EXPERT REPORT OF BENNETT J. WASSERMAN, ESQ.
ON BEHALF OF PLAINTIFF

September 30, 2003

Glenn A. Bergenfield, Esq.
212 Carnegie Center, Suite #106
Princeton, New Jersey 08540

Re: Carbis Sales, Inc. d/b/a Carbis Ladders and Safe Step Reinsurance, Ltd. v. Israel N. Eisenberg, Esq., Post & Schell, P.C. formerly known as The Law Offices of Stanley P. Stahl
Docket No: CAM-L-2350-01

Dear Mr. Bergenfield:

You have asked me to provide you with an opinion as to whether or not Israel N. Eisenberg Esq., Post & Schell, P,C. and The Law Offices of Stanley P. Stahl deviated from accepted standards of practice in connection with their legal representation of Carbis Sales, Inc. d/b/a Carbis Ladders and Safe Step Reinsurance, Ltd. in the defense of claims embodied in a lawsuit entitled Dennis Carr and Angela Carr v. U.S. Home Corporation d/b/a U.S. Homes, R.D. Werner Company, Carbis Sales, Inc. d/b/a Carbis Ladders, John Does 1-10, Superior Court of New Jersey, Law Division, Burlington County, Docket No: L-21-92.

I have concluded that Israel N. Eisenberg, Esq., Post & Schell, P.C. and The Law Offices of Stanley P. Stahl did in fact deviate from the accepted standards of attorney practice for the reasons set forth in this report.

DOCUMENTS REVIEWED

In connection with this opinion, I have reviewed the following documents:

The Legal Malpractice Action:
Carbis Sales, Inc. et al v. Israel Eisenberg, Esq. et al
Docket No: L-2350-01

1. Complaint filed April 12, 2001;
2. Answer to Complaint, Separate Defenses and Counterclaim of Defendants (undated);
3. Answer to Counterclaim of Plaintiffs filed December 2, 2002;
4. Amended Complaint filed May 12, 2003;
5. Answer to Amended Complaint, Separate Defenses and Counterclaim (undated);

6. Memorandum of George Ellis, Esq.;
7. Plaintiffs' Answers to Defendants' Interrogatories;
8. Defendants' Answers to Plaintiffs' Interrogatories and First Notice to Produce;
9. Deposition of Paul Junius, Esq. taken June 24, 2003 with exhibits; and
10. Deposition of Israel Eisenberg taken September 8, 2003.

The Underlying Case: Dennis Carr et al v. U.S. Home Corp. et al
Docket No: L-21-92

1. Box of various pleadings including Complaint and summary judgment motions;
2. Boxes of various discovery documents including interrogatories, document productions, demands for admissions, Dennis Carr's medical records, files received from the worker's compensation carrier; Carbis Work Load Documents, and Photographs (I have not reviewed the video-tapes);
3. Box of Deposition transcripts including depositions of the following persons and exhibits:
   Dennis Carr, Samuel Cramer, Angela Polidoro, Richard Ryan, David Ryan, Roy Martin, John Palumbo, Gary Goldstein, Linda Dupont, Diane Chando, James Aravecz, Donald Koestler, Gwendolyn Ryan, Donald Bompensa, Barbara Smith and Robert Marshall;
4. Box of Expert Witness Reports including the following:
   Expert Report and Deposition of Ervin Leshner;
   Expert Report and Deposition of John Johnson;
   Expert Report of Raymond Sams;
   Expert Report of Nicholas Colanzi;
   Vocational Expert Reports of Robert Wolf and James Pascuiti;
   Medical Expert Reports of James Collier, M.D. and Benjamin Smolenski, M.D.;
5. Trial Transcripts September 16 through September 26, 1997 and trial exhibits;
6. Box of Appellate Briefs and Appendices, legal research and handwritten notes; and
7. Time records of Israel N. Eisenberg from 6/1/97 to 10/1/97.

INTRODUCTION

This case was lost because trial counsel, Israel Eisenberg, Esq., was unprepared to try it. It appears that he received the file just prior to the trial starting and he did not do what needed to be done. He did not learn the facts of the file. He put too few hours of trial preparation. The time sheets and bills produced after his deposition show that Eisenberg put in 18 1/2 hours in trial preparation the week before the trial started. He testified that he did not bill for the hours spent learning the file, due to the late transfer of the file from Beth Wright to him. He was unable to estimate how many hours he put in that were unbilled. As a consequence, he was unable to develop a coherent legal strategy. His witnesses were unprepared for trial so they testified in ways that were unhelpful or ineffective. He did not call certain necessary and helpful

witnesses. He was unable to cross-examine effectively, especially the Plaintiff, and he failed to make many important objections. Further, it was quite evident that he was not familiar with important facts which were essential to put on an effective defense for his client. As a result, he was unable to persuade the jury of his client's position in large measure because he was simply unprepared at the trial.

It is also my opinion that the lawyer (Beth Wright, Esq.) or lawyers who prepared the case before Eisenberg should have done several things which would have strengthened the case if Eisenberg had used this discovery which most probably would have resulted in a lower award. While this case should have been won on liability, it is also true that this verdict was far out of the range of the norm for the injury sustained by Plaintiff (a surgical herniated disc). The undeservedly high award occurred due to the failure of the lawyers to conduct appropriate discovery and to hire appropriate experts, as the co-defendants had done.

These deviations from the standard of care were to a reasonable degree of probability the proximate cause of Carbis' losing the case; put differently, to a reasonable degree of certainty, Carbis would have won the case but for the malpractice of the Defendant attorneys.

FACTS OF CARR et al v. U.S. HOME CORP.

Dennis Carr and Angela Carr, his wife, instituted a lawsuit to recover damages for an injury allegedly sustained on April 7, 1990 when Dennis Carr fell off a ladder in the course of his employment. The original Complaint apparently filed by Carr named R.D. Werner Corp. (the manufacturer of the ladder) and U.S. Home Corp. (the general contractor and developer).

[1] U.S. Home Corp. joined Tempcon Corp. (the HVAC subcontractor) and Red Lion Insulation (Carr's employer) as third party defendants. Discovery began.

a. Discovery

At his deposition taken on January 10, 1994 (prior to Carbis being named in the case), Dennis Carr testified to many crucial facts that others contradicted.

He testified he had gotten the job assignment from his employer, Red Lion, on the morning of April 7, 1990 at about 6:00 – 6:30 a.m. (T44). He testified both that he did not keep ladders on his truck (T47) and that he had 12' ladders on his truck. (T57). He claimed the highest ceiling he would be working on that date was 8-9' so he got a 6' ladder from Bill Baker at the Red Lion warehouse that morning. (T56). Red Lion had approximately 30 ladders in the warehouse at that time. (T48). In the past, he had rejected ladders from the warehouse because he had noticed that the ladders were broken and asked the warehouseman to give him another because the legs were damaged. (T50). He testified that he could tell if the legs were broken when a ladder was passed out to him from the warehouse bay door (T52) but that he did not examine the ladder at Red Lion's warehouse on the day of the accident. (T59 – T60). He did not know whether the damage on the ladder legs was there before the accident. (T117).

The alleged accident occurred on Saturday, April 7, 1990, shortly after he arrived at the job at about 7:30 – 8:00 a.m. (T43; T62). He testified that the accident happened in the following manner. The house had a two story foyer (this is much higher than 8-9' ceiling). (T138). He explained that he was carrying the tools necessary for the job, the ladder and the foam (T64), that he positioned the 6' ladder in the doorway opening so that he would be coming up on the side of the door. (T68). He was sure there was no debris or lumber in the work area (T138) but did not see the duct hole cut in the floor (T139). He had started to foam the area, the top of the door, the window. (T64). He was on the 2nd or 3rd stair on the ladder and the top of the ladder was about at his belt buckle. (T76). As he was coming down the ladder, he felt the ladder go to the left (away from the door) and could hear it crack. (T78). He had only two more steps to go and tried to get off the ladder as quickly as possible (T79); he tried to run off the ladder from the second or third rung. (T74). He had one foot on the ladder and his left foot hanging out to try to catch himself. He tried to catch the end of the stairs and got his foot caught in an HVAC cutout by the stairs. (T79). He went down on his left knee and landed on his left side. (T80).

He immediately stood up and picked up the ladder. (T131). After he fell, he noticed that one of the feet on the ladder was broken. He does not know if it was completely broken off, it "might have been off" (T81-82), both sides were broken and one was off or hanging. (T82). When he fell off the ladder, two kids came running out of the basement to help him. (T111). He put the ladder in his work truck and went straight home, doing no more work that day. (T81).[2]

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[1] A copy of the original complaint is not in the Carr v. Carbis files.

[2] Dennis Carr's wife, Angela, testified at her deposition that Dennis arrived home at about 2:00 p.m. (T28)

This version of the accident is contradicted by others and by Carr, himself. For example, no one at Red Lion agreed that he got a job assignment on Saturday morning. In fact, they were surprised he claimed to be working on Saturday morning since he had written "done" on his assignment sheet reflecting his work at Carriage Park. He had to use a 12' ladder to reach the window in a two-story foyer. Baker did not give him a ladder that morning and, anyway, Carr always picked and inspected his own ladders when he needed one other than those already on his truck. Why Carr would need a 6' ladder when he had a 12' ladder on his truck at 6:00 a.m. is also not explained.

Though Carr claimed to have fallen into an HVAC vent, there was no vent there as a matter of law. The kids who "helped him up" were never identified or found.

Carr's testimony went on: He said he went back to work the following Monday (86). He claims he told Linda Dupont at Red Lion about the fall (T87) and that after trying to work he was going to the hospital. (T89). He does not recall where he worked on Monday or if he worked the whole day. (T139).[3] Dave Ryan came to his house at 11:00 p.m. Monday night and told him if he did not come to work the following morning he was fired. (T142-T143). He had to "crawl" to get to work, went in and told Ryan how much pain he was in. Ryan told him he had to get his jobs done. He did one job and went to the hospital; he could not walk and was taken in by wheelchair (T143), but drove himself to and from the hospital. (T144). On Wednesday morning, Dave Ryan and "another fellow" came and took his truck. (T143).

There are several inconsistencies in this testimony:

1. He left the ladder on his truck until he went back to work on Monday, took it off the truck and gave it back to his employer (T84);
2. He had it and then gave it to his lawyer and it was in his possession from the time it left the job site until the day of the deposition (T85);
3. On either Tuesday or Wednesday after the accident, David Ryan came to his house and retrieved the ladder and his work truck. (T156). At some point after this, contemplating a lawsuit, he tried to get the ladder back and asked his friend, Steve McMichael, who also worked at Red Lion if he could get the ladder. (T158). He was not able to give any time frame in which he asked McMichael to get the ladder and did not know whether or not anyone else had used his work truck between the day of the accident and when the ladder was retrieved by McMichael. (T158 – T164). He does not known when McMichael brought him

[3] Carr's timesheets from Red Lion show that he worked 13 hours on April 9, 1990 and 4 hours on April 10, 1990.

the ladder.[4]

At this deposition, Carr was shown a photograph of a ladder and was unable to identify whether the photographs of the allegedly faulty ladder depicted the actual ladder he was using on April 7, 1990. (T157). This seems to be the only issue Eisenberg used at trial. It is the entirety of his opening and his closing arguments. Carr was also unable to identify the exact location in Carriage Park that the accident was to have occurred. He was not able to provide an address or location of the construction site. (T110).

Carr testified that he had another fall in July 1992 in which he reinjured his back. (T26). He had been going up stairs and his right leg buckled which made him grab the handrail. The handrail came loose and he fell backwards. (T27). Prior to the July 1992 fall, he testified that his back was "fine" (T27) and that he had not seen a doctor since May 1991. (T28).

In answers to interrogatories, Carr stated that he had been in a car accident in June, 1992, had fallen down stairs and injured his back in July 1992 and had approximately 7-8 minor accidents while working with Red Lion. None of this seems to have been explored further. No medical records concerning these accidents were discovered by Wright or Eisenberg. In addition, Chiumento was probably Carr's lawyer in the lawsuit about the July 1992 fall; so the records could have easily been gotten by a Notice to Produce Documents.

Carr also states in his answers to interrogatories that he went back to work for Red Lion in June 1990 for 2 weeks and then again for 4 weeks in August/September, 1990. This appears to be more consistent with the Ryan's testimony than Carr's. It also explains Angela Carr's confusion about which time, the first or second, the truck was taken by Red Lion.

Dennis Carr was deposed for a second time on November 28, 1995. Although an attorney for Carbis was present, he asked not one question of Mr. Carr at that deposition.

On June 1, 1994, Richard Ryan, David Ryan and William Baker of Red Lion Insulation were deposed.

Richard Ryan testified that Dennis Carr's work for Red Lion was less than satisfactory on occasion. Richard had disciplined Dennis on occasion for reporting jobs being further along in the foaming and caulking stage than they really were (T32-34; T105-106; T112-113) and had gotten complaints more about Dennis from his customers than about any other employee (T94-97). As a result, his work had to be watched closely. (T95). Red Lion required Dennis to report where he was and what times he was there. (T108).

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[4] There is no mention at this deposition or in Carr's answers to interrogatories regarding the ladder being in his brother's shed or any storage for 18 months until he gave it to his lawyer. This explanation seems to have first come up at trial.

Red Lion had been working on the Carriage Park development for years and Carr would have had firsthand knowledge of every model house on that site and would have known what ladders he would need. (T91). Richard Ryan produced daily schedules for Dennis Carr for April 5-9, 1990. (T39). The daily schedules showed that there was no new work at Carriage Park for April 6 (T51) and there was no daily schedule for April 7, 1990, the day of the alleged accident. (T54-55). Mr. Ryan identified records for Carr's work on April 5 and 6, 1990. Mr. Ryan testified that he would be hard-pressed to come up with a good reason why Dennis was working on that Saturday. (T57). There were no new work assignments on that day. (T110, T118). Mr. Ryan also testified that Dennis Carr had worked on April 9th. (T63 and T65). Carr's truck was assigned to another employee (George Strurgis) on April 11th.

Mr. Ryan testified that he was under the impression that the ladder involved in Mr. Carr's accident had been repaired after the accident. (T123-124, T126-127). It was Red Lion's policy not to send ladders into the field that were damaged in any way. The installers were held responsible for inspecting the equipment before they took one and to turn in equipment that was not up to standard. (T126). When he was shown the ladder in Carr's attorney's possession, he testified that that ladder was in "bad shape" and would "absolutely not" have gone out in service. (T127). He does not know how Carr's lawyer got the ladder (T133) and he found it very difficult to believe that the ladder he was shown at the deposition was the ladder involved in Carr's accident. (T133).

Richard Ryan's testimony thus contradicts Dennis Carr's testimony on all points.

David Ryan testified as follows:

The only discussion he had regarding the ladder involved in Carr's accident was that it was back in their warehouse. It came back and he did not know which ladder it was, nobody could identify it. (T187). He received a letter on June 22, 1990 from Carr's lawyer (T188) [asking for the ladder]. Dave Ryan regularly inspected the Red Lion ladders; it was a habit. (T202). When shown the ladder allegedly involved in Carr's accident, he testified that if he saw that ladder on the job he would have personally taken it off the job and thrown it away. (T205).

Thus, David Ryan contradicts Carr as well.

William (Billy) Baker's testimony was:

It was his responsibility to take broken ladders and put them in the storage shed. (T162). Most of the Red Lion installers would take the ladders themselves from the warehouse (T162) and that Carr "mainly got his own." (T173). The installers would inspect the ladder and if it had anything wrong, he would take it and put it in the shed. (T166). He testified that the ladder shown to him at the deposition had been "used pretty hard" and that he did not know if it was the ladder used by Carr. (T172). He testified that Carr would keep two or three ladders on his truck most of the time (T173-174). Mr. Baker had no recollection of being advised about Carr's accident. He does not remember Dennis saying anything to him about it. (T176, T179).

Baker thus contradicts Carr; he did not drive him home after the accident or even know about it as Dennis and Angela Carr had testified at their depositions. Yet, this issue was not adequately explored by Eisenberg with Baker at the trial.

William Baker, David Ryan and Richard Ryan were almost not allowed to testify at trial because their names were not on Eisenberg's witness list.

b. Amendment to Complaint adding Carbis Sales

In October 1994, Carr amended the complaint, by a Second Amended Complaint, to include Carbis Sales, Inc. d/b/a Carbis Ladders as a defendant. The allegations against Carbis were that it was negligent in marketing, selling, distributing, shipping and delivering the defective ladder or otherwise placing the ladder into the stream of commerce. (Second Amended Complaint at Count 8).[5]

On June 2, 1995, Angela (Carr) Polidoro's deposition was taken.

Mrs. Carr testified that her husband had gotten his assignment from Red Lion on Friday night so he knew where he had to go that morning (T29 and T30). She testified that Dennis had come home between 1:00 and 2:00 on Saturday afternoon. He was taken home by Billy Baker. Dennis was sitting in the passenger side and Billy got out of the drivers side door, helping Dennis get out of the truck. (T26-27). She did not know if Dennis had gone back to Red Lion after he fell and did not know how he met up with Billy. (T31). Dennis had told her that he was climbing up a ladder to spread insulation and that the legs of the ladder had given way and he had fallen, downward, and landed on the tail of his back. (T28). She testified that her husband did nothing on Sunday (T32) but that he went to work on Monday and returned home at around 11:00 after having gone to the hospital emergency room. (T34). Mrs. Carr testified that her husband never returned to work at Red Lion after the accident. (T40).

With regard to the night that Dave Ryan came to their home to discuss Dennis' back problem, Mrs. Carr testified that it was "a couple of weeks after the accident, maybe three weeks at the most after the accident." (T37). Dave Ryan had told her husband that if he did not come back to work he was fired. (T39). The following morning someone came and took the truck. (T39).

Nearly all of Angela Carr's testimony is contradicted by others.

Dennis and Angela were separated in October 1991 and divorced in January 1993. (T11).

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[5] It is interesting to note that the Second Amended Complaint does not allege that Carbis negligently "repaired" the ladder and does not sound in products liability but negligence. This became an issue at trial on the issue of comparative negligence; discussed later in this report.

Dennis had wanted a divorce so that he could get remarried. (T11). She testified that Dennis had never done anything around the house, not laundry, or meals, or cleaning or taking care of the kids – she did it all (while he was out working). (T16-18). They hardly ever went out. (T19). The "family exercise" was fishing. Dennis did not play football, or baseball, or volleyball, or go to the gym. (T20-21). He would play Pinochle. (T21). When she was asked if there was anything Mr. Carr had been doing before the accident that he stopped doing after the accident, she replied "well, he never did anything anyway." (T42). They were intimate "occasionally . . . twice a week" before the accident, but not at all after. (T43 and T54). After the accident, they were constantly fighting (T52). They had gotten into a fight, he had thrown an ashtray at her, she jumped on him and he grabbed her neck. (T62-63). This resulted in a restraining order being issued. (T58). Mr. Carr started seeing another woman (she believes in October or November 1991). (T54).

c. Summary Judgments Granted to U.S. Homes and Tempcon

In February, 1996, U.S. Homes Corp. moved for Summary Judgment based upon the following:

1. Red Lion had no record of sending Dennis Carr to any job on April 7, 1990. Red Lion only has records of Carr working on April 5, 1990 and April 9, 1990. In the five days prior to the accident, Carr had been assigned to insulate more than 30 homes at over 12 developments, of which only 2 homes were at Carriage Park. (Red Lion Assignment Sheets for Carr).
2. U.S. Homes received no accident reports until the lawsuit was filed;
3. Carr did not have an exact address or location for the house where the accident occurred. (Carr's response to Demands for Admissions #5 and #6). In discovery, Carr described the house as follows: facing the house the garage was located on the left (T109-110), the stairway leading to the house was located to the left of the doorway in the foyer (T67-71), the HVAC cut-out was located on the floor directly next to the stairway (T71), the house had a basement (T71). Carr drew a diagram of the house at his deposition (Exhibit 1).
4. Carr's timesheets for the week of the accident show that he worked at 2 Carriage Park houses. However, neither could be the location of the accident, according to Carr's description of the house. The first did not have an HVAC duct near the stairway and the second had no basement.
5. Carriage Park had 6 model homes under construction on April 7, 1990. None of the six houses fit the description Carr gave of the house. (U.S. Homes Summary Judgment motion, Exhibit G).

Based upon these inconsistencies, Summary Judgment was granted to U.S. Homes Corp. on April 29, 1996 and the Third Party Complaint against Tempcon Corporation by U.S. Homes Corp. was dismissed on May 16, 1996.

On May 17, 1996, Carbis (and co-defendant Werner) moved for summary judgment on

the same grounds as U.S. Homes Corp. listed above and upon the additional basis that Carr failed to establish a reliable chain of custody regarding the ladder and was unable to identify the ladder in his counsel's possession as the one involved in the accident. The Court denied the motions on June 21, 1996, ruling that "a rational jury could reach more than one conclusion, that is, that the ladder identified by Plaintiff Carr could be the ladder allegedly involved in the accident" (Opinion at p. 3) and that the "inconsistencies in plaintiff's testimony go to credibility, which is a jury question." (Opinion at p. 4).

d. Expert Opinions

During discovery, the following expert reports were produced.

1. Ervin Leshner on behalf of Carr. Leshner rendered a report on August 2, 1992 finding that the failure to properly reinforce the ends of the ladder legs to prevent lengthwise splitting was a design error causing the right rear leg of the ladder to fail. The report concluded that Werner Ladder manufactured and sold a ladder that was defective due to a quality and design defect. Leshner later amended his report on September 15, 1992 opining that Carbis Sales, Inc had repaired and modified the design of the ladder and was therefore negligent in selling, repairing and modifying the subject ladder that was defective and caused Dennis Carr to be injured.

2. John Johnson on behalf of Carbis. Mr. Johnson in his January 8, 1996 report questions the chain of custody of the ladder. However, upon inspection of the ladder allegedly used by Carr at the time of his accident, he concludes that the amount of damage to the ladder could not have occurred as the result of a single event, that the damage would have been evident before the accident occurred, that the extreme amount of abuse evidenced that it would not have been put back in service, that the amount of the damages would have rendered the ladder useless prior to the accident, that the like new condition of the three rubber feet on the ladder indicate that either the ladder pads were put on after the ladder was damaged or that the ladder was intentionally damaged after the new pads were put on. He concludes that the facts in evidence do not support the allegation that the ladder was ever involved in the accident as described by Mr. Carr. In a supplemental report dated February 19, 1996, Mr. Johnson opines that if Carbis had utilized the repair instructions for cutting down ladders it would have met ANSI standards and therefore the damage would have had to occurred after any repair.

3. Raymond Sams for U.S. Homes. Mr. Sams' report details each of the Carriage Park homes and opines that Mr. Carr's accident did not occur at any Carriage Park house since none of the Carriage Park homes fit the description of any Carriage Park model.

4. Nicholas Colanzi for Tempcon Corp. Mr. Colanzi's report opines that Mr. Carr's accident did not occur as described by Mr. Carr. He bases his report on the physical configuration of the model homes at Carriage Park and further opines that if the accident did happen it was as a result of the improper use of a ladder which was defective and not suitably maintained in a safe condition to be used by Mr. Carr for construction work. Mr. Colanzi

opines that if Mr. Carr's feet were no higher than 2'-3' from the floor, given the placement of the ladder adjacent to the front door and as it began to fall, Mr. Carr's body would have had to have moved at least 5' while it rotated counterclockwise for his left toe boot to have entered a narrow 4" vent opening even if there was one in the house he was working.

5. Dale King for Werner Ladders. Mr. King rendered a report on September 19, 1994. In his report he concludes that the ladder had been improperly cut down from a 12' ladder to a 6' ladder; that cracking must have been present before the cut-down to warrant such a repair and was an indication that the ladder was abused during the time preceding the accident. He observed that the spreaders were attached with pop rivets and were located at different levels on the ladder, the feet were replaced with new parts and pop rivets, the left rear foot was broken off, the left front had a cracked rail, the right front was missing a rivet and the rail was cracked and the right rear bracket was dented. In his opinion, this poor repair made the ladder unstable. He also opined that Mr. Carr did not perform an adequate inspection of the ladder prior to using it. The ladder was wobbly at the time of the accident because the repair to the ladder was improper and the rails were cracked causing them to be weak.

Medical experts were retained by Werner and Tempcon. Dr. Benjamin Smolenski and Dr. James Collier opined that Mr. Carr was not being treated and did not require further treatment, that he had some residuals status post-laminectomy and disc excision, but he did not have any neurological deficit. He appeared to be functioning reasonably well in his present job which required him to drive a truck at least two hours per day.

Vocational experts were hired by Carr and Tempcon. Carr's expert, Robert Wolf, computed his wage loss at $452,344. Tempcon's expert, James Pacuiti, opined that Mr. Carr did not have a lifetime income loss as a result of his accident.

No medical or vocational experts were retained on behalf of Carbis and it had no agreement to use the experts of the co-defendants.

e. Trial

The case came on for trial on September 16, 1997. Two defendants remained at the time of trial, Werner and Carbis.

Eisenberg's opening to the jury seemed to concede that the ladder was defective and was in no condition to be used and should not have been used. He tried to imply, impermissibly, that Carbis was contributorily negligent. (9/16/97 T81).

Carr's attorney called as its first witness Dale King, the co-defendant Werner's expert witness. He did not call his own expert, Ervin Leshner. Eisenberg objected to the use of King by Plaintiff (9/16/97 T94) as being a "surprise" and requested a mistrial. (T100). He later withdrew his objection.

Mr. King testified that he determined the ladder to be originally a 12' ladder. (9/17/97 T5). The fact that it was now a 6' ladder did not cause the accident. (9/17/97 T34). He testified that the alterations played a substantial part in the accident (T24) and that the ladder was negligently repaired by use of pop rivets (T8), a missing rivet on the right front foot (T10), no bracing on the ladder (T13), uneven spreader bars (T15-17) and no bottom braces (T35). He testified that he did not think Werner was aware of ladder cut-downs, that they never authorized ladders to be cut down. (T23).

On cross-examination by Eisenberg, Mr. King testified that anyone could get Werner repair parts (T40-42). He testified that Werner did not ship the foot on this ladder to Carbis. (T46). He doubted that the ladder was repaired by a qualified and trained repairman and was included to think it was by someone doing haphazard repairs. (T56-58).

The cross-examination of King was not effective. Eisenberg seemed genuinely surprised that King was testifying against Carbis. Yet King was the only one who gave competent testimony that it was Carbis' work that caused the ladder to fail. King's "expert" opinions were never given in proper form; no objection to this was made. Evidence impeaching King was found after the trial and was put into the Appellate briefs. Eisenberg and Wright did not get this information before the trial and that is consistent with the lack of preparation that led to the case being lost.

The next witness for Carr was his treating physical, Dr. Burton Pearl. He testified that he first saw Carr on August 10, 1991 at which time he was given the history of the April accident. Dr. Pearl testified regarding Carr's lumbar laminectomy. On cross-examination, Dr. Pearl testified that in December 1991 he gave Carr clearance to drive a tractor trailer.

Dennis Carr was the next witness. He testified that he went to work on Saturday, April 7, 1990 (9/17/97 at T100) and that he drew a ladder from the Red Lion warehouse. (9/17/97 at T104). He describes the house he was working in as having an "enormous sized entrance doors with some type of a window over top of the door, which I needed a ladder to get up that high. So I set the ladder up, I got my foam polyseal together, and I went up and I foamed the top of this door, whatever it was, and window. I was coming down the ladder. I heard the ladder crack and it twisted, and I knew that I was going over, so I jump off the ladder. Then I dropped the foam, and I went to my left, and I stepped in a hole – a cutout in the floor, a hole in the floor, That's when I fell over on my left side." (9/17/97 at T110). He further testified "two kids came out of the basement because they heard the – I guess it made a heck of a noise 'cause it's just on plywood floors, and they came up to see what was the matter, and they asked me if I needed help out . . . . I went directly home." (9/17/97 at T111). Carr testified that he went to work on Monday but that he was in a lot of pain, worked on his first assignment and went to the hospital. (9/17/97 at T112). Carr testified that the ladder was on the truck that his boss took from him the Tuesday following the accident. (9/17/97 at T116-117).

In identifying the ladder in the court room, he testified that the missing leg came off on the job at Carriage Park that morning (9/17/97 at T129). He also testified that Steve

McMichael brought the ladder back to him. (9/17/97 at T130).

Carr testified that he went back to work as a truck-driver approximately 1 ½ years after surgery (9/17/97 at T146). He would make trips to Baltimore of approximately 3 hours each way, five days a week. (9/17/97 at T147). He did this job for almost a year. (9/17/97 at T148). Then, perhaps, after his next fall, he took a different run with less hours. (T149).

Dennis told the court that before his accident, he fished, played golf, jogged, lifted weights, played volleyball and horseshoes. (9/17/97 at T150). Carr was asked during direct examination about the July 1992 accident. He testified that his leg gave out on him and he fell down and broke his left hand. (9/17/97 at T158). He testified that he fell because the same left that had been bothering him since the accident gave out. (9/17/97 at T159). Carr also testified that he told him employer about the accident on Monday and did not work at all on that day. (9/17/97 at T178). He testified that the ladder was still on his truck when it was taken away by Dave Ryan (and an unidentified person). (9/17/97 at T177).

On cross-examination by Eisenberg, Carr twice testified that on the day of the accident he observed that the foot was broken totally off of the ladder (9/17/97 at T178).

Also on cross-examination, Carr testified that Mr. McMichael brought him the ladder the same morning in his truck. (9/17/97 at T186). He also testified that he put the ladder in his backyard and then locked it up in his brother's shed until he turned it over to his lawyer probably a year later. (9/17/97 at T189). (There was no testimony about this at the deposition or in his answers to interrogatories). He also testified that he could not identify the ladder at his deposition because he was very nervous. (9/17/97 at T 185).

During the cross-examination of Carr by Eisenberg, Eisenberg agreed with and the court advised the jury that Dennis Carr was not seeking additional damages with regard to the injuries he sustained during the fall in 1992 for any injury to his arm. (9/18/97 at T35). One can assume that Eisenberg agreed to this because he know little of the July 1992 fall.

Diane Chando, a Red Lion employee, testified next. Ms. Chando was not questioned by Eisenberg as to whether or not Dennis Carr told her about his fall on April 9th but at her deposition she said that she heard of the accident for the first time from Linda McMichael who prepared the worker's compensation claim forms. (8/4/94 at T73).

Plaintiff called his attorney, John Becker, as his next witness. Mr. Becker was called to testify as to conversations he had with his client prior to his deposition. (9/18/97 at T77). Mr. Becker testified (9/18/97 at T78 – T84):

A. I went to meet Dennis and see the ladder in June of 1991 . . . .[6]
Q. Okay. Is the ladder that you saw in June of 1991 in the courtroom today?
A. Yes. The ladder is right behind counsel's table. . . .
Q. What conversation did you and Dennis have with regard to the ladder and Dennis' ability to identify this ladder as having been involved in the accident?
A. I believe that meeting was the – it was my first time to interview Dennis extensively about the case and about what had happened, so I questioned him pretty much in the beginning when the accident happened, how it happened. He brought the ladder out of the shed, showed it to me. I took photographs One thing I did as him was – there was a piece missing . . . . My recollection is Dennis believed or thought the piece was left at the scene of the accident. . . . He was hurt, and he wanted to go home. . . .

Q. After the deposition, did you have any discussion with Dennis concerning what his testimony was at the deposition?
A. Absolutely.
Q. What do you recall discussing with Dennis after the deposition?
A. He was very nervous in the deposition. I told him it was okay. It's all right to be nervous. It's understandable. There was some – I questioned him – or he asked me about the photographs, and I told him where they were taken, how they had come to be. He was concerned that he wasn't quite sure about the use of the photographs and whether or not, you know, it was – the questions were – were intended or not intended to mislead him. And he couldn't absolutely say the photographs were the – the ladder. I then said. Dennis, the ladder that you gave me, that you brought from the shed, that's the ladder you fell from? He said yes. I said that's good enough.

Eisenberg made a puzzling objection – attorney/client privilege – which was overruled. He should have questioned Becker about the whereabouts of the ladder and this new story about the shed. This might have made relevant to the judge the June 29, 1990 letter to Red Lion by Chiumento asking to buy the ladder when it was allegedly already in Carr's brother's shed.

Robert Wolf testified next concerning Dennis Carr's economic loss. As noted above, Carbis did not have an expert to refute this testimony.

Marianne Carr, Dennis' Carr's current wife testified briefly regarding Dennis' current complaints and limitations. Disappointingly, there was no cross-examination of Mrs. Carr by Eisenberg. It was also wrong for Eisenberg not to have taken her deposition before she testified at trial.

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[6] This meeting was more than one year after the date of the accident. Mr. Becker did not assume possession of the ladder until 14 months post-accident. He did not work for Pennington & Thompson in June 1990. (T9/18/97 at T97).

The trial continued on September 22, 1997 at which time motions were argued. The first argument was concerning the stipulation that the parties entered into that Carr would not be seeking any damages as a result of the 1992 injuries. The second motion concerned subpoenas issued by Eisenberg to Richard Ryan, David Ryan and William Baker. Carr objected. Eisenberg argued that he did not name these witnesses on his witness list because he had misunderstood whether Carr would be calling them in his case. (9/22/97 at T9). Finally, the court discussed whether or not there was a necessity for Mr. Murphy (Werner's attorney) to attend the trial the next day. (9/22/97 at T17). Werner argued that there was no evidence on the part of the co-defendant that could implicate that the particular ladder was defective at the time it left possession of Werner. The Court without objection from Chiumento agreed and granted Werner's application to dismiss. (9/22/97 at T24-T25). Dale King had testified for Carr and his company (Werner Ladder) and was then rewarded with a dismissal of the claim against Werner.

The last witness for Carr, Angela Polidoro, testified on September 23, 1997. Angela testified that Dennis knew he was going to Carriage Park on Friday night before the accident. (9/23/97 at T48). She testified that he left for work at around 7:00 a.m. and that at 11:00 a.m. she heard him come home. "I had seen the truck pull up and, of course, my first reaction is to look outside, you know, see that he's home and watching him get out of the car, out of the truck I should say, he got out very slowly, like it was like pausing, you know, like stopping and one leg at a time and not where he just jumped out of the truck , it was one leg at a time. . . . He shut the car – the truck door and hesitated before he took another step to start approaching to come into the house. . . ." (T9/23/97 at T49).

Angela also recalls someone from Red Lion coming to pick up the truck two or three days after that Saturday (9/23/97 at T52), that Steve McMichael brought the ladder back (9/23/97 at T58) and that it was under lock and key in Dennis' brother's shed. (9/23/97 at T60). She testified that Dennis went to the hospital on the following Monday morning (9/23/97 at T63) and that Dennis had tried to go to work in June but could not work and Billy Baker had brought him home. (9/23/97 at T65). Plaintiff then rested.

Eisenberg began his case by calling Richard Ryan from Red Lion Insulation. Mr. Ryan was handed a two-page statement that he had given to the worker's compensation carrier on July 13, 1990. (9/23/97 at T119). The statement said that when the ladder was found, it was repaired. (9/23/97 at T123). However, Mr. Ryan was not able to read the statement so a typed version of the statement was made for the trial. (9/23/97 at T123). Carr's attorney objected to the use of the typed transcription of the statement as unfair and prejudicial. (9/23/97 at T124). The Court ruled in Carr's favor and the statement was out. (9/23/97 at T128). Eisenberg had not prepared this witness nor had he called the writer of the statement, so this chaotic presentation was made in front of the jury. Finally, Mr. Ryan testified regarding Dennis Carr's disciplinary problems, including whether he had knowledge of whether Carr had been drinking on the job. (9/23/97 at T194-T198).

An issue arose with regard to a letter written by Carr's attorney to Red Lion in June 29, 1990, which asked for the ladder in question. Very little foundation for this had been shown.

The letter was not permitted into evidence by the Judge. (9/23/97 at T201-202).

Eisenberg's second witness was David Ryan. Eisenberg again focused his questioning on whether or not Dennis Carr drank on the job. (9/23/97 at T225). Chiumento objected and the Court agreed that there was no evidence that Carr was drinking on the day of the accident. (9/23/97 at T227). He testified that Carr's truck was taken from him twice, once within a few days of the accident and once in June or July. (9/23/97 at T233). This is consistent with Dennis' answers to interrogatories that he went back to work after the accident for Red Lion in June and August/September. However, Eisenberg did not expand upon this.

Carbis' expert witness, John Johnson, was next called. He testified that the type of failure to this ladder was as the result of an impact (9/24/97 at T50), that the weight of a person could not have caused this type of damage (9/24/97 at T53), that the ladder had been used in that condition for a great amount of time (9/24/97 at T58), that the use of pop rivets in the repair of the ladder and the lack of bracing did not play a role in the happening of the accident (9/24/97 at T67-T68) and that the wear of the feet on the ladder was not consistent with the condition of the rest of the ladder. (9/24/97 at T76). He opined that based upon the amount of damage to the ladder, it was not useable before the accident. (9/24/97 at T75).

On cross-examination, Johnson testified, that Werner had no standards or guidelines for cut-downs of ladders and that he had never contacted anyone at Werner to learn of their position on ladder cut-downs. (9/24/97 at T148-T157). He agreed that the ladder in question had pop rivets, no washers, no bracing and no warning labels. (9/24/97 at T158-159).

Johnson was ill-prepared for cross-examination. Moreover, if Carbis was authorized to do Werner repairs, this should have been shown.

The final witness for Carbis was Samuel Cramer, the President of Carbis. He agreed that Carbis did repair ladders in New Jersey, they were one of the few authorized repair centers for Werner (9/24/97 at T164) and that they were conservative in their judgment of what could be repaired; they would rather replace a ladder than repair it. (9/24/97 at T167). The employee of Carbis that did all of the repairs was Harry Hall. (9/24/97 at T168). [Mr. Hall was not called at trial]. The primary business of Carbis ladders was ladder sales, not repairs. Approximately 75% of broken ladders were not repairable. (9/24/97 at T176). He agreed that the ladder appears to have been cut from 12' to 6'; but the way the Carr ladder was repaired was contradictory to the way Carbis repaired ladders. (9/24/97 at T178-181).

On cross-examination, Cramer testified that he never contacted Hall to testify at trial. (9/24/97 at T184). He testified that Carbis' employees went to Werner for training and Werner was aware of the ladder cut-downs. (9/24/97 at T192). The repair kits from Werner did not come with rivets and pop-rivets were acceptable under Werner's repair system. (9/24/97 at T216). Finally, Carbis' records indicated that they never bought a pair of feet for the ladder from Werner, but they may have put the old feet back on after a repair. (9/24/97 at T216).

On September 25, 1997, summations were heard. Nearly the entire Eisenberg summation focused on the absence of McMichael as a witness. (9/25/97 at T48-T63). Eisenberg touched on the dispute over whether or not Carr actually worked on April 7, 1990. (9/25/97 at T67)

The jury returned a verdict in favor of the Plaintiff and against Carbis Sales, Inc. and assessed damages for Dennis Carr in the amount of $600,000 and damages to his ex-wife, Angela Carr, in the amount of $100,000 on her consortium claim. Carbis made a motion for judgment notwithstanding the verdict based upon numerous trial errors that alone or in concert clearly and convincingly showed a miscarriage of justice. The court entered judgment on November 20, 1997 in the amount of $684,160 to Dennis Carr and $114,000 to Angela Carr and denied the motion for a new trial on December 16, 1997.

Carbis filed an appeal on December 26, 1997. The appeal was based upon many issues. However, the following are noted:

1. The trial court erred in allowing Dale King to testify as Plaintiff's liability expert at the time of trial due to surprise;
2. The trial court erred in not instructing the jury that the Plaintiffs and Defendant, Werner, were working in concert against Carbis and in permitting the Plaintiffs to read in Dale King's deposition testimony under R. 4:16-1(b) after he had testified as Plaintiff's expert. (Defendant made no record here);
3. The jury verdict for loss of consortium shocked the conscience. (Defendant had not made below the argument it made here);
4. Plaintiff Dennis Carr's testimony effectively linked his subsequent 1992 accident to the subject accident without the necessary medical proofs thus tainting the jury and prejudicing the defense. (Defendant made a poor record here with his stipulation);
5. The trial court erred in not admitting Richard Ryan's July 13, 1990 statement into evidence. (But, this was mishandled in various ways at trial);
6. The trial court erred in not giving the adverse inference charge for failure to produce Ervin Leshner and Steve McMichael.

On July 13, 1999, the appeal was denied.

LEGAL ANALYSIS

New Jersey courts have broadly defined a lawyer's obligation to act in a client's best interests. The applicable standard has existed in the state for over seventy years, having first been articulated in McCullough v. Sullivan, 102 N.J.L. 381 (E & A 1926). The McCullough court expressly stated that an attorney owes a duty to a client to have:

> that reasonable knowledge and skill ordinarily possessed by other members of his profession. He contracts to use the reasonable knowledge and skill in the

> transaction of business which lawyers of ordinary ability and skill possess and exercise.

The courts have since consistently held that an attorney is obligated to exercise that degree of knowledge, skill and ability which attorneys acting under similar circumstances possess and exercise. See, e.g., St. Pius X House of Retreats v. Diocese of Camden, 88 N.J. 571, 588 (1982). In determining whether an attorney has deviated from his or her duty of care, the attorney's conduct must be compared to that which would ordinarily be exercised by "members of the legal profession similarly situated...." Lamb v. Barbour, 188 N.J.Super. 6, 12 (App. Div. 1982). N.J.S.A. 2A:13-4 provides that "[i]f an attorney shall neglect or mismanage any cause in which he is employed, he shall be liable for all damages sustained by his client."

In addition to demonstrating that a defendant attorney breached his or her duty, a plaintiff in a legal malpractice case must also prove that the defendant attorney's breach of duty was a proximate cause of the plaintiff's damages. Lamb v. Barbour, supra, 188 N.J. Super. at 12; Grunwald v. Bronkesh, 254 N.J. Super. 530 (App. Div. 1992); 2175 Lemoine Avenue Corp. v. Finco, Inc., 272 N.J. Super. 478 (App. Div. 1994); Mallen and Smith, Legal Malpractice, §8.2 (5th Ed. 2000). In New Jersey, it is not necessary that the plaintiff demonstrate that the attorney's conduct is the proximate case, but only that it is a proximate cause of the injury. Hoppe v. Ranzini, 158 N.J. Super. 158 (App. Div. 1978).

In order to meet its burden in an attorney malpractice case as to the element of proximate cause, a plaintiff client must demonstrate that the defendant attorney's negligence or breach of duty was a "substantial contributing factor" in causing the client's damages. The New Jersey Supreme Court has described the "substantial factor" standard of causation as follows:

> The substantial factor test accounts for the fact that there can be any number of intervening causes between the initial wrongful act and the final injurious consequence and does not require an unsevered connecting link between the negligent conduct and the ultimate harm. The test is thus suited for legal malpractice cases in which inadequate or inaccurate legal advice is alleged to be a concurrent cause of harm.

Conklin v. Hannoch Weisman, 145 N.J. 395, 420 (1996). The burden of proving the causal relationship between the wrongful act and the injury rests with the plaintiff. Lamb v. Barbour, supra, 188 N.J. Super. at 12.

It is well settled that an attorney is liable for any loss "proximately caused the client by his negligence," Gautam v. DeLuca 215 N.J. Super. 388, 397 (App Div) certif. denied 109 N.J. 39 (1987). The claim of malpractice there was failure to meet a time-bar. In order to recover from an attorney for missing a time bar, "a client must establish the recovery which the client would have obtained if malpractice had not occurred." Frazier v. New Jersey Mfrs. Ins. Co., 142 N.J. 590,601 (1995). The measure of damages in such a case, then, is ordinarily the amount the client would have received in the absence of his attorney's negligence, and generally requires

proof of the "viability and worth of the claim that was irredeemably lost," Gautam, supra, 215 N.J. Super. at 397.

OPINION

A. Discovery done by Post and Schell

As to the discovery conducted by Mr. Eisenberg's predecessors, it was grossly inadequate. The experts who testified for US Homes and Tempcon Corp. (or another who would have reached the same, inescapable conclusion)[7] should have been hired by counsel for Carbis after Plaintiff's Complaint was dismissed as to them by way of summary judgment April 29, 1996 as to U.S. Homes and May 16 1996 as to Tempcon.

This would have made clear to the jury that large portions of Carr's story were not true. In fact, Carr's story that he fell in a Carriage Park model and that his foot fell into an HVAC vent and he struck the staircase with his left side is not true as a matter of law. (See summary judgment ruling on U.S. Homes' motion). Carr gave this version at trial. The judge would probably have told Carr that this was not so as a matter of law, if the Judge had been requested to do so. If the judge declined to do that, fact witnesses and experts could have been called who proved that there were no Carriage Park models fitting Carr's description and no HVAC vents to fall into. It is unfortunate that Mr. Eisenberg did not know the case well enough even to ask Carr one question on this topic.

No orthopedic or neurological experts were consulted. Other co-defendants had hired them. Carr's post-laminectomy complaints were quite serious. He should have been evaluated by a defense doctor. There is good reason to believe that an expert would have found that Dennis had a rather unremarkable recovery, not the catastrophe he described as the co-defendants had done. Dennis had a violent end to his first marriage; we know of thrown ashtrays, his wife jumping on him and a restraining order. He had a post accident, pre-divorce girlfriend – his first wife testified that he wanted the divorce so that he could marry the girlfriend. He soon got remarried. He was cleared to drive a truck for a living and has done so. These are not usual activities for one in chronic, debilitating pain. In addition, an orthopedic expert would have evaluated if any of Dennis's problems arose from his fall in 1992 (which Dennis' attorney offered to not bring up at the Carbis trial), his 7 or 8 on the job accidents, his 1988 fall or his June 1992 car accident. Dennis testified at his deposition that he had no treatment with a doctor from May 1991 until his fall in 1992. So it would not be a big leap to conclude that he was healthy post laminectomy and that his current problems, if real, arose from

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[7] Both experts opine that Carr's version of the fall was impossible since there were no model houses that fit the description given by him at his deposition and even those with vents in the front foyers would have caused an impossible fall for his left foot to get caught in the HVAC vent. Carr testified that the house he was working on had a two story foyer. He therefore had no need for a 6 foot ladder for that job, the job required a 12 foot ladder. (See David Ryan Deposition at T208).

the 1988 fall, the June 1992 car accident, the July 1992 fall or his subsequent 8 or 9 prior accidents at Red Lion.

On that same topic, Dennis testified that his fall in 1992 was caused by his back condition from his fall off the ladder, yet, at trial he kindly offered not to bring it up and blame Carbis. This fall and all his other accidents and domestic misadventures needed to be explored. If Eisenberg's predecessor had gotten the medical and legal records relating to these events, it is likely that they would have shown that the defendant in that case was responsible for Carr's problems, at least according to Carr and that he had been healthy until that fall. There is no other explanation for plaintiffs' counsel offering to not introduce proofs on the fall which Carr had, in depositions, blamed on Carbis.

Once an orthopedic examination was done Carr should have been sent to a vocational rehabilitation specialist and an economist. There is little doubt that Carr could have made more than $13,000 per year. If the injury actually made him incapable of continuing to do physical labor, he could have been retrained to do a job that paid better than $13,000. The jury heard none of this since Eisenberg's predecessors did not hire these experts.

The lawyers should have gotten more details on the Carr divorce file. The divorce file might have shown that the reasons for the divorce were other than what the Carrs testified to at the trial. Mr. Carr had a girlfriend and it was more likely that, rather than his chronic pain and inability to work or make love to his wife was that caused Mrs. Carr to throw an ashtray at him and him to choke her. What Eisenberg did get showed that Carr received temporary disability benefits for 52 weeks but was not used at trial.

The lawyers, in the course of performing a reasonable investigation, should also have gotten the worker's compensation file. The Carrs tearfully testified that they had no money for food; yet the worker's comp system is designed to avoid just such a result. I understand that Chiumento's office handled this claim so getting the information should not have been too hard.

At Rick Ryan's deposition he should have been shown the statement he gave to the worker's comp investigator. He might have remembered it then, verified it then, closer in time to when he gave it. This would have been a devastating piece of evidence, especially woven into all the other inconsistencies of Carr's story about the ladder, how he got it and what he did with it. If Ryan could not remember or if he just could not read the writing, then the lawyers handling the case could have taken further steps to see if Ryan's memory could be refreshed. There he could have been given a transliteration of the statement without serious objection. The worker's comp investigator could also have been contacted and deposed. The statement of Ryan could have come in through the investigator on a variety of grounds. If the investigator could not have been found and Ryan had no recollection then this fact should have been reported to the client.[8]

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[8] Much has been made of unwillingness of Carbis and Ladder Management to consider seriously an offer to settle the case. But if clients are not told that crucial evidence in their case is, actually inadmissible, then clients should not be faulted for not

The Worker's Compensation investigator who took down Rick Ryan's statement should have been contacted during discovery so that he could authenticate and verify the statement. This statement was crucial to the defense and could have been decisive in this case. Eisenberg evidently agreed since he took great pains at trial to try to introduce it.

The lawyers should have found McMichael and tried to interview him. McMichael may not have corroborated the story told by Carr – that Carr asked McMichael to get the ladder from his truck and that he did so. Everyone else seemed to contradict Carr – no one at his company even seemed to know that he'd fallen – so it is likely that McMichael would have contradicted Carr, too.

The lawyers should have sought the two workers who were supposedly in the basement at the time of the fall. They supposedly rushed to Carr's assistance. Undoubtedly if they existed they would have asked Carr what happened and, if Carr said the ladder failed, they would probably have taken a quick look at the ladder. It is not known if they existed but these were claimed eyewitnesses to the ladder soon after it failed. If they did not exist, that would go a long way toward proving that Carr's version of what occurred was probably a fabrication.

Thought should have been given to a video surveillance of Carr. He was a truck driver who claimed that his customers did much of the unloading for him. This is possible but unlikely and a video surveillance film of him doing normal lifting, even on one occasion, would have substantially destroyed his credibility.

No proofs were collected from Carbis of ladders that Carbis declined to repair. Carbis' position was that it would not have tried to repair a ladder with the problems this ladder had. Carbis needed to show that this had happened before, that it did not repair ladders that were badly damaged. Even if the evidence was entirely oral from the Carbis employee who performed the actual repairs, at least some proof on this crucial point would have been gathered. Such documentation would also have established a consistent policy on Carbis' part to limit its repair work of ladders to only those that could be safely repaired. The only records that were produced only showed several cut downs.

Carbis employees should have been interviewed and prepared for trial. The cross-examination of Cramer – that he was not there all the time – was well done but would not have mattered if the ones who were there, doing the repairs had been there to testify.

The evidence rebutting Kings testimony (that cut downs were almost never good) was collected after trial. It could and should have been easily collected before trial. It was clear long

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making better decisions about settlement. Here, Eisenberg did not know the case well enough to uncover that his predecessors had not done what was necessary. This led to Eisenberg's belated and unsuccessful attempt to introduce the statement through the retyped version, in front of the jury.

before the trial that Werner had the only expert who blamed poorly done cut down for the accident. The lawyers who preceded Eisenberg should have found out well before trial if Werner considered Carbis an authorized shop or if Werner was going to criticize Carbis. All evidence that Carbis was approved by Werner should have been marshaled.

Finally, no questions of Carr were ever asked at his second deposition by any Carbis attorney. At the first deposition, Carbis was not a party; at the second deposition, John Talvaccio, Esq. was there, but he asked no questions.

B. Eisenberg's Pre Trial Preparation and Trial Performance

I have spent much time outlining and discussing the facts that existed. The reason for this is that our law states that a lawyer may make a judgment and, if it is reasonable, it is not a violation of the standard of care even if it would have been done differently and better by another lawyer. See, e.g., Zeigelheim v. Apollo, 128 N.J. 50 (1992), Celucci v. Bronstein, 277 N.J.Super. 506, 523 (App. Div. 1994). Here the work by Eisenberg shows that the reason for his poor judgment was that he simply did not know the case well enough to try it competently. He was unable to make proper tactical moves in the case because he did not know the case. I have pointed out so many mistakes in order to convey to the reader the inescapable conclusion that these mistakes were the result of a lack of adequate preparation, not a reasonable judgment that just didn't work out.

Eisenberg should have finished the discovery that his predecessors failed to complete. I saw in Junius' answers to interrogatories that soon after Eisenberg was hired he promised Junius that he was finishing up discovery – and this case needed that – but it appears that Eisenberg did not do that. So, it is a breach of the standard of care for Eisenberg to tell Junius he would get needed discovery done and then not do that. Many of these things are described in this report.

Eisenberg should have met with his clients to get a sense of how they might perform at trial and to prepare them to do as well as possible. Had he done this, Eisenberg would have realized that he'd need to bring to trial the men who actually did the repairs at Carbis, not just the boss.

Eisenberg should have then prepared a proper witness list that included these men as well as the Ryans and the worker's comp investigator. He should have prepared all of the evidence that he might want to introduce.

Eisenberg's opening had no theme and it failed to acquaint the jury with his theory of the case. He did say that the ladder that Carr had might not be the ladder, based upon Carr's uncertainty at depositions if the ladder in the pictures was the ladder he had used. Eisenberg then claimed that the ladder should not have been used, prompting a successful objection by the plaintiff that comparative negligence was not a defense, as a matter of law.

This opening reflected Eisenberg's shallow grasp of the facts. It made no sense to say Carr had mistakenly gotten the wrong ladder. The logical defense here was that Carr was not telling the truth. As I described above, there was a wealth of evidence to use to show that Carr was not truthful as to whether he was working on Saturday (his pay records say no and he had signed a statement "done" that he had finished these houses on Friday), if he fell into an HVAC vent (he didn't as a matter of law), if a 6 foot ladder would ever be used in those houses (his boss testified a 12 foot was required), how he got home and when (did he drive himself home at 10 or did Baker take him at 2), that despite his claim that he could not work on Monday, he worked 13 hours the following Monday and 4 on Tuesday, whether he told anyone at work that he had fallen (he claimed he told his boss of his injury and was fired that week but his boss did not know of his accident for months and the pay records show that he was not fired for months and much more. Carr returned to work at Red Lion for 2 weeks in June, 1990 and then again for 4 weeks in August/September of 1990. Carr had been driving for 6 hours a day as a truck driver, was fine, and then fell again. There were no witnesses to the fall, though Carr claimed there were. He claimed to be using a 6' ladder but if he was working on a window above a door in a two-story foyer, as he testified, a 12' ladder would have been necessary (or he had to be wrongly standing on the top of the 6' ladder). Carr contradicted himself and he was contradicted by nearly every witness in the case. Eisenberg did not bring this up, I assume, because he was not aware of these contradictions, because he was not trial ready for this case.

Eisenberg's cross-examination of Carr suffered from the same flaw; it could have been devastating. Likewise, his examination of other witnesses generally did not get to the issues that would have undercut Carr's believability. There was no other defense but Carr was not telling the truth or was mistaken about the ladder.

Eisenberg should not be heard to argue that he was reluctant to attack the credibility of Carr so directly; he hounded Carr with questions about his use of alcohol that day and in this he had no proof at all, as he conceded to the judge. This was wrong-headed and improper, as the court ruled.

I also question Eisenberg's cross-examination of Becker. It does seem wrong for the judge to have let Becker testify – the Appellate Division so ruled. But, once the wrong objections (attorney client privilege!) were overruled, Eisenberg might have realized the golden opportunity he had. Eisenberg could have gotten into the June 29, 1990 letter that Chiumento wrote wanting to get the ladder from Red Lion; supposedly Carr had the ladder in his possession since April 10th, according to one of the versions. He could have gotten into the worker's compensation case, the claimed wrongful termination case, the 1988 fall, the June 1992 car accident, the July 1992 fall, maybe the divorce case, and what attempts Becker made to interview the two workers who came on the scene months after the "fall."

Eisenberg's claim of surprise at Dale King's appearance in the trial is hard to understand. King was the only expert who claimed that the ladder was defectively repaired, the only one who blamed Carbis. Eisenberg should have been ready for King, even if it was not the plaintiff who called him. Eisenberg knew or should have known that the plaintiffs' expert Leshner was not

going to be able to establish a claim against Carbis; Beth Wright had written to Junius that fact. Eisenberg should not have blithely assumed that that was the end of it. He should have realized that King was the expert for whom he had to prepare. Eisenberg objected but then inexplicably withdrew his objection to King's testimony and failed to seek a remedy at trial. King did not give expert testimony in a form allowed, as the Carbis appellate brief pointed out; but since no objection was made to this at trial (and other matters complained of in the appeal brief), the appellate division did not consider this argument.

Eisenberg also failed to do more to show that Werner and the plaintiff had made a deal. Chiumento did not say anything against Werner in his opening. It is obvious that Chiumento made a deal with Murphy that he would not present a case against them if they would only stay in the case so that King could testify, even if it had to be on behalf of Werner. The best for Chiumento was calling King on his case, as his witness; but if the judge said no, then Murphy would have had to call him on her case. Our law frowns upon litigants who pretend to have a claim against a party; this is especially so when the reason for the claim is to procure testimony that might not otherwise come in. Why didn't Eisenberg ask for a hearing? Why didn't Eisenberg question King about this, ask him who he wrote his report for? How much was he paid by Chiumento to be his expert? This is a question asked of experts in most cases but was not asked here.

The cross-examination of the plaintiffs' witnesses did nothing to expose the contradictions in Carr's story. Eisenberg must not have known of the facts these other witnesses could have introduced that contradicted Carr. Likewise, the case lacked experts to contradict plaintiffs' experts on damages and liability. By the end of the case Eisenberg had to concede that the only issue was: is this the ladder that Carr was on when he fell? He had produced no proofs to show that Carr was not believable at all, not as to the ladder, the accident nor as to his current problems. And on that issue, it was clear, Carbis would lose. The only evidence Eisenberg introduced on that issue was that Carbis sometimes decided not to cut down a ladder if the damage was too bad. And on this one, the damage was too bad. But even in that point, he had holes in his case; he had neglected to bring in the Carbis employees who actually performed the repairs.

CONCLUSION

It has often been said that an attorney is not a guarantor against errors in judgment. Lamb v. Barbour, 188 N.J.Super. 6, 12 (App. Div. 1982). An attorney does not commit malpractice if he or she makes a judgment that turns out to be erroneous. In Charter Oak Fire Ins. Co. v. State Farm Mutual Auto Ins. Co., 344 N.J.Super. 408 (App. Div. 2001), the court ruled that the attorneys obligation was to use his professional judgment to formulate a legal strategy; it was not malpractice if that strategy proved unsuccessful. The treatise writers make this clear. The question ultimately is of reasonableness, which is determined by whether the lawyer complied with the standard of care. Brziak v. Needle, 239 N.J.Super. 415 (App. Div. 1990). The result can be different if the issue is whether the attorney's investigation was reasonably sufficient for an informed judgment rather than the propriety of the judgment call. In either case, the lawyer is

required to make an informed judgment. Mallen and Smith, Legal Malpractice, §30.27 (5th Ed. 2000). See also, N.J. Model Jury Charge, §5.37.

On the other hand, it is equally clear that an attorney has an obligation to carefully investigate his case and then, based on that, to formulate a legal strategy. Zeigelheim v. Apollo, 128 N.J. 250 (1992). Passanante v. Yormark, 138 N.J.Super. 233 (App. Div. 1975) cert. denied 70 N.J. 144 (1976), makes this clear too. An attorney has a duty to investigate what his case is about. An attorney has a duty to diligently and zealously pursue his clients claim. (See RPC 1.3). It is inarguable that an attorney whose superficial grasp of a matter causes the case to be lost is guilty of negligence, even gross negligence. Matter of Youmans, 118 N.J. 622 (1990). The treatise writers are equally clear on this point as well. An attorney is not the guarantor of each judgment made – but an attorney who makes poor judgments based upon a superficial grasp of a case or due to its inadequate preparation is guilty of malpractice. An attorney who does not do his work may not hide behind the judgment rule, as if all wrong judgments were protected. The ultimate issue in a legal malpractice action is whether the lawyer's decisions were a reasonable exercise of professional judgment. Prince v. Garruto, Galex & Cantor, 346 N.J.Super. 180 (App. Div. 2001).

The questions for the jury in this case are easy to articulate. Was this case lost due to wrong-headed judgments fairly made? Or was the case lost due to the inadequate preparation by Eisenberg and inadequate discovery done?

In either case, the inquiry is entirely whether the lawyer acted reasonably and diligently before he exercised his judgment. As stated in Model Jury Charge, 5.37:

> An attorney cannot be held liable for malpractice so long as he/she employs such judgment as is allowed by the standards of accepted legal practice . . . . but an attorney who departs from standard legal practice cannot excuse himself/herself from the consequences by saying it was an exercise of his/her judgment. If the exercise of an attorney's judgment causes him/her to do that which standard legal practice forbids, the attorney would be guilty of malpractice. Similarly, an attorney whose judgment causes him/her to omit doing something which in the circumstances is required by standard legal practice is also guilty of malpractice.

To a reasonable degree of certainty the failures on Eisenberg's part at and before trial as well as his predecessors during discovery constituted a whole host of departures from accepted standards of practice which together was a substantial contributing factor to the unfavorable verdict and judgment entered against Carbis. This case was lost due to the inadequate preparation and the failings of discovery or, stated differently, to a reasonable degree of certainty this case would have been won if tried by a lawyer who had prepared adequately for trial, consistent with the standard of care.

I can also say to a reasonable degree of certainty that the award was far too high because of the failure of the firm to hire experts to evaluate the many Carr injuries and review his wage

loss claim. The other defendants had done this but once they were dismissed, Eisenberg no longer had an expert to describe Carr's injury. An orthopedist would have no doubt wanted to see Carr's records from his second fall, his car accident or his many claims of injury after he had left the doctor's care and begun to drive a truck 6 hours per day and unload product[9]. Assuming liability were established, which was by no means clear, a surgical disc with an average result usually is worth in the range of $50,000 to $150,000.

An attorney whose trial performance is inadequate, inconsistent with the standard of care, is answerable in malpractice for this just as he would be lax in the preparation of a contract or in a sloppily done closing on real estate. The fact that the jury decided against the defendant is not a defense here; in fact, it is further proof of the inadequacy of the work done. It is therefore my opinion as indicated above that the defendant attorneys deviated from accepted standards of practice as more fully set forth above and those deviations constituted substantial causative factors in the unfavorable result that was achieved.

Thank you for the opportunity to review this very interesting matter. I stand ready to testify on behalf of your client should that be necessary.

Very truly yours,

Bennett J. Wasserman

BJW/slf
Enclosure-CV

[9] Testimony like this would not only have lessened the damage award but would have undercut Carr's credibility even further.