

**UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

CASE NO: 6:08-CV-1992-ORL-31DAB

**JEREMY KEIRNS AND DAWN
KEIRNS,**

Plaintiffs,

vs.

**TRICAM INDUSTRIES, INC., HOME
DEPOT U.S.A., AND HD SUPPLY,
INC.,**

Defendants.

**PLAINTIFFS' MOTION FOR ORDER PERMITTING DESTRUCTIVE TESTING AND
ANALYSIS OF COMPONENT PARTS OF THE SUBJECT LADDER AND
MEMORANDUM OF LAW IN SUPPORT THEREOF**

Plaintiffs, **JEREMY KEIRNS AND DAWN KEIRNS**, pursuant to Rule 34, Federal Rules of Civil Procedure, move this honorable Court for an order permitting certain limited destructive testing and analysis of certain component parts of the subject ladder in the above matter and state as follows:

STATEMENT OF THE CASE

This is a product liability action in which Plaintiffs allege that the “subject ladder” manufactured and sold by Defendants and one or more of its component parts failed, either due to manufacturing or design defect, during normal and expected use. As a result, it is alleged that the ladder collapsed causing Plaintiff to fall while installing a residential pool screen enclosure and sustain injuries.

To avoid any claim of spoliation of evidence, Plaintiffs gave notice to Defendants of proposed destructive testing of certain component parts of the subject ladder *before* this lawsuit was filed, inviting Defendants to attend. Defendants objected to any destructive testing of the subject ladder.¹ This lawsuit ensued. After attempts at reaching agreed terms on the testing failed, Plaintiffs elected to serve and file this Motion For Order Permitting Destructive Testing, And Analysis Of Component Part of the Subject Ladder And Memorandum Of Law In Support Thereof.

Plaintiffs and Defendants have been unable to reach an agreement regarding Plaintiffs' request to conduct destructive testing of certain component parts of the subject ladder despite good faith efforts and Plaintiffs' offer to coordinate the testing and analysis when Defendant and its representative and expert(s) can be present while the entire procedures are recorded by digital or taped video means. Attached as Exhibits "A" through "D" are letters between the attorneys attempting to resolve this matter in good faith. There have also been email exchanges and telephone conversations in which no agreement could be reached.

Plaintiff attaches as Exhibit "E" the affidavit of a consulting engineer retained by Plaintiffs in support of this motion. Lewis Barbe describes in the affidavit the testing protocol proposed and the basis for the request. Mr. Barbe desires to perform metallurgical and hardness testing of certain component parts of the subject ladder, including one failed rivet from the "rear rail" and one non-failed rivet from the "front rail". The two rivets that failed attached the cross brace of the ladder to the "rear rail" of the subject ladder. Material surrounding the failed and non-failed rivets must be cut

¹ In *Cole v. Keller Industries, Inc.*, 872 F.2d 1470 (E.D. Va. 1994), the district court affirmed a summary judgment in favor of a ladder manufacturer when the plaintiffs conducted destructive testing without advance notice to the ladder manufacturer. The defendant argued successfully that the destructive testing prevented the defense experts from inspecting the failed step and rivets in their original condition. Plaintiffs desire to avoid any such claim or defense by filing suit and pursuing this motion and court order.

and the specimen rivets extracted. The extracted rivets will be examined microscopically with and without the chemical applications. Some destructive testing will be performed of each of the extracted rivets by sectioning the rivets, grinding, polishing and etching the specimens to conduct metallographic techniques, examining them microscopically, and capturing photographic images of the results. The hardness of the rivets will then be analyzed using non-destructive harness measurement testing.

Attached to Mr. Barbe's affidavit are photographs of the subject ladder and its component parts, including the rivets. Also attached to Mr. Barbe's affidavit is a one page test protocol which summarizes the proposed testing.

APPLICABLE LAW

Federal Rule of Civil Procedure 34(a)(1) provides that a party may make a request for production to "inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) which provides that parties may obtain discovery of any matter, not privileged, that is relevant to the claim or defense of any party. Plaintiffs' experts are in possession and control of the subject ladder in this particular case. This motion and court order is sought to avoid any claim of spoliation of evidence. See *Cole v. Keller Industries, Inc., supra*.

In ruling on a motion for destructive testing of evidence, the court should consider whether (1) proposed testing is reasonable, necessary, and relevant to proving movant's case; (2) non-movant's ability to present evidence at trial will be hindered, or non-movant will be prejudiced in some other way; (3) there are any less prejudicial alternative methods of obtaining evidence sought; and (4) there are adequate safeguards to minimize the prejudice to non-movant, particularly non-movant's ability to present evidence at trial. *Mirchandani v. Home Depot, U.S.A., Inc., 235 F.R.D.*

611 (D. Md. 2006). In order to justify destructive testing of item, evidence sought must be integral to proving movant's case and do more than strengthen already established claim or defense. *Id.*

In *Mirchandani* the plaintiffs in a product liability suit against a ladder manufacturer and seller were entitled to conduct metallurgical and hardness tests on one of two locking bolts in the ladder's hinges, even though the bolt would be destroyed during testing. The defendants' experts did not believe that the proposed destructive testing would prove their case and that they would be unable to conduct a live presentation in front of the jury involving the ladder. The plaintiff's theory was that the ladder collapsed because of a defectively designed or manufactured locking bolt. The defendants had been afforded the opportunity to fully inspect the ladder and videotape demonstrations of their experiments on it, and there were no reasonable nondestructive alternative methods available. Defendants would be able to attend the testing and all testing procedures would be photographed. *Id.*

While plaintiffs must show that evidence sought through destructive testing is necessary to prove their case, the burden is not so high as to require definitive proof that plaintiff's hypothesis will prove correct. *Id.* A material change in the appearance of an object, even when the non-movant plans to present the object at trial, is insufficient to categorically prohibit destructive testing. *Id.*

ARGUMENT

The subject ladder collapsed after rivets which attach the cross brace to the front and rear "rails" failed and snapped from the rear rail according to the testimony of Plaintiff which will be offered at trial and which has been elicited by Defendants' counsel. One potential cause of this failure would be a metallurgical design or manufacturing defect.

The testing proposed by Plaintiffs meets the four prong test in that the proposed testing is

reasonable, necessary and relevant to proving Plaintiffs' case. Plaintiffs desire to test the component parts that are alleged to have failed causing the ladder's collapse. The Defendants' ability to present evidence at trial will not be hindered or prejudiced in some other way. The ladder will still be available in its "general condition" and the entire process will be photographed in detail, before and after destructive testing. Moreover, Defendants may attend the testing. That there are no non-destructive alternative means to conduct the metallurgical testing Plaintiffs' experts require. Adequate safeguards are proposed to minimize any prejudice to Defendants, including photographing and taping the pre-testing and post-testing condition of the ladder, as well as the testing itself, and permitting Defendant to be present for the testing. Clearly, the proposed testing is relevant to one hypothesis of the cause of the accident, that the rivets failed due to design or manufacturing defect. It is both reasonable and necessary for Plaintiffs to be allowed to conduct metallurgical and hardness testing to explore this hypothesis and develop expert opinions on the cause of the ladder's failure and collapse.

Particularly given that the subject ladder is not being entirely destroyed and that one failed and one non-failed rivet will not be disturbed at all by the proposed testing, Defendants' ability to present evidence (the ladder and its component parts) in its "general condition" at trial will not be hindered or prejudiced. Moreover, exemplar ladders of the same model number would presumably be within Defendants' control for use at trial. In *Cameron v. District Court*, 193 Colo. 286, 565 P.2d 925 (1977) cited in *Mirchandani v. Home Depot, U.S.A., Inc., supra*. The court allowed for destructive metallurgical testing of the metal in a defective tire case, basing its ruling primarily upon the fact that the condition of the tire could be captured photographically and that any evidentiary value lost by virtue of the inability to present the tire to the jury was insufficient to deny the

development of the plaintiff's expert's opinion. In *Sarver v. Barrett Ace Hardware, Inc.* 63 Ill.2d 454, 349 N.E.2d 28 (1976), cited in *Mirchandani v. Home Depot, U.S.A., Inc., supra.* a lawsuit arising from the use of a hammer, a piece of which allegedly chipped off of the face of the hammer during use, metallurgical testing was permitted and which required that three quarter inch holes be drilled into the side of the hammer and that a wedge-shaped section be excised from the face of the hammer for analysis. In allowing for the testing, the court observed that the jury would still be able to view the hammer and the "general condition" of its striking face. *Sarver v. Barrett Ace Hardware, Inc., Id.* at 30-31. In addition the original condition of the hammer's face was to be preserved by macrophotographs that would be available for presentation to the jury.

Finally, adequate safeguards have been proposed to minimize any potential for prejudice to Defendants including inviting Defendants to attend and observe, and Plaintiffs will photograph and videotape the ladder and its component parts before, during and after the testing. In fact, numerous photographs of the subject ladder and its component parts already exist and have been provided to Defendants.

This case is analogous to the circumstances in *Mirchandani*. As in *Mirchandani*, Plaintiff desires to conduct metallurgical and hardness testing upon component parts of a ladder, and no alternative non-destructive means are available to accomplish this task. Moreover, as in *Mirchandani*, Defendants in this case will be permitted to be present at the destructive testing at their own expense, and the entire event will be photographed and videotaped.

It is necessary for Plaintiffs to conduct this testing in their efforts to prove the ladder was defective in either its design or manufacture. Without this testing, Defendants would simply argue that absent such testing the cause of the rivet damage seen in the photographs cannot be proven and

that any argument that the rivets failed due to some design or manufacturing defect is speculation. Whether or not the hypotheses predicated upon potential failure due to metallurgical causes proves correct or not, the testing should be allowed. While plaintiffs must show that evidence sought through destructive testing is necessary to prove their case, the burden is not so high as to require definitive proof that plaintiff's hypothesis will prove correct. *Mirchandani v. Home Depot, U.S.A., Inc., supra.*

WHEREFORE, Plaintiffs, **JEREMY KEIRNS AND DAWN KEIRNS**, move this Honorable Court for an Order Permitting Destructive Testing and Analysis of the subject ladder and its component parts with reasonable notice to Defendants and consistent with the "Recommended Test Protocol For Failed Step Ladder" attached to the Affidavit of Lewis Barbe and with this motion, permitting the specific destructive testing described therein, to be photographed and videotaped, and permitting Defendants and their representative to attend and observe.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of February, 2009, a true and correct copy of the foregoing has been furnished by U.S. Mail to: Gregory P. Durham, Esq., 2101 South Waverly Place, Suite 200 E., Melbourne, FL 32901.

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