N.J.* 263, 264 (1984); *Suter v. San Angelo Foundry & Mach. Co.,* 81 *N.J.* 150 (1979); *Crumb v. Black & Decker (U.S., Inc.),* 204 *N.J. Super.* 521, 527 (App. Div. 1985) (comparative negligence is not a defense in a workplace products liability case, since "employee has no meaningful choice. He either work[s] at his assigned task or [is] subject to discipline or . . . labeled as a troublemaker.").

Moreover, a Plaintiff's knowledge that a product is "inherent[ly] danger[ous] or risk[y]" does not absolve a manufacturer of its duty to warn and does not place liability on the plaintiff:

> We have consistently emphasized that a plaintiff injured in the workplace as a result of a known dangerous product cannot and should not be characterized as someone who has voluntarily and unreasonably encountered a known danger. A plaintiff who uses or is exposed to a defective product in the course of his or her employment may not be able to exercise meaningful choice with respect to confronting the risk of injury posed by the product

Coffman, supra 133 *N.J.* at 603, 604-605 (citing *Campos v. Firestone Tire & Rubber Co.,* 98 *N.J.* 198, 209 (1984)). Under such circumstances where a worker is often not free to disregard the dangers inherent in his or her employment, "the interests of justice dictate[] that contributory negligence be unavailable as a defense to strict liability claims." *Id.* at 606 (quoting *Bexiga v. Havir,* 60 *N.J.* 402, 412 (1972)); *see also, N.J. Civil Model Jury Charge* 5.40D-4 at 9 ("[i]n workplaces comparative negligence is generally not charged"); *N.J. Civil Model Jury Charge* 5.40K at 2 (stating that the defense that a plaintiff was at fault by voluntarily and unreasonably proceeding to encounter a known danger ***"is not available to an employee's workplace injury."***) (emphasis in original). Evidence of Plaintiff's comparative negligence should be barred.

Likewise, testimony and reports which attempt to blame Plaintiff for this incident should be barred since Plaintiff's comparative negligence is not admissible in a products liability workplace injury. *See, Crumb v. Black & Decker (U.S., Inc.),* 204 *N.J. Super.* 521, 527 (App. Div. 1985) (comparative negligence is not a defense in a workplace products liability case, since the "employee has no meaningful choice. He either work[s] at his assigned task or [is] subject to discipline or . . . labeled as a troublemaker."). As the Appellate Division held in *Fabian v. Minster Mach. Co., Inc.,* 258 *N.J. Super.* 261 (App. Div. 1992):

> in the same manner as a protective device, *a warning sign is provided to protect the inattentive worker*. For that reason, *the plaintiff's lack of attention is not an answer to the failure to post a warning sign*.

Id. at 279 (emphasis added). By continually asserting and/or bringing up the fact that Plaintiff allegedly made a "rookie" or "apprentice" mistake, Defendants are simply asserting that Robert Shenton was comparatively negligent and should be blamed for this workplace product's liability injury. Such an approach is barred under well-settled New Jersey law. *Ibid.*

Defendant's should be barred from referencing Plaintiff's testimony that he made an apprentice mistake and that he "voluntarily" and/or "unreasonably" encountered the known danger that the cap was holding back a pressurized system. *N.J. Civil Model Jury Charge* 5.40K at 2 (stating that the defense that a plaintiff was at fault by voluntarily and unreasonably proceeding to encounter a known danger ***"is not available to an employee's workplace injury."***) *See, e.g., Suter v. San Angelo Foundry & Mach. Co.*, 81 N.J. 150, 158 (1979); *Cavanaugh v. Skil Corporation*, 331 N.J.Super. 134, 178-190 (App. Div. 1999); *see also Restatement (Second) of Torts* § 402A cmt. n (1965).

For example, Dr. Wu opines in his June 19, 2015 narrative report that "Mr. Shenton was a trained sprinkler fitter and was aware of the hazards associated with disassembly of the pressurized piping. He was also aware of the potential that the subject piping was pressurized. Yet, Mr. Shenton chose to disassemble the charged piping and expose himself to the hazards for other reasons." *Id.* at 18. Likewise, he states "[a]s a journeyman sprinkler fitter with over 14 years of experience, Mr. Shenton knew or should have known that any fire sprinkler piping in the building could be filled with water and pressurized, regardless of whether he was present during the hydrostatic pressure testing." *Id.* at 16. These types of

opinions are improper and should be barred. Indeed, a workers "lack of attention is not an answer to the failure to pose a warning sign" on Anvil's SK-1 cap. *See, Fabian, supra* 261 *N.J. Super.* at 279.

Moreover, Mr. Shenton in no way voluntarily and knowingly encountered a known risk when he attempted to remove the Anvil SK-1 cap. As Mr. Shenton testified, he was working other jobs separate from the NBTV job and was not aware that a "hydrostatic pressure test" had been performed on the permanent fire department connection system and that it was therefore under pressure. (*Exhibit B - Deposition of James Devaney* at 35:14-37:3; 38:3-11). Robert was also not aware whether "there was a [pressure] gauge, if I knew where it was, I could [have potentially checked it]. Again, I don't know if there was one. I don't know where it's located." (*Exhibit A - Deposition of Robert Shenton* at 78:22-79:3). "I assumed with my foreman that . . . the system would already be down." *Id.* at 81:20-82:15. As such, it was Mr. Shenton's belief that the system was <u>*not*</u> pressurized when he began removing the cap:

> Q. In other words, because, as a journeyman sprinkler fitter, you knew that it was dangerous to disassemble a pressurized sprinkler system. You never would have started to disassemble that coupling and take out that cap if you knew it was pressurized, correct?
> A. That's correct.
>
> Q. You understood that you can get injured severely if you did try and disassemble that coupling and cap while it was pressurized, correct?
> A. That's correct.

(*Exhibit A - Deposition of Robert Shenton* at 78:5-18). Given this testimony, the assertion that Plaintiff knowingly and voluntarily assumed the risk of unscrewing a pressurized cap is improper. Plaintiff believed the system to be depressurized - the representation of this belief and his actions as a "rookie" mistake or "apprentice" mistake are improper, prejudicial and should be barred in all reports and testimony.

D. <u>Defendant Should Not Be Permitted to Raise a Defense That it Had No "Duty to Provide a Different Product to Warn about Pressurization of the System."</u>

Defendant essentially argues that it had no obligation to provide a warning with it's SK-1 cap. This argument cuts to the ultimate issue in the case and is essentially a last ditch motion for summary judgment. Such an argument is wholly improper under *Seoung Ouk Cho v. Trinitas Regional Medical Center,* 443 *N.J. Super*. 461 (App. Div. 2015). In *Seoung,* the Appellate Division reviewed a trial court's decision wherein the court dismissed a Plaintiff's complaint at trial via an *in limine* motion. The Appellate Division reversed, holding that the Court's:

> fair administration of justice demands that we protect a litigant's right to proceed to trial when he or she has not been afforded the opportunity to respond to dispositive motions at a meaningful time and in a meaningful manner. We therefore hold that, absent extraordinary circumstances or the opposing party's consent, the consideration of an

> untimely summary judgment motion at trial and resulting dismissal of a complaint deprives a plaintiff of due process of law.

Id. at 475. Defendant's argument also fails substantively. Defendant fails to provide any warning with its product, therefore the warning is presumptively inadequate. *Fabian, supra* 258 *N.J. Super.* at 278-79. Moreover, Defendant cannot claim that because its product is a component part "of a complex sprinkler system," they have no duty to design a safer product. As the Appellate Division held in *Molino v. B.F. Goodrich Co.*, 261 *N.J. Super.* 85 (App. Div. 1992), when a product is required to be used together with another product, a duty to warn of the dangers of the entire assembly exists:

> [h]ere, even though the tire was separate from the rim assembly, the pieces were by design required to be used together. The evidence appears to support plaintiffs' contention that the tire manufactured by [defendant] was part of the system involved with the multi-piece rim assembly unit . . . [i]f [the jury is] convinced that [defendant] should have foreseen or actually knew of the dangers involved with the rim assemblies used with its product, the jury would then consider [defendant's] duty to provide an adequate warning of hidden dangers to reasonably foreseeable users, unless the danger was so obvious that such users would know of it.

Id. at 94. Like the tire and rim in *Molino*, the Anvil SK-1 cap is meant to be used with a grooved coupling as part of an assembly to seal pressurized water in a sprinkler system. When sealed, the danger is not obvious as to whether the system is pressurized or not. As such, Defendant has a duty to design a product which will safely alert users the system is pressurized.

Plaintiff's In Limines

IV. **Defendant Should Not Be Permitted to Reference a Lack of Prior Accidents**

It is boilerplate law that a lack of prior accidents is inadmissible to show either the condition was safe or the defendant was not at fault. *See e.g. Schaefer v. Cedar Fair, L.P.,* 348 *N.J. Super.* 223, 233 (App. Div. 2002) ("the absence of other accidents to show the safety of a condition is not admissible."); *see also Rogove v. Stavola Constr. Co., Inc.,* 331 *N.J. Super.* 212, 215 (App. Div.), *certif. denied,* 165 *N.J.* 602 (2000) (lack of prior accidents cannot be used to show the absence of a dangerous condition).

Indeed, such evidence is unduly prejudicial, distracting, simply not relevant and should not be admitted. See *N.J.R.E.* 401; *see also* Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, Comment 3 to *N.J.R.E.* 401 (Gann) ("Generally, the defendant in a negligence action may not introduce an absence of prior accidents to prove the safety of its property" (citing See Schaefer v. Cedar Fair, 348 N.J. Super. 223, 233 (App. Div. 2002); Rogove v. Stavola Const. Co., Inc., 331 N.J. Super. 212, 215 (App. Div.), certif. den. 165 N.J. 602 (2000))). Such testimony should be barred.

V. **Bar Reference to FM Standards**

Defendant should not be permitted to refer to factory mutual ("FM") standards to claim its product does not need a warning tag. Such standards are misleading and irrelevant to the alleged defects and/or failure to warn claims in this case.

The FM standards upon which Defendant rely govern issues such as the amount of pressure in a sprinkler system - not whether a warning should be placed on an end cap to prevent workers from becoming needlessly endangered. (*Exhibit P - Deposition of Joseph Beagan* at pg. 91 to 92) (FM standards are private industry standards which "address [obtaining FM] markings, they address quality control, they do address pressure[.]"). While defense expert Dr. Neil Wu implied that he believed FM standards addressed the sufficiency of warnings, no support is found for this position. (*Exhibit T - Deposition of Neil Wu, P.E.* at pg 89-94) (responding "that's correct. I did not find the word warning," when asked whether the FM standards discussed or evaluated warnings or the lack thereof on approved products). As Anvil's national product manager testified when examining an FM approval report:

> Q. Now, it looks like if you could look with me here the tests [to meet FM approval] that were performed was a hydrostatic test?
>
> A. Yep. So hydrostatic tests, one sample of each size, it's the bushing, cap. From one of each size tested to four times their rate of working pressure for five minutes, no deformation, leakage or failure was noted.
>
> Q. And then the conclusion indicates that they met the requirements at a rated working pressure of 500 PSI as far as the coupling goes and that the SK-1 cap met the FM requirements for 300 PSI; is that right?
>
> A. No. There's no coupling approval in this. We're talking about ductal iron bushings and threaded couplings, so those are threaded fittings so those were 500 PSI. The cap it should have the - - yes, right here, so the SK-1 cap one inch - - one and-a-quarter through eight-inch MPS meets the Factory Mutual [FM] research approval at 300 PSI.

Id. at 87-2 to 87-21; *see also,* pg. 105, 107. As such, reference to FM standard compliance should be barred pursuant to *N.J.R.E.* 403. Such standards are not relevant, since they do not address warnings or the lack thereof and how a sufficient warning relates to product safety. Admission of these standards does not add or detract from Defendants obligation to make a reasonably safe product as alleged herein and therefore would only be misleading, confusing and irrelevant to the jury.

Likewise, Exhibit 1019, identified in Defendant's pretrial exchange should be barred since it simply shows that Anvil's SK-1 cap adequately withstands pressure under the FM standards. This fact is not material to the claims alleged and is misleading, confusing and irrelevant.

VI. **Dr. Wu and Dr. Doris' Testimony Should Be Barred as Net Opinions**

Dr. Wu and Dr. Doris should be barred since their testimony and narrative reports constitute net opinions. As stated in *Creanga v. Jardal,* 185 *N.J.* 345 (2005):

> [Under] *N.J.R.E.* 703, an expert's opinion must be based upon "facts or data... perceived by or made known to the expert at or before the hearing." An expert's conclusion is considered to be a "net opinion," and thereby inadmissible, when it is a bare conclusion unsupported by factual evidence. *Buckelew v. Grossbard*, 87 N.J. 512, 524; *see also Johnson v. Salem Corp*., 97 N.J. 78, 91 (1984)... In other words, an expert must " 'give the why and wherefore' of his or her opinion, rather than a mere conclusion." *Rosenberg v. Tavorath*, 352 N.J.Super. 385, 401 (App.Div.2002).

Id. at 360. To avoid being barred as a net opinion, an expert must show his opinions are "based on the 'methods and procedures of science' rather than on 'subjective belief or unsupported speculation'; the expert must have 'good grounds' for his or her belief." *Feit v. Great-West Life & Annuity Ins. Co.,* 460 *F. Supp. 2d* 632, 636 (D.N.J. 2006) (citing *In re Paoli Railroad Yard PCB Litigation,* 35 *F.3d* 717, 742 (3d Cir. 1994), *cert. denied*, 513 *U.S.* 1190, 115 *S.Ct.* 1253 (1995)). "Courts need not admit bare conclusions or mere assumptions proffered under the guise of 'expert opinions[.]'" *Ibid.* (quoting *Daubert*, *supra*, 509 *U.S.* at 596, 113 *S.Ct.* at 2786). An expert opinion is inadmissible "if the court concludes that an opinion based upon particular facts cannot be grounded upon those facts." *Fedorczyk v. Caribbean Cruise Lines, Ltd.*, 82 *F.3d* 69, 75 (3d Cir.1996). Likewise, if the expert opinion is based on mere "speculation or conjecture, it may be stricken." *Ibid; see also, Gen. Elec. Co. v. Joiner*, 522 *U.S.* 136, 146, 118 *S.Ct.* 512, 519 (1997).

Indeed, the net opinion rule requires "an expert to give the why and wherefore of his or her opinion, rather than a mere conclusion." *Polzo v. Cnty. of Essex*, 196 *N.J.* 569, 583 (2008) (quoting *State v. Townsend,* 186 *N.J.* 473, 494 (2006)); *see also, Buckelew v. Grossbard*, 87 *N.J.* 512, 524 (1981). When an expert is seeking to establish a cause and effect relationship, supporting data and facts are vital to that opinion. *Rubanick v. Witco Chem. Corp.,* 242 *N.J. Super.* 36, 49 (App. Div. 1990); *see also*, *Johnson v. Salem Corp.,* 97 *N.J.* 78, 91 (1984) (noting that "[t]he weight to which an expert opinion is entitled can rise no higher than the facts and reasoning upon which that opinion is predicated[.]") (internal citations omitted). Accordingly, an expert who offers an opinion without providing specific underlying reasons for the conclusion "ceases to be an aid to the trier of fact and becomes nothing more than an additional juror." *Jimenez v. GNOC, Corp.*, 286 *N.J. Super.* 533, 540 (App. Div. 1996), *abrogated by Jerista v. Murray*, 185 *N.J.* 175 (2005)).

A. Dr. Wu Should Be Barred as a Net Opinion

Here, Defense Engineering Expert Dr. Wu concludes that "Mr. Shenton rationalized that the piping containing the [Anvil] cap was not pressurized" and that "the cause of the incident was Mr. Shenton's failure to follow established safe work practices." (*Exhibit A - Narrative Report of Dr. Wu* at 1-2). Dr. Wu concludes that the Anvil cap "was not required to contain a warning to inform or remind a user of the hazards" of the product and that a warning would not have prevented this incident. *Id.* at 2. When confronted with testimony from Robert Shenton that he would not have attempted to remove the

Anvil SK-1 cap if it contained a warning stating, "contents [are] under pressure" Dr. Wu maintains that he "can't say with certainty that [Robert] would have heeded that warning." (*Exhibit T - Deposition of Neil Wu, P.E.* at 63-13 to 64-4, 70-3 to 70-6, 73-16 to 74-7, 76-5 to 76-16).

Dr. Wu testifies, "I will defer to the human factors experts to address the effectiveness and whether Mr. Shenton . . . would heed that warning." (*Exhibit T - Deposition of Neil Wu, P.E.* at 63-24 to 64-4). Moreover, Dr. Wu states, "an additional warning would not have changed the outcome of this event . . . I will defer to the human factors expert who may have already looked at . . . and examined whether or not the human factors elements would have led him [to heed or not heed the warning]." *Id.* at 70-4 to 70-6, 71-21 to 71-25. Dr. Wu's testimony shows that his conclusions are not grounded in fact or reason, but on his own speculation and conjecture. *See, e.g. Fedorczyk, supra* 82 *F.3d* at 75. His assertion that "an additional warning would not have changed the outcome of this event" has no factual basis and is in stark contrast to the plain evidence, including testimony from Robert Shenton that he would not have loosened the cap on a pressurized sprinkler system had the cap contained a warning denoting the system to be under pressure.

Moreover, Dr. Wu repeatedly concedes that he will defer to the human factors expert as to whether a warning would have prevented this incident. Dr. Wu holds himself out as an Engineering Expert and both testifies and writes in his narrative report that the Anvil SK-1 cap "was reasonably safe and fit for use, and was not required to contain a warning[.]" *Wu, June 19 Report* at 2. It is clear from Dr. Wu's deposition testimony that he cannot assess how the safety of the Anvil SK-1 cap is affected by the inclusion of a warning. As such, he should be barred from testifying that Anvil manufactured a reasonably safe product. Likewise, he should be barred from testifying that "[t]he cause of the incident was Mr. Shenton's failure to follow established safe work practices," since this statement both improperly attributes negligence to Mr. Shenton and is reached without adequately considering the inclusion of a warning on Anvil's product.

Additionally, Dr. Wu's conclusion that the bolted flange end cap is "rarely used" is an irrelevant net opinion as it is unsupported by any facts or data. (*Exhibit U - Wu Report* at 20); *see also, Feit, supra,* 460 *F. Supp. 2d* at 636 ("[c]ourts need not admit bare conclusions or mere assumptions proffered under the guise of 'expert opinions"). Dr. Wu provides no facts, data or sources whatsoever that support his statement. As such, the statement should be barred. Beyond that, it is not related nor a legally cognizable defense as previously discussed.

B. Dr. Wu Should be Barred from Testifying as to Legal Conclusions

Lastly, Dr. Wu's conclusion that "[t]he Anvil SK-1 cap met industry standards for design and manufacture, was reasonably safe and fit for use, and was not required to contain a warning to inform or remind a user of the hazards associated with disassembly of pressurized piping systems" must be barred. This statement cuts to the ultimate issue to be determined by the finder of fact and is an impermissible conclusion of law. It is well settled that expert witnesses may not render opinions on matters which involve a question of the law. *L&L Oil Service v. Div. of Taxation*, 340 *N.J. Super.* 173, 182 (App. Div. 2001)(proposed expert testimony from employee of Division of Taxation that sales tax was inapplicable

to business was an opinion on an issue of law and inadmissible); *see also, Boddy v. Cigna Property & Cas. Cos.*, 334 N.J.Super. 649, 659, (App.Div.2000) (expert's opinion that policy exclusion was poorly drafted and ambiguous not permitted); *Healy v. Fairleigh Dickinson Univ.*, 287 *N.J.Super.* 407, 413,(App.Div.), *certif. denied*, 145 *N.J.* 372, *cert. denied*, 519 *U.S.* 1007, 117 *S.Ct.* 510 (1996) ("once the trial court correctly determined that the interpretation of the contract language was a legal matter, [the court] was obligated to disregard the expert's opinion concerning its interpretation"); *Marx & Co., Inc. v. Diners' Club Inc.*, 550 *F.2d* 505 (2nd Cir.), *cert. denied*, 434 *U.S.* 861, 98 *S.Ct.* 188 (1977) (holding that it was error for the trial court to allow a lawyer/witness to render his opinion on the legal significance of certain contract terms, and the legal obligations arising therefrom); *State v. Grimes*, 235 *N.J.Super.* 75, 79 (App.Div.), *certif. denied*, 118 *N.J.* 222 (1989) (holding expert opinion is not admissible concerning the domestic law of the forum); *Neswith v. Walsh Trucking Co.,* 123 *N.J.* 547, 549 (1991) (defense expert on traffic safety should not have been allowed to offer an opinion as to ultimate issue of whether defendant driver or plaintiff pedestrian had last clear chance to avoid collision.) Dr. Wu's statement on this issue must be barred.

C. Dr. Doris Should be Barred as a Net Opinion

Dr. Doris should also be barred as a net opinion. Dr. Doris' testimony is unsupported by facts or data and is merely his own opinion and conjecture. *See, Fedorczyk supra,* 82 *F.3d* at 75 (expert opinions cannot be based on mere speculation and conjecture rather than data); *see also Jimenez, supra* 286 *N.J. Super.* at 540 (an expert who offers an opinion without providing specific underlying reasons for the conclusion "ceases to be an aid to the trier of fact and becomes nothing more than an additional juror.") Here, Dr. Doris concludes that:

> [f]rom a human factors engineering perspective, the subject Anvil SK-1 cap was neither defective nor reasonably safe for lack of explicit warnings or instructions directing workers to verify the system is depressurized before attempting to remove the cap

(*Doris Narrative at* 4). Ultimately, Dr. Doris concludes that "a warning [on the Anvil SK-1 cap] would not communicate any new or additional information" to Mr. Shenton and therefore would not be heeded. This conclusion is belied by the facts and Mr. Shenton's explicit testimony that had there been a warning on the SK-1 cap that the system was under pressure, he never would have removed the cap. (*See, Wu Dep at* x). Indeed, given Robert Shenton's testimony, Dr. Doris' finding that "[t]his incident . . . resulted from Mr. Shenton's belief that the system was depressurized" and his finding that a warning would not have communicated any new information to Mr. Shenton are contradictory and simply cannot stand.

Quite clearly, as Mr. Shenton's testimony shows, a warning *would* have communicated to Mr. Shenton that *the system was pressurized*. As such, he would *not* have disassembled the pressurized system. Dr. Doris' finding that this incident occurred because Mr. Shenton believed the system to be depressurized and his finding that a warning would not have changed that belief are simply illogical and not grounded in facts or data but are rather Dr. Doris' own speculation and conjecture. Such opinions should be barred as net opinions.

D. Neither Expert Should Be Permitted to Testify to a Warning That the Contents "May" Be Under Pressure

Defendant and its witnesses should be barred from misrepresenting Plaintiff's theory of the case that the cap should have contained a warning tag that the system "may" be under pressure. This is not Plaintiff's position. Instead, Plaintiff alleges that the cap should have contained a tag stating "**WARNING - SYSTEM IS UNDER PRESSURE**." It is distracting, confusing, misleading and prejudicial for Defendant's to attempt to distort Plaintiff's theory of liability and same should be barred.

VII. Defendant's Experts Should Be Precluded from Testifying There Is No Law That Required a Warning Here

Defendants and their experts argue they should not be held accountable because, they say, there has been no criminal or regulatory violation with regard to the product at issue. They argue in essence, there is "no law" that requires ths product be made safe and therefore the jury should conclude the product is in fact safe. They further argue that many of the industry standards plaintiff relies upon have either not been passed into law or do not apply to defendants in a regulatory sense. They wrongly assert that the standards have not been enacted into law by any governmental authority, that there has been no criminal or regulatory violation, and that therefore they are not liable. These arguments have absolutely no support in the law, do not represent the law of this State, and should be rejected out of hand. *See, e.g., McComish v. DeSoi*, 42 N.J. 274, 282 (1964) ("manual" about wire rope cable and clamp use was admissible as "illustrative evidence of safety practices or rules generally prevailing in the industry, and as such it provide[d] support for the opinion of the expert concerning the proper standard of care"); *Rosenberg v. Tavorath,* 352 N.J.Super. 385, 405-06 (App.Div. 2002); *Constantino v. Ventriglia*, 324 N.J.Super. 437, 441-42 (App.Div. 1999), *cert. denied* 163 N.J. 10 (2000) (expert may ground opinion in industry standards of care); *Smith v. Kris-Bal Realty, Inc.*, 242 N.J.Super. 346, 348 (App.Div. 1990); Model Jury Charge 5.10H, "Standards of Construction, Custom and Usage in Industry or Trade"; *see also Black v. PSE&G*, 56 N.J. 63, 77 (1970) (safety codes represent minimum standards and do not establish the complete duty of the utility under all circumstances)

It is simply not relevant whether or not the various technical texts/standards cited by plaintiff's expert have been adopted as law by the State of New Jersey. Rather, they are merely standards of practice accepted and used by engineers and other professionals. In fact, the Model Jury Charge 5.10H, "Standards of Construction, Custom and Usage in Industry or Trade" states:

> Some evidence has been produced in this case as to the standard of construction in the industry. Such evidence may be considered by you in determining whether the defendant's negligence has been established. If you find that the defendant did not comply with that standard, you may find the defendant to have been negligent. ... Compliance with an industry standard is not necessarily conclusive as to the issue of negligence, and does not, of itself, absolve the defendant from liability. The defendant must still exercise reasonable care under all the circumstances, and if you find that the

> prevailing practices in the industry do not comply with that standard, the defendant may be found negligent by you notwithstanding compliance with the custom or standard of the industry.

Model Jury Charge 5.10H, *citing*, *Adams v. Atlantic City Electric Co*., 120 N.J.L. 357, 368-370 (E. & A. 1938); *Buccafusco v. Public Service Electric and Gas Co*., 49 *N.J. Super*. 385 (App. Div. 1958), *certif. denied*, 27 *N.J*. 74 (1958); 2 *Harper and James*, *Law of Torts*, 17.3, pp. 978-979; *Prosser*, *Torts*, 32, p. 135 (2*d ed*. 1955); *Annotation*, 55 *A.L.R*. 2*d*. (1957). The standards presented in the Dreyer and Moss reports help to establish a baseline against which the safety of the product in question may be measured. The issue of legal violation is not determinative with respect to any technical safety engineering evaluation.

Indeed, the same argument defendants make here was made in a falldown case involving an alleged defect on a sidewalk outside a movie theater, *Tambaro v. Hazlet Multiplex Cinemas, et al.*, A-4972-03T2 (App.Div. 2005)(Attached hereto). There the plaintiff's expert relied upon safety standards, including the ASTM Standard Practice for Safe Walking Surfaces. The defendants in *Tambaro* invited the Law Division to commit error by asserting the report of the plaintiff's expert, William Poznak, was a "net opinion" since the ASTM and other standards he relied upon has not been adopted by the New Jersey BOCA building code. The Law Division accepted the invitation, ruled the report was a net opinion and granted summary judgment.

The Appellate Division relied upon well established precedent that a plaintiff need not prove a regulatory violation and that an expert may rely upon general safety practices and standards in the industry to prove a negligence claim. The Appellate Division concluded:

> By incorporating the industry standards, the authenticity of which was not disputed or contradicted by defendant's expert, as well as his own "experience as a Civil Engineer and Construction Official," Poznak presented a sufficient ground for his opinion "that persons proceeding along this area could be easily caused to trip and fall," and "that the maintenance of said sidewalk area, was contrary to ...general safety practices and rules prevailing in the industry."
>
> We recognize that the standard cited by Poznak apparently has not been incorporated into the BOCA code, and therefore does not govern the owner's or builder's obligation to governmental authorities. Nonetheless, it is a permissible standard against which to measure the allegation that the sidewalk posed a danger for purposes of a negligence analysis. *See, e.g., McComish v. DeSoi*, 42 N.J. 274, 282 (1964) ("manual" about wire rope cable and clamp use was admissible as "illustrative evidence of safety practices or rules generally prevailing in the industry, and as such it provide[d] support for the opinion of the expert concerning the proper standard of care"); *Constantino v. Ventriglia*, 324 N.J.Super. 437, 441-42 (App.Div. 1999), *cert. denied* 163 N.J. 10 (2000) (OSHA regulations are admissible as evidence of the industry standard of care); *Smith v. Kris-Bal Realty, Inc.*, 242 N.J.Super. 346, 348 (App.Div. 1990)

Tambaro v. Hazlet Multiplex Cinemas, et al., A-4972-03T2 (App.Div. 2005) at pg. 6-7. Plaintiff is simply not required to prove any kind of "regulatory violation" to prove liability. Defendants should be precluded from raising such arguments or having its expert distract the jury and fog the issues with testimony that implies the contrary.

Beyond that, as previously stated, experts are not permitted to testify as to what the law is or is not. And beyond all that, the New Jersey Products Liability Act indeed requires products to be made safe.

For all these reasons defendant's experts should not be allowed to testify there is no "law" that the product have a warning or otherwise be made safe.

VIII. Bar OSHA Reports and Reference to OSHA Reports

The OSHA reports and related citations should be barred. It is well settled law that OSHA reports are inadmissible hearsay. *See Millison v. E.I. du Pont de Nemours & Co.,* 226 *N.J. Super.* 572, 593 (App. Div. 1988), *aff'd* 115 *N.J.* 252 (1989) ("[t]here can be no question that the OSHA citations were hearsay . . . and were improperly admitted[.]"); *see also, N.J.R.E.* 803(c)(8). Indeed, "OSHA citations are the opinions of investigators and ordinarily do not 'carry with [them] the indicia of reliability that is inherent in government adopted safety standards.'" *Ibid.* (internal citations omitted). As such, the OSHA report and citations in this case should be barred as inadmissible hearsay.

Moreover, the OSHA report, file, diary sheet and citations should not be admitted since they are irrelevant, misleading, confusing and wholly prejudicial. *See, N.J.R.E.* 403. OSHA regulations apply to employers, not product manufacturers. *See, Millison, supra* 226 *N.J. Super.* at 594 (OSHA was enacted to insure healthy work conditions "by creating *employer* compliance through sanctions." OSHA enables "the Secretary of Labor to issue citations if upon inspection or investigation he believes that an *employer* has violated any standard, rule or order promulgated under the Act.") (emphasis added).

Here, the OSHA sections at issue - § 1926.20 and § 1926.21 - apply exclusively to employers, not manufacturers. Under § 1926.20, "no contractor or subcontractor for any part of the contract work shall require any laborer or mechanic employed in the performance of the contract to work in surroundings or under working conditions which are unsanitary, hazardous, or dangerous to his health or safety." Likewise, § 1926.21 deals with " education and training of *employers* and *employees* in the recognition, avoidance and prevention of unsafe conditions in employments covered by the act." (emphasis added) Clearly, both standards apply exclusively to employers and have no relation to the wrongful acts complained of herein. Since OSHA has no bearing on the question about whether Anvil's product is defective, admission of the report, citations and specific sections would be confusing, misleading and prejudicial to the jury. Beyond that, as previously discussed, the product manufacturer cannot blame the employer.

IX. Bar Reference to Building Code and Other Irrelevant Documents

Defendant attempts to introduce into evidence New Jersey state building codes and other irrelevant documents such as standards for the installation of sprinkler systems. None of these documents are relevant or have any bearing on the issues in dispute. Indeed, Plaintiff's claims relate to the design of the Anvil SK-1 cap. Introduction of these materials and testimony would be misleading, confusing, distracting and irrelevant pursuant to *N.J.R.E.* 403. These documents should be barred.

X. Bar Reference to the Accident Report

Defendant should not be permitted to reference the accident reports in this case since such reports are rife with hearsay. Statements in accident reports, as in police reports, are, without equivocation, hearsay. *See N.J.R.E.* 801(c) (defining "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted"). Under bedrock New Jersey rules of evidence, such statements are presumptively inadmissible. *See, N.J.R.E.* 802 ("Hearsay is not admissible except as provided by these rules or by other law.").

The accident reports in this case are almost exclusively hearsay statements. Defendant should not be allowed to introduce statements from non-testifying witnesses contained in the reports, or use their own expert witnesses to introduce the contents of the report. Indeed, it is well settled that it is "improper to [question] a witness about inadmissible hearsay documents[.]" *James v. Ruiz,* 440 *N.J. Super.* 45, 76 (App. Div. 2015). As such, Defendant should not be permitted to back-door in the accident reports or the statements in the accident report as they are inadmissible hearsay.

XI. Bar Testimony That No Other Manufacturers Provide Warnings with Their Caps

Defendant should be barred from referencing an industry standard or "consensus" on not placing a warning on grooved caps. It is error to refer to prevailing industry standards or the "conventional practice of the industry" in a failure to warn products liability case. *Freund v. Cellofilm Properties, Inc.,* 87 *N.J.* 229 (1981). Instead:

> a products liability charge in an inadequate warning case must focus on safety and emphasize that a manufacturer, in marketing a product with an inadequate warning as to its dangers, has not satisfied its duty to warn, even if the product is perfectly inspected, designed and manufactured . . . the [jury] charge must make clear that knowledge of the dangerous trait of the product is imputed to the manufacturer. It must also include the notion that the warning be sufficient to adequately protect any and all foreseeable users from hidden dangers presented by the product. *This duty must be said to attach without regard to prevailing industry standards*.

Id. at 243-44. As such, evidence of prevailing industry standards should be barred as irrelevant, prejudicial and misleading pursuant to *N.J.R.E.* 403. Indeed, reliance on industry standards to purport that a product is safe, despite the lack of a warning is reversible error. *Id.* at 245. Such testimony must be barred.

Moreover, Exhibits 1130 and 1131 should be barred as well since these exhibits relate to "industry consensus design of grooved caps[.]" For the reasons set forth above, these exhibits are misleading, prejudicial and irrelevant. *N.J.R.E.* 403. Additionally, these exhibits were never produced during discovery. It would be unfair, unjust and unduly prejudicial for Plaintiff to confront these exhibits for the first time at trial. *Humenik v. Gray,* 350 *N.J.Super.* 5, 18, 19 (App.Div.) *certif. denied,* 174 *N.J.* 194 (2002) ("pre-trial practice is designed to eliminate the element of surprise at trial").

XII. Defendant Should Be Barred from Introducing Substantive Evidence Not Produced in Discovery and Fact Witness Not Produced for Deposition

This Court should bar the introduction of any exhibits which Defendant has not produced in discovery. Likewise, Defendant should not be permitted to call individuals who were not produced for deposition in discovery. Discovery rules are "designed to eliminate, as far as possible, concealment and surprise in the trial of law suits to the end that judgements therein be rested upon the real merits of the causes and not upon the skill and maneuvering of counsel." *Wymbs v. Twp of Wayne,* 163 *N.J.* 523, 543 (2000). As such, it is left to the sound discretion of the Court what type of sanctions to impose for failure to comply with pre-trial discovery practices. *Brown v. Mortimer,* 100 *N.J. Super.* 395, 401 (App. Div. 1968). Here, Defendant should be barred from referencing and/or introducing into substantive evidence documents not produced in discovery.

Likewise, Defendant should not be permitted to call the signatory of the interrogatories, Steve Scott. This individual was specifically noticed to appear for a deposition but was never produced. As such, Defendants should not be permitted to produce him for the first time at trial after failing to do so during discovery.

XIII. Defendant Should Not be Permitted to Point its Finger at Settling Defendants

Defendant should be barred from making any arguments or claims that the settling general contractor or Plaintiff's employer are substantively at fault for this accident. Such claims are inappropriate unless the liability of the settling defendant is proven. *See, Mort v. Besser Co.,* 287 *N.J. Super.* 423, 431-32 (App. Div. 1996); *Shatz v. TEC Technical Adhesives,* 174 *N.J. Super.* 135, 145-46 (App. Div. 1980) (where plaintiff settles claim against one defendant, the remaining defendants have the burden of proving the settling defendant's liability). A plaintiff settling with one defendant does not release the remaining defendants, unless there is full satisfaction. *Ibid.* If a remaining defendant asserts culpability on a settling defendant, they have the burden to prove the settling defendant's conduct to be negligent, as they would have if they were sued for contribution from another party. *Ibid*. This promotes settlements in multi-party litigation, and therefore does not place an advantage on the remaining defendants. *See generally*, *Kiss v. Jacob*, 138 *N.J.* 278 (1994); *Theobald v. Angelos*, 44 *N.J.* 228 (1965); *Cartel Capital Corp. v. Fireco of New Jersey*, 81 *N.J.* 548 (1980).

If one or more remaining defendants are found negligent, the fact finder must determine whether the settling defendant's conduct was also negligent, in order to apportion fault in percentages between

the remaining defendants and the settling defendants. This burden rests with defendant as stated in Model Civil Jury Charge, 1.17, which provides in part:

> If you find that one or more of the remaining defendants were negligent and that such negligence was a proximate cause of the accident, you must next consider the conduct of the settling defendant. You will have to determine whether or not the settling defendant *[name]* was negligent and a proximate cause of the accident. The burden of proving that the settling defendant was at fault is on the remaining defendant(s).
>
> In the event that you find that a settling defendant was negligent and a proximate cause of the accident, you must apportion fault in terms of percentages among/between the settling defendant(s) and the remaining defendant(s). (emphasis added).

Mort v. Besser Co., supra, was a product liability case in which the plaintiff sued the manufacturer of a machine, an engineering company that designed its control panel, the manufacturer of the control panel, and the electrical contractor who installed the control panel. The engineering company and the electrical contractor settled with the plaintiff prior to trial. Over the plaintiff's objection, the trial judge permitted the jury to assign fault percentages to the two settling parties.

The Appellate Division reversed, holding that the lack of evidence at trial demonstrating the fault of the two settling defendants precluded an allocation of fault to them. *Id.* at 433. With respect to the engineering company, the court noted that it was a member of the chain of distribution of the control panel. Thus, although it could be held strictly liable in tort, the only fault attributable to it on that basis would be identical to the fault assigned to the manufacturer of the control panel on the same theory. In response to a specific interrogatory, the jury had determined that the control panel manufacturer was liable on a negligence theory, but not on a strict liability theory. *Id.* at 427. Therefore, the court reasoned, the engineering company could be subject to a separate fault allocation only if it had been guilty of negligence beyond that attributed by the jury to the panel manufacturer. Since none of the expert witnesses had identified any independent negligent conduct by the engineering company, the court concluded that there was no factual basis supporting the jury's allocation of fault to it. *Id.* at 433. Similarly, the court decided that the issue of the electrical contractor's fault should not have been sent to the jury because there was no testimony that it had performed its services negligently. *Id. See also Sullivan v. Combustion Engineering*, 248 N.J. Super. 134, 144 (App. Div.), cert. den. 126 N.J. 341 (1991) (asbestos exposure case in which the court held that the non-settling defendants could not introduce the interrogatory answers of settling codefendants to support an allocation of fault to the settlers. The court reasoned that the answers provided no basis from which an assessment of percentages could be derived because they failed to indicate the length of time the plaintiff had been exposed to each defendant's products).

Here, Plaintiff has settled with the general contractor for the job site and the property owner. He likewise has a workers compensation claim with his employer, Landmark Fire Protection. Defendant should not be permitted to point the finger at these individuals or allocate fault unless and until he has proven each of them liable for Robert Shenton's injuries. Defendant has not and cannot produce any evidence faulting the general contractor or property owner for Robert Shenton's injury. It also has no

experts on these issues. As such, Anvil should not be permitted to point the finger and allocate fault to settled defendants at trial.

Likewise, Defendant should not be permitted to introduce documents and interrogatories from these settled parties. *See Sullivan, supra* 248 N.J. Super. at 144 (defendant barred form introducing interrogatories of settled co-defendants). Moreover, Defendant should not be allowed to introduce evidence relating to "tool box talks" since this evidence will purportedly attempt to place blame on Plaintiff's employer for this incident. Admission of these documents would impermissibly deflect the burden of proof from defendant to show that these settled defendant's bear a percentage of fault for Plaintiff's injuries. *See, N.J. Model Civil Jury Charge,* 1.17.

XIV. Speculative Statements in the Report of Defense Medical Expert Dr. Blank with Regard to Body Parts for Which No Injury Is Claimed and Having Played Football in High School Should be Barred

Dr. Blank should not be permitted to testify as to any alleged injuries to Plaintiff's lower back. Robert Shenton does not claim injuries to his lumbar spine as a result of this incident. (*See Exhibit M - Narrative of Dr. Lance Markbreiter*). Indeed, Plaintiff's orthopedist notes injuries to Robert Shenton's cervical spine and makes no mention of the lumbar spine. *Id.* at 5. As such, Dr. Blank should not be permitted to testify as to any alleged injuries to Robert Shenton's lower back. Likewise, statements like plaintiff "had prior low back tightness before his fall" should be barred.

Additionally, Dr. Blank should not be permitted to testify that Robert Shenton's neck injuries are a result of his playing high school football. Dr. Blank writes in his narrative report, "[Robert Shenton] played left guard and [defensive] tackle. This would put tremendous strain on the neck and back and can cause disc pathology and degenerative disease." *Blank Narrative* at 2. This statement is wholly speculative and fails to establish any medical link between Robert's prior activities and his condition as a result of this incident. *See Paxton v. Misiuk,* 34 N.J. 453, 460 (1961); *Ratner v. General Motors Corp.,* 241 *N.J. Super.* 197, 203-206 (App. Div. 1990). Since Defendant has not offered any medical expert opinion that would support such a link, this statement should be barred.

Response to Defendant's In Limines

XV. Testimony as to Landmark's Post-incident Practice of Placing Signage Regarding System Pressurization Should be Permitted

Testimony regarding Landmark Fire Protection's post-incident practice of placing warning tags on pressurized caps should be permitted. This evidence is wholly relevant and should not be barred as evidence of subsequent remedial measures. *See N.J.R.E.* 407; *Brown v. Brown,* 86 *N.J.* 565, 581 (1981) (*N.J.R.E.* 407 "excludes relevant evidence only if that evidence is used 'to prove negligence or culpable conduct'"). Here, evidence of the measures taken by Landmark are not being introduced to show negligence or culpable conduct on the part of Anvil, but rather to demonstrate the feasibility and practicality of warning of the dangers of the pressurized Anvil SK-1 cap.

It is well-settled that post-incident practices done to correct a dangerous condition are admissible to "demonstrate [the] feasibility and practicality" of the repairs. *Harris v. Peridot Chemical (New Jersey), Inc.,* 313 *N.J. Super.* 257, 292-93 (App. Div. 1998). Here, Landmark's acts of placing warning tags on Anvil's SK-1 caps show that the ability to warn of the pressurized cap is and was both feasible and practical. Nonetheless, Anvil chooses not to and continues to refuse to warn of its SK-1 cap's dangerous properties.

Moreover, "evidence of subsequent corrective measures has long been permitted in New Jersey to prove 'the condition existed at the time of the accident.'" *Ibid.* (quoting *Lavin v. Fauci,* 170 *N.J. Super.* 403, 407 (App. Div. 1979). In this case Robert Shenton contends that Anvil's SK-1 cap was in a dangerous condition at the time of the accident since it lacked a warning stating "**DANGER - SYSTEM IS UNDER PRESSURE**." Testimony that Plaintiff's employer now places warning tags stating that the system is pressurized shows that at the time of the incident Anvil's product was defective in that it lacked the very warning Plaintiff's employer now deems necessary. Since the product was dangerous at the time of Robert Shenton's injury, Anvil cannot discharge its duty to warn to Plaintiff's employer and the subsequent measures taken to correct the dangerous condition are admissible. *See, e.g. Fabian, supra* 258 *N.J. Super.* at 275-76 ("[i]t is not disputed that defendant [manufacturer's] duty was not delegable to plaintiff's employer. A manufacturer cannot delegate its duty to provide safety devices or warnings to a down-stream purchaser").

XVI. Plaintiff's Proffered Experts Are Qualified and the Treatises Upon Which They Rely Are Relevant and Admissible

Plaintiff seeks to admit testimony from professional engineers Paul Dreyer and Theodore Moss regarding the design and dangers of the Anvil SK-1 cap. As part of their testimony both experts rely on the Hierarchy of Safety, which prescribes that a manufacturer must "[1] Eliminate the hazard [of its product] through design . . . if this cannot be done[;] [2] Protect the operator/worker from hazardous exposure by properly guarding/safeguarding against potential hazards. If this cannot be done[;] [3] Provide warnings of the potential hazards to constantly alert workers to their presence." (*Exhibit H - Narrative Report of Theodore Moss* at 12). Both of Plaintiff's experts submit that these principles have

been adopted in various recognized and industry wide embraced publications. Defendant disputes that these texts apply to Fire Protection products.

Under the learned-treatise rule, "a text will qualify as a 'reliable authority' if it represents the type of material reasonably relied on by experts in the field." *DaGraca v. Laing*, 288 *N.J. Super*. 292, 300 (App. Div. 1996) (quoting *Jacober by Jacober v. St. Peter's Medical Center*, 128 *N.J.* 475, 495 (1992)); *see also Ryan v. KDI Sylvan Pools, Inc.,* 121 *N.J.* 276, 287 (1990). In determining reliability of the treatise, "'[t]he focus should be on what the experts in fact rely on, not on whether the court thinks they should so rely.' " *Jacober, supra,* 128 *N.J.* at 495-96. If it is demonstrated that others in the field rely upon the materials presented then the texts are presumptively reasonable and admissible unless "unusual or extreme circumstances" are shown. *Landrigan v. Celotex Corp.,* 127 *N.J.* 404, 420 (1992); *see also State v. Kelly,* 97 *N.J.* 178, 210-11 (1984). Whether the texts are persuasive or controlling goes to the "weight of the opinion, not to its admissibility." *State v. Smith,* 262 *N.J. Super.* 487, 521 (App. Div.), *certif. den.* 134 *N.J.* 476 (1993).

Here, both Plaintiff's engineering experts attest that the basic Hierarchy of Safety tenants are set forth in various learned treatises including, "the National Safety Council in its Accident Prevention Manual for Industrial Operations, the Standard Handbook for Mechanical Engineers, [OSHA] literature, and literature provided by the CDC. Various technical papers discuss this safety hierarchy and its application (see, e.g. "Safety Hierarchy: Design Vs. Warnings" by Marc Green, PhD, "The Safety Hierarchy and Its Role in Safety Decisions" by Kenneth R. Laughery and Michael S. Woglater, etc." (*Exhibit H - Narrative Report of Theodore Moss*). Paul Dreyer submits that the Hierarchy of Safety is well-known and adopted by numerous texts relating to mechanical and safety engineering. (*Exhibit J - March 15, 2015 Narrative of Paul Dreyer*). The purpose of these principles is to ensure that products are safely designed and manufactured. *Ibid.* Defendant's argument that these safety engineering standards do not apply to Fire Protection products is without support.

As Defendant's own expert concedes, the engineering "safety hierarchy was born out of *consensus*" in the safety engineering community. (*Doris* at 12). *See, Hisenaj v. Kuehner*, 194 *N.J.* 6, 17 (2008) ("[s]cientific literature also can evidence reliability where that 'literature reveals a *consensus* of acceptance regarding a technology.') (emphasis added). As such, Plaintiff's expert's testimony is admissible and the sources they rely on are admissible as well.

If anything, Defendant's challenge to the Hierarchy of Safety cuts to the weight to which the texts, treatises and testimony discussing this subject should be given. Indeed, the persuasiveness of a source relied upon goes "to the weight of the opinion, not to its admissibility." *State v. Smith,* 262 *N.J. Super.* 487, 521 (App. Div.), certif. den. 134 *N.J.* 476 (1993). Moreover, these principles, texts and treatises are admissible simply to show the standard of care in the industry, not to show a legal or legislative violation of a statutory principle. *See, e.g., Alloway v. Bradlees, Inc.,* 157 *N.J.* 221, 235 (1999) (holding that OSHA violation is admissible to show employer may be liable, affording applicable OSHA regulations "relevance, but not dispositive weight, in the liability inquiry[.]"). As such, the standards, texts and treatises are admissible and Plaintiff's experts are permitted to testify to same.

XVII. Plaintiff Should Be Permitted to Show Photographs of His Injuries

Plaintiff is permitted to show images depicting his injuries as well as demonstrative exhibits showing his injuries, surgeries and recommended surgeries. It is well established that the use of demonstrative evidence in opening statements, closing arguments and throughout trial violates no court rule, nor does it violate any case law. *See, e.g. Cross v. Robert E. Lamb*, 60 *N.J. Super.* 53 (App. Div. 1960). New Jersey has a long standing tradition of allowing attorneys to introduce demonstrative evidence when the proffered demonstrative evidence aids the jury in understanding relevant aspects of their case. *Ibid.*

Likewise, "graphic" injuries of plaintiff's damages should not be excluded. This was a substantial incident. Plaintiff lost the use of his right eye and was caused to fall approximately fifteen feet to the ground sustaining neck and back injuries. Evidence should not be excluded merely because it is prejudicial, indeed, evidence must be *unduly* prejudicial in order for the evidence to be excluded. *See, e.g. Stigliano v. Connaught Laboratories,* 140 *N.J.* 305, 317 (1995); *Rosenblit v. Zimmerman,* 166 *N.J.* 410 (2001) ("[t]hat evidence is shrouded with unsavory implications is no reason for exclusion when it is a significant part of the proof."). Here, graphic images of Plaintiff's damages are part of the proofs necessary to establish Robert Shenton's case. As such, they should not be barred.

XVIII. Plaintiff is Permitted to Offer Evidence of the Cost/Utility of Manufacturing a Safer Product and the Money Defendant Paid Its Experts

Evidence that Defendant has paid experts and attorneys to litigate this case rather than simply manufacture a safer product is highly relevant and admissible. As noted by the United States District Court, District of New Jersey:

> strict liability law is, if anything, intended to temper the profit motive by making a manufacturer or marketer aware that it may be less costly in the long run to market a product more safely, or not to market it at all. *See Holford, The Limits of Strict Liability for Product Design and Manufacture*, 52 *Tex.L.Rev.* 81, 86 (1973). As noted by Dean Wade, "Manufacturers are frankly in the business of making and selling products for the profit involved." Wade, *On Product Design Defects and their Actionability*, 33 *Vand.L.Rev.* 551, 569 (1980)
> . . .
>
> Indeed, any avoidance of product liability for reasons unrelated to the inherent value of the product itself would permit the continued marketing of products that do not truly pay their way, thus discouraging the profiting entities from devoting their energies to making their product safer, or to producing products that are more socially beneficial in the long term.

Cipollone v. Liggett Grp., Inc., 644 *F. Supp.* 283, 289 (D.N.J. 1986). The fact that Defendant has refused to spend a small sum to make their product safer is relevant and admissible since it relates to the very purpose of products liability: to motivate defendant's to make safer products. *Ibid.*

Moreover, evidence that Defendant has paid their experts to testify and write narrative reports in this matter is admissible under this Court's Rules. *R.* 4:17-4(e) explicitly states that an expert must reveal, amongst other things, "whether compensation has been or is to be paid for [his] report and testimony and, if so, the terms of the compensation." *See, e.g. N.J. Model Civli Jury Charge* 1.13C ("The amount of the witness' fee is a matter that you may consider as possibly affecting the believability of an expert."). Clearly New Jersey law permits testimony regarding how much an expert was paid. Defendant's attempt to mischaracterize this type of evidence as "settlement negotiations" is misguided and should be rejected.

XIX. Stipulations in Front of the Jury Are Permissible

The New Jersey Court Rules do not bar stipulating in front of a jury. *R.* 4:25-7(c) states only that "[a]ttorneys shall have the continuing obligation to report to the court any stipulations reached during the course of the trial." It is practical that stipulations be reached in front of the jury depending on the subject matter. It would be cumbersome, cause undue delay and be unwarranted to ask the jury to leave or side bar every matter where a simple stipulation or non-disputed issue may be established. As such, a boilerplate request for all stipulations to be outside of the jury is impractical, time wasting and should be denied.

Respectfully submitted,
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Counsel for Plaintiffs Robert and Lisa Shenton

By: _____
MARK W. MORRIS

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