NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2791-10T2

LAUREN KLIMKO, a minor
by her Guardian ad Litem,
JAMES KLIMKO, JAMES KLIMKO,
Individually, and ALEXANDER
KLIMKO,

Plaintiffs-Appellants/
Cross-Respondents,

v.

VINYL WORKS CANADA,

Defendant-Respondent/
Cross-Appellant,

and

TRENT PETTIT, JERSEY CHEMICAL,
INC., and BEST IN PLASTICS CORP.,

Defendants.

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Argued February 15, 2012 - Decided October 22, 2012

Before Judges Yannotti, Espinosa and
Kennedy.

On appeal from Superior Court of New Jersey,
Law Division, Bergen County, Docket No. L-
6671-08.

Thomas D. Flinn argued the cause for
appellants/cross-respondents (Garrity,
Graham, Murphy, Garofalo & Flinn, P.C.,

attorneys; Mr. Flinn of counsel; Sarit Weitz, on the briefs).

Stephen L. Hopkins argued the cause for respondent/cross-appellant (Braff, Harris & Sukoneck, attorneys; Mr. Hopkins of counsel; Massimo F. D'Angelo, on the briefs).

PER CURIAM

On July 10, 2006, nine-year old Lauren Klimko was injured when she fell from her family's pool ladder and hit her armpit on the ladder's safety gate latch. Her parents, James and Alexandra Klimko, instituted this product liability action on behalf of themselves and her (collectively, "plaintiffs"),[1] alleging that the placement of the latch was a design defect. In its amended answer, defendant Vinyl Works Canada,[2] the manufacturer of the ladder, asserted a defense of comparative negligence and filed a counterclaim against Alexandra for contribution and indemnification based upon her negligence in assembling the ladder.

Prior to trial, plaintiffs filed a motion in limine seeking the dismissal of the counterclaim against Alexandra and to bar evidence of Alexandra's negligence and Lauren's comparative negligence. Defendant filed a motion to exclude plaintiffs'

[1] To avoid confusion, we refer to plaintiffs by their first names.

[2] The other defendants named in the complaint are not parties to this appeal.

expert's testimony as a net opinion. The judge denied both motions.

In this appeal, plaintiffs argue that the court erred in its decision of the in limine motion allowing evidence of Alexandra's and Lauren's negligence to be presented to the jury. In addition, they argue that the court erred in denying their motions for a judgment notwithstanding the verdict or a new trial or for additur. Defendant filed a cross-appeal, in which it argues that the trial court erred in denying its motion to exclude the testimony of plaintiff's liability expert. For the reasons that follow, we affirm the judgment.

I

Plaintiffs purchased the ladder in April 2006. Alexandra installed it with assistance from a neighbor. Before installation, Alexandra read and understood the instructions accompanying the ladder. Those instructions cautioned that "[f]ailure to follow [them] may result in serious personal injury." Nonetheless, Alexandra failed to follow two of the instructions.

First, the instructions required the installer to secure the ladder to the pool by inserting two bolts through the ladder platform into the top rail of the pool. Alexandra testified that she understood that the bolts provided the only direct

attachment between the ladder and the pool and that the purpose of putting the bolts through the rail of the pool was for the safety and stability of the ladder. At the end of the initial instructions, the last sentence stated, "Do not deviate from these instructions." Alexandra admitted that, even though she knew that the bolting system was for the stability of the ladder, she decided not to bolt the ladder to the pool. She testified that, at the time of installation, the ladder was "very steady" and that she only planned to insert the bolts if that changed.

The instructions also required the installer to fill each side of the part of the ladder that goes into the pool with ten pounds of sand or gravel. Alexandra understood that the purpose of this instruction was to weight the ladder down to the bottom of the pool so it would not move around. However, instead of following the directions, Alexandra chose to fill the ladder with water. Defendant's president, Trent Pettit, testified that if the ladder is filled with water, rather than sand or gravel, the ladder "will not sit stable on the pool floor."

Defendant also provided safety instructions for users. Lauren testified that she understood that the rule was to "climb out of the pool, and once you reach the top you turn around and climb down." At the time of her deposition, Lauren stated that

she "kind of remember[ed]" or was "pretty sure" that she "stepped down to the first step and then started to turn around," before falling.[3] Carolyn Smith, a neighbor who saw Lauren fall, testified at her deposition that she thought Lauren was "in the process of stepping down as she was turning[.]"

In her deposition testimony, Lauren initially stated the ladder was sometimes "like shaky, like not stable."[4] Her subsequent deposition answers, however, made it unclear whether she was referring to defendant's ladder or the ladder plaintiffs installed following her accident.

Lauren was treated and received stitches for a "major cut" at a hospital emergency room. Once her stitches were removed, she completed various forms of scar therapy. After the accident, the injury prevented her from continuing dance and swim lessons, as well as attending a summer camp program. After the scar began to heal, she did not resume dance classes because dance outfits revealed her scar and she has continued to wear

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[3] Both Lauren and Smith gave testimony at trial that differed from their deposition testimony. Asked at trial whether, on the date of the accident, she began to turn around as she was climbing down the ladder, Lauren testified that she did not remember. Smith testified at trial that Lauren was "completely turned around" when she was descending the ladder and that she slipped when she "was in the process of stepping down to the first step" from the platform.

[4] At trial, Lauren testified that she never had any problems with the ladder before her fall.

long sleeve shirts to conceal the scar. Two experts in the field of plastic and reconstructive surgery, David J. Bikoff, M.D., and Barry Citron, M.D., testified that Lauren's scar was now mature and that she could have scar revision surgery in the future, but that she would always have a permanent scar on her upper arm.

The ladder, a 2006 AF Deluxe A-Frame Ladder and gate, was developed, designed and marketed by defendant, which began selling it at the beginning of 2006. The ladder's latch, a Stanley latch, was the type used by defendant's competitors at the time. The ladder was consistent with both national and local codes, including those of the American National Standards Institute for Pools and Spas (ANSI-NSPI) and the Consumer Products Safety Commission (CPSC) Guidelines. Defendant consulted with various professionals involved in plastic molding when it designed the ladder.

Both parties presented expert testimony regarding the alleged defect in the ladder.

Thomas Cocchiola, qualified as an expert in professional engineering, testified on behalf of plaintiffs that the ladder was defective. Cocchiola acknowledged that defendant "did a pretty good job" installing "skid resistant" treads, but it should have "anticipated that kids [were] going to fall[,]"

especially in a wet area. Cocchiola testified that Lauren's injury was caused by the ladder's defect, specifically the metal latch. Cocchiola further testified that the metal latch was defective because it "[stuck] out along the railing in an area where a person could fall[,]" thereby creating a "an unnecessary hazard, mainly for kids." Although Cocchiola testified that defendant had several safer alternatives to installing the metal latch, including utilizing a magnetic latch or "revers[ing]" the latch by placing it on the railing, he admitted that the latch was commonly used on pool products and throughout various industries. He also admitted that the ladder complied with consumer product safety council standards, including the ANSI/NSPI-4 1999 standard. In fact, as a whole, defendant's ladder was "pretty good" in terms of its overall stability. Although Cocchiola suggested several alternative ways to design defendant's ladder, he did not complete any testing on his proposals, nor was he aware of any company that manufactured a pool ladder using a magnetic latch.

Defendant's representatives, Trent and Fred Pettit, testified that defendant considered, but rejected, alternatives to the metal latch, including a magnetic latch or "recessing" the latch. Fred testified that he did not believe a magnetic latch was safe. Recessing the latch was also rejected,

according to Trent, because it "would pose as a pinch point for fingers" and obstruct the "accessibility of the gate latch for exit from the swimming pool."[5]

George Pfreundschuh, qualified as an expert in the field of engineering, testified that defendant's ladder was "fabricated in accordance with proper engineering practices" and complied with ANSI/NSPI standards. Pfreundschuh described the latching design and mechanism as "reasonably safe." He determined that an alternative design, such as a magnetic latch, would not work.

According to Pfreundschuh, Alexandra's failure to attach the ladder to the pool's rail, as required by the instructions, made the ladder "unstable" and "present[ed] a safety hazard[.]" The instability, he said, increased the likelihood of a fall. Moreover, he stated that "the injury to [Lauren's] left arm clearly indicates that she did not succeed in substantially rotating her upper body [once she reached the ladder platform] at the time of her fall." Pfreundschuh concluded that Lauren's "accident occurred because of her failure to exercise reasonable

[5] On cross-examination, both Pettits admitted that their trial testimony conflicted with prior sworn statements in which they said either that defendant did not consider recessing the latch or that they did not know whether it had. Additionally, Fred presented inconsistent testimony as to why defendant did not utilize the magnetic latch.

care for her safety while attempting to descend the ladder and that the ladder was improperly installed by her mother."

After defendant rested, plaintiffs filed a motion to dismiss defendant's counterclaim against Alexandra, which the court denied. In returning its verdict, the jury answered "yes" to the following interrogatories:

> 1. Did plaintiff, Lauren Klimko, prove by a preponderance of the evidence that the defendant, Vinyl Works Canada's product as designed was defective in that it was not reasonably safe for its intended or reasonably foreseeable use?
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> 2. Did plaintiff, Lauren Klimko, prove by a preponderance of the evidence that at the time of the accident the Vinyl Works Canada product was being used for an intended or reasonably foreseeable purpose, that is, that it was not being misused or had not been substantially altered in a way that was not reasonably foreseeable.
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> 3. Did plaintiff, Lauren Klimko, prove by a preponderance of the evidence that the defect in the Vinyl Works Canada product was a proximate cause of the accident?
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> 4. Did defendant, Vinyl Works Canada, prove by a preponderance of the evidence that plaintiff, Lauren Klimko, was negligent?
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> 5. Did defendant, Vinyl Works Canada, prove by a preponderance of the evidence that plaintiff, Lauren Klimko's negligence was a proximate cause of the accident and her own injuries?
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> 6. Did defendant, Vinyl Works Canada, prove by a preponderance of the evidence that Alexandra Klimko was negligent?

> 7. Did defendant, Vinyl Works Canada, prove by a preponderance of the evidence that Alexandra Klimko's negligence was a proximate cause of the accident and Lauren Klimko's injuries?

The jury quantified Lauren's damages at $25,000 for pain and suffering and $25,000 for future medical expenses. The jury found defendant 20% liable, Lauren 10% liable, and Alexandra 70% liable. Plaintiffs filed a motion for a judgment notwithstanding the verdict, a new trial, or additur. The trial court denied the motions.

II

The Product Liability Act, N.J.S.A. 2A:58C-1 to -11, sets forth a single cause of action:

> A manufacturer . . . shall be liable in a product liability action only if the claimant proves . . . that the product causing the harm was not reasonably fit, suitable or safe for its intended purpose because it . . . was designed in a defective manner.
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> [N.J.S.A. 2A:58C-2.]

To bring a strict products liability design defect action, "a plaintiff must prove that (1) the product was defective; (2) the defect existed when the product left the hands of the defendant; and (3) the defect caused the injury to a reasonably foreseeable user." Jurado v. W. Gear Works, 131 N.J. 375, 385 (1993); N.J.S.A. 2A:58C-2. Citing Green v. Gen. Motors Corp.,

310 N.J. Super. 507 (App. Div.), certif. denied, 156 N.J. 381 (1998), plaintiffs argue that the strict liability analysis of their complaint requires a focus on the condition of the product at the time the manufacturer placed the defective product into the market. Id. at 516. Arguing that their own negligence does not bear on the condition of the product when it left the control of the manufacturer, they contend that the trial court erred in admitting evidence of their negligence. We disagree.

We grant substantial deference to the trial judge's discretion on evidentiary rulings. Bd. of Educ. of Clifton v. Zoning Bd. of Adjustment of Clifton, 409 N.J. Super. 389, 430 (App. Div. 2009); Benevenga v. Digregorio, 325 N.J. Super. 27, 32 (App. Div. 1999), certif. denied, 163 N.J. 79 (2000). As a general rule, the trial court's ruling will not be disturbed unless there is a clear abuse of discretion. Dinter v. Sears, Roebuck & Co., 252 N.J. Super. 84, 92 (App. Div. 1991). Reversal is only appropriate when the trial judge's ruling was "so wide of the mark that a manifest denial of justice resulted." Bd. of Educ. of Clifton, supra, 409 N.J. Super. at 430 (quoting State v. Carter, 91 N.J. 86, 106 (1982)).

A defendant cannot defend itself in a design defect case on the ground that the plaintiff "fail[ed] to discover the defect in the product, or to guard against the possibility of its

existence." Lewis v. Am. Cyanamid Co., 294 N.J. Super. 53, 75 (App. Div. 1996), aff'd in part and modified in part, 155 N.J. 544 (1998). However, "plaintiff's fault is a defense when there is evidence that 'plaintiff with actual knowledge of the danger posed by the defective product voluntarily and unreasonably encountered that risk.'" Ladner v. Mercedes-Benz of N. Am., Inc., 266 N.J. Super. 481, 495 (App. Div. 1993) (quoting Cartel Capital Corp. v. Fireco of N.J., 81 N.J. 548, 562-63 (App. Div. 1980)), certif. denied, 135 N.J. 302 (1994). A defendant need not show that the plaintiff had knowledge of the product's particular defect. 266 N.J. Super. at 495. Rather, defendant must demonstrate that "before plaintiff's injury [plaintiff] was consciously aware of the specific danger that injured him and, with that knowledge, voluntarily exposed himself to the danger." Lewis, supra, 294 N.J. Super. at 77.

In short,

> Contributory negligence is not a defense to a strict-liability action when a plaintiff's negligent conduct consists of merely failing to discover or guard against the possibility of a defect in a product. In general, however, when a plaintiff with actual knowledge of the danger presented by a defective product knowingly and voluntarily encounters that risk, a trial court should submit the comparative-negligence defense to a jury.
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> [Johansen v. Makita U.S.A., Inc., 128 N.J. 86, 94 (1992) (internal citations omitted).]

The proffered evidence here was not that Alexandra or Lauren was negligent in failing to discover the possibility of a defect in the ladder. Rather, Alexandra knew that proper installation of the ladder required bolting the ladder to the pool and filling each side of the ladder with ten pounds of sand or gravel. Further, she knew that the purpose of these instructions was to provide stability to the ladder and that the instructions further cautioned that failure to follow the instructions could result in serious personal injury. Nonetheless, she assumed the risk associated with improperly installing the ladder, and, as she testified, only planned to properly secure the ladder if a problem developed.

Similarly, Lauren was aware of the safety requirement regarding how to use the ladder to get out of the pool to avoid a fall. Although she could not recall at trial whether she had complied with the rule, the record at the time of the motion, which included the deposition testimony of Lauren and the neighbor witness, indicated that she had not turned around completely before descending the ladder when she fell.

In light of this record, we discern no abuse of discretion in the court's denial of plaintiffs' in limine motion.

Plaintiffs also argue that the trial court erred in denying their motions for a judgment notwithstanding the verdict, a new

trial, or additur. These arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). In light of our decision on plaintiffs' appeal, we need not consider the merits of the cross-appeal.

Affirmed.