UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

BEVERLY BROSIUS,

Plaintiff,

v. **Case No. 6:20-cv-1136-ACC-DCI**

THE HOME DEPOT INC. and TRICAM INDUSTRIES, INC.,

Defendants.

ORDER

This cause comes before the Court on Defendants The Home Depot Inc. and Tricam Industries, Inc.' *Daubert* Motion to Exclude Plaintiff's Expert John Morse (Doc. 34) and Motion for Summary Judgment. (Doc. 36). Plaintiff has filed Responses to both Motions arguing that her expert should not be excluded and summary judgment should be denied because the step stool at issue had design and warning defects. (Docs. 39, 40). Defendants filed a Reply to these issues. (Doc. 45).

Because the Court finds that the testimony of Plaintiff's expert must be excluded, Plaintiff cannot prove a design defect. Plaintiff also cannot prove a warning defect because she did not read the label and never made a claim regarding placement of the warning label. For the reasons set forth below, summary judgment will be granted on Plaintiff's negligence and strict liability claims against Defendants.

I. BACKGROUND

Plaintiff Beverly Brosius brings this products liability case arising out of injuries she sustained while using a HBPRO3-15 step stool branded as a Gorilla Ladders Stepstool ("the Stepstool").[1] (Doc. 36-1, Photograph; Doc. 34-2, Morse Rep. at 3). Plaintiff fell from the Stepstool while using it to replace a "shade sail" covering her back patio following Hurricane Irma. (Doc. 39-1, Brosius Dep., at 19-20, 52-53).

The Stepstool is rated for 250 pounds, has three steps made of plastic, the top step one of which is a platform standing area that is 28 inches above the floor; the frame and the supports and braces are made of steel. (Doc. 34-2 at 3). There are four feet on the Stepstool and a latching system designed to keep the platform in the deployed position once it is engaged. (*Id.*). The latch mechanism uses a spring to engage the latch when the latch achieves the proper position; a secondary action is not required to put the latch into its locked position. (Ver Halen Rep., Doc. 36-2 at 3). The latch is located under the top step/platform and no portion of it is visible from the top of the platform. (Doc. 34-2 at 3). The latch fits down over a horizontal brace running between the rear rails or legs of the step stool; all three steps are hinged near the front of the step on the front section of the Stepstool. (*Id.*). The rear of the two lower steps are held up by a pair of bars attached to the middle of the top

[1] Defendants describe the HBPRO3-15 model as a "Stepstool," while Plaintiff uses the traditional two-word phrase "step stool."

step/platform. (*Id*.). All three steps tilt together when the step stool is being folded up for storage or unfolded into the deployed position. (*Id*.; Doc. 36-2 at 2).

The steps of the step stool have a curved profile on the front edge when viewed from a bird's eye view. (Doc. 34-2 at 3). The front edge of the steps comes closest to the pivot point at the center of each step; the overhang gets larger moving outward from the center, reaching about 1.25 inches from the front edge of the step to the pivot point. (*Id*.).

There is a warning label with many instructions located on a large sticker placed under the second step of the Stepstool. (*Id*. at 10). One of these instructions (number 2 under PROPER SETUP) is to "Make sure step stool is fully open, spreaders secure, pail shelf in position." (*Id*). There is no warning that the step stool can fold up while in use if it is not locked. (*Id*. at 14).

(Doc. 40 at 14).

Tricam manufactured and sold 133,506 units of the HBPRO3-15. (Doc. 36-6 ¶ 3, Simpson Aff.). The ladder design has been tested and meets the requirements of the American National Standards Institute's (ANSI) A14.2-2007, the standard for portable metal ladders that covered this Stepstool at the time it was manufactured in 2014.[2] (Doc. 36-2 at 2, 4; Ver Halen 2014 Tricam Ind. Test Rep., Doc. 36-5). It also

[2] The Stepstool is from Lot number L-318667 and has a date of manufacture of November of 2014. (Doc. 34-2 at 3).

met the requirements of the applicable OSHA standards. (Doc. 36-2 at 2). There have been no claims similar to Plaintiff's that this ladder design self-folded. (*Id*. at 3).

Plaintiff purchased the subject Stepstool from a Home Depot location in Lake Mary, Florida in 2015. (Doc. 36-3 at 13).[3] Plaintiff, who is 5'5" tall, was using the Stepstool to reach an eyebolt underneath the eave of her house located 8'6" above her concrete patio, so that she could attach the clip connected to the sun shade. (*Id.* at 19, 27; Doc. 36-2 at 2). On the date of the incident, September 14, 2017, she used the Stepstool between 11:30 a.m. and noon while the weather was clear, hot, and not windy. (Doc. 36-3 at 19, 27). She did not read the Stepstool's warnings and instructions before using the Stepstool for the first time, and she did not read the Stepstool's warnings or instructions on the day of her fall. (*Id*. at 13-14).

At the time of the incident, Plaintiff had opened the Stepstool "all the way" and placed all four legs of the Stepstool on the cement patio in her backyard. (*Id.* at 32-33). As she started to ascend with the clip on the rope attached to the sun shade in her right hand, she put her right foot on the first step of the Stepstool, and then her left foot on the second step of the Stepstool. (*Id*. at 34). Then "everything moved," it "slipped" and she fell. (*Id*. at 35). "All I know is I stepped, it slid, something hit

[3] Plaintiff also filed a copy of her deposition attached to her response to summary judgment. (Doc. 39-1 at 1-35). Citations are to the deposition pages in the identical copy of Plaintiff's deposition filed by Defendants. (Doc. 36-3 at 1-35).

me, and I fell" so that she "ended up on the ground." (*Id*. at 38, 43). When the Stepstool slipped, it went forward and to the side, and Plaintiff fell backwards. (*Id*. at 37). After Plaintiff fell, the ladder was to her right. (*Id*. at 40). Plaintiff "thought it had started to close up" and "it had come together some"; the Stepstool was not closed and had not "collapsed," but it had come "inward." (*Id.* at 41-42). When she fell, she dislocated her left knee and fractured her left tibia plateau. (*Id.* at 39). There was "no damage" to the ladder beyond "minor scratches" on the right side of the step stool consistent with it falling on the concrete slab on its right side, and it is usable without difficulty. (Doc. 36-2 at 2).

On June 8, 2020, Plaintiff filed suit against Defendants Tricam Industries, Inc. and The Home Depot, U.S.A., Inc. in state court and the Defendants removed the case to this Court on June 26, 2020. (Doc. 1). Plaintiff asserts claims against Defendants for strict liability (Counts I and III) and negligence (Counts II and IV) based on design defects and failure to warn theories[4] after she fell and was injured while using the Stepstool designed by Tricam that she purchased at The Home Depot store.

Plaintiff retained John S. Morse, Ph.D., P.E. as an expert witness to prepare a report based on his examination and testing of the Stepstool and the incident scene.

[4] Plaintiff originally asserted claims under a manufacturing defect theory, however, she abandoned this theory in her Response to Defendants' Motion for Summary Judgment. (Doc. 40 at 15 ("Plaintiff hereby withdraws her strict liability and negligence claims against each Defendant to the extent these claims are premised on the theory that the subject step stool is defective in its manufacture or assembly.").

(Doc. 34-2, Morse Rep.). He opines in his October 23, 2020 Report,[5] that the Stepstool was designed in a "defective and unreasonably dangerous" condition because the force required to engage the safety latch on the Stepstool is "too large," the Stepstool's overhang on the steps is "too large" and/or "too high" and, in his opinion, safer designs exist. (Doc. 34-2 at 13 ¶¶ 3, 4, 8, 9). The Morse Report was served on Defendants on November 11, 2020. (Doc. 41 at 7).

The Court's Case Management and Scheduling Order set Plaintiff's expert disclosure deadline as July 1, 2021 and the parties' discovery deadline as September 1, 2021. (Doc. 18). After the discovery deadline, on September 23, 2021, Plaintiff attempted to supplement her expert witness disclosure for Dr. Morse via an Amended Disclosure, stating that "[a] complete report of all opinions held by the above expert witness to date, the basis and reasons for each opinion, the facts and data considered, any exhibits that will be used and the expert's Rule 26 materials *have been provided* to Defendants." (Doc. 29 (emphasis added)).[6]

However, after Defendants filed their Motion for Summary Judgment (Doc. 36) and *Daubert* Motion to exclude Dr. Morse's opinions (Doc. 34), on October 1, 2021,[7] Plaintiff filed a new affidavit by Dr. Morse, dated October 20, 2021, to

[5] Plaintiff moved to limit the testimony of Defendants' expert, Jon Ver Halen. (Doc. 43). The Court need not reach this issue because Dr. Morse's opinions regarding defective design and warning will be excluded.

[6] Magistrate Judge Irick struck the Amended Disclosure as improperly-filed discovery on October 1, 2021. (Doc. 35).

[7] Defendants did not depose John Morse.

"supplement" his year-old Report from October 23, 2020. (Doc. 39-2). On November 4, 2021, Defendants filed their Reply in support of their summary judgment motion. (Doc. 45).[8]

II. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate when the moving party demonstrates "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant must satisfy this initial burden by "identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Norfolk S. Ry. Co. v. Groves*, 586 F.3d 1273, 1277 (11th Cir. 2009) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). In response, "a party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of [her] pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248, 256 (1986) (citation and internal quotation marks omitted).

The movant is entitled to summary judgment where "the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect

[8] The parties also filed Motions in Limine (Docs. 41, 42, 44) and Plaintiff filed a Daubert Motion to exclude the opinions of Defendants' Expert Jon Ver Halen (Doc. 43) which the Court does not reach given the grant of summary judgment to Defendants.

to which she has the burden of proof." *Celotex*, 477 U.S. at 323. In deciding whether to grant summary judgment, the Court resolves all ambiguities and draws all permissible factual inferences in favor of the non-moving party. *Anderson*, 477 U.S. at 255; *Shotz v. City of Plantation, Fla.*, 344 F.3d 1161, 1164 (11th Cir. 2003) (citation omitted).

Federal courts cannot weigh credibility at the summary judgment stage. *See Feliciano v. City of Mia. Beach*, 707 F.3d 1244, 1252 (11th Cir. 2013) ("Even if a district court believes that the evidence presented by one side is of doubtful veracity, it is not proper to grant summary judgment on the basis of credibility choices." (citation and internal quotation marks omitted)). Therefore, the Court will "make no credibility determinations or choose between conflicting testimony, but instead [will] accept [the non-moving party's] version of the facts drawing all justifiable inferences in [the non-movant's] favor." *Burnette v. Taylor*, 533 F.3d 1325, 1330 (11th Cir. 2008). Notwithstanding this inference, "[t]here is [still] no genuine issue for trial unless the non-moving party establishes, through the record presented to the court, that [she] is able to prove evidence sufficient for a jury to return a verdict in [her] favor." *Cohen v. United Am. Bank of Cent. Fla.*, 83 F.3d 1347, 1349 (11th Cir. 1996).

III. ANALYSIS

Plaintiff asserts negligence and strict liability claims against Defendants for the design and sale of the Stepstool in a "defective and unreasonably dangerous

condition." (Doc. 1-1 ¶¶ 37-48, 61-73). Strict liability in Florida includes three distinct components. "[A] product may be defective by virtue of a design defect, a manufacturing defect, or an inadequate warning." *Jennings v. BIC Corp.*, 181 F.3d 1250, 1255 (11th Cir. 1999) (quoting *Ferayorni v. Hyundai Motor Co.*, 711 So.2d 1167, 1170 (Fla. 4th DCA 1998)); *Pinchinat v. Graco Children's Prod., Inc.*, 390 F. Supp. 2d 1141, 1146 (M.D. Fla. 2005).

A. **Design Defect Claims**

Under Florida law, a strict products liability action based upon design defect requires the plaintiff to prove that (1) a product (2) produced by a manufacturer (3) was defective or created an unreasonably dangerous condition (4) that proximately caused (5) injury. *McCorvey v. Baxter Healthcare Corp.*, 298 F.3d 1253, 1257 (11th Cir. 2002); *West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 87 (Fla. 1976).[9] To prove any products liability claim sounding in negligence, whether negligent design or the negligent failure to provide adequate warnings or instructions, a plaintiff must establish (1) that the defendant owed a duty of care toward the plaintiff, (2) that the defendant breached that duty, (3) that the breach was the proximate cause of the plaintiff's injury, and (4) that the product was defective or unreasonably dangerous. *Cooper v. Old Williamsburg Candle Corp.*, 653 F. Supp. 2d 1220, 1226 (M.D. Fla. 2009); *Marzullo v. Crosman*, Corp., 289 F.Supp.2d 1337, 1342 (M.D. Fla. 2003)

[9] The parties stipulate that Florida law applies to Plaintiff's product liability claims in this diversity case, 28 U.S.C. 21 1332. (*See* Doc. 52 at 1, 10).

(citing *Stazenski v. Tennant Company*, 617 So.2d 344, 345–46 (Fla. 1st DCA 1993)). The plaintiff has the burden of proof on each element. *Cooper*, 653 F. Supp. 2d at 1226.

For Plaintiff to establish her claims for negligent design and strict liability, she must demonstrate that the Stepstool was defective. *Alvarez v. General Wire Spring Co*., No. 8:07-CV-1319-T-33TGW, 2009 WL 248264, *4 (M.D. Fla. Feb. 1, 2009) (*Marzullo*, 289 F.Supp.2d at 1342). "Design defects must be proven by expert testimony." *Id.* (citing *Drury v. Cardiac Pacemakers, Inc.*, No. 8:02CV933T-17MAP, 2003 WL 23319650, *4 (M.D. Fla. June 3, 2003)); *Savage v. Danek Medical, Inc*., 31 F. Supp. 2d 980, 983–84 (M.D. Fla. 1999) (citing to multiple cases).

The Court is required to act as a "gatekeeper," admitting expert testimony only if it is reliable and relevant. *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993); *Torres v. Carnival Corp*., 635 F. App'x 595, 599 (11th Cir. 2015).[10]. Federal Rule of Evidence 702, which governs whether to admit expert testimony, provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the

[10] Unpublished opinions of the Eleventh Circuit constitute persuasive, and not binding, authority. See 11th Cir. R. 36-2 and I.O.P. 6.

> witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Supreme Court clarified this rule when it abandoned the previous *Frye* Test. *Daubert*, 509 U.S. at 587. Explaining how a court should approach the admissibility of an expert's testimony, the Supreme Court held that a trial judge "must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Id.* at 589. In determining reliability, a court focuses not on the expert's conclusions but rather on his principles and methodology. *Id*. at 594-95; *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 154 (Stevens, J., concurring in part and dissenting in part) ("*Daubert* quite clearly forbids trial judges to assess the validity or strength of an expert's scientific conclusions, which is a matter for the jury." (footnote omitted)).

The Eleventh Circuit in applying *Daubert* has held that a court may admit into evidence expert testimony if the proponent of the expert testimony, when challenged, proves by a preponderance of the evidence that:

> (1) the expert is qualified to testify competently regarding matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.

See Monster Energy Co. v. Consolidated Distributors, Inc., No. 6:11-cv-329-Orl-22DAB, 2012 WL 12904168, at *1–2 (M.D. Fla. Dec. 14, 2012) (citing *City of*

Tuscaloosa v. Harcos Chems. Inc., 158 F.3d 548, 562 (11th Cir. 1998)). The burden of making this showing is on the party offering the expert, and admissibility must be shown by a preponderance of evidence. *McCorvey v. Baxter Healthcare Corp*., 298 F.3d 1253, 1257 (11th Cir. 2002) (citations omitted).

The Court does not evaluate the credibility of opposing experts or the persuasiveness of competing scientific studies. *Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK, Ltd.*, 326 F.3d 1333, 1341 (11th Cir. 2003) (internal citations omitted). "[I]t is not the role of the district court to make ultimate conclusions as to the persuasiveness of the proffered evidence." *Id.* The Court's duty is limited to "ensur[ing] that the fact-finder weighs only sound and reliable evidence." *Allison v. McGhan Med. Corp*., 184 F.3d 1300, 1311 (11th Cir. 1999).

1. Plaintiff's Expert's Opinion

Dr. Morse's Report dated October 23, 2020 (the "Report") describes his opinions to "a reasonable degree of engineering probability" based on "material examined to date" with the possibility they will "be augmented and/or modified" if more material is examined. (Doc. 34-2). Although Plaintiff also relies in her Responses on Dr. Morse's Affidavit prepared one year later, on October 20, 2021, (Doc. 40-2), the Court does not consider the opinions expressed in the 2021 Affidavit because Plaintiff did not timely produce Morse's opinions and methodologies contained therein in accordance with the Court's Case Management and Scheduling Order ("CMSO").

Under Federal Rule of Civil Procedure 26, the Court can establish a deadline for expert disclosures. Fed. R. Civ. P. 26(a)(2)(C). The CMSO in this case set Plaintiff's expert disclosure deadline as July 1, 2021 and the discovery deadline as September 1, 2021 and required:

> [T]he party shall fully comply with Federal Rule of Civil Procedure 26(a)(2) and 26(e). Expert testimony on direct examination at trial will be limited to the opinions, bases, reasons, data, and other information *disclosed in the written expert report disclosed* pursuant to this Order. Failure to disclose such information may result in the exclusion of all or part of the testimony of the expert witness.

(Doc. 18 at 3). Rule 16(b) authorizes the district court to control and expedite pretrial discovery through its scheduling order and gives the court "broad discretion to preserve the integrity and purpose of the pretrial order, including the exclusion of evidence as a means of enforcing the pretrial order." *See Companhia Energetica Potiguar v. Caterpillar Inc*., No. 14-CV-24277, 2016 WL 3102225, at *5 (S.D. Fla. June 2, 2016) (citation omitted).

In addition, the Eleventh Circuit has held that a supplemental expert report may be excluded as untimely pursuant to Federal Rule of Civil Procedure 37(c) if the proponent of the expert fails to serve the Report prior to the deadline imposed. *Corwin v. Walt Disney Co*., 475 F.3d 1239, 1252 (11th Cir. 2007) (affirming trial court's exclusion of affidavits for untimeliness which supplemented experts' prior reports and were filed four months after expert report deadline set in court's scheduling order) (citing *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287,

1323 (11th Cir. 2003)); *Walker v. Yamaha Motor Co*., 2016 WL 7325525, *2 (M.D. Fla. Jan. 20, 2016) ("Affidavits from expert witnesses, which are served after the deadline for disclosing expert reports and also contain new opinions and/or restructure the original expert opinions may be stricken as untimely."); *cf. Travelers Prop. Cas. Co. of Am. v. All-S. Subcontractors, Inc*., No. CV 17-0041-WS-B, 2018 WL 1787883, at *10 (S.D. Ala. Apr. 13, 2018) (denying motion to exclude expert affidavit on untimeliness grounds where the affidavits did not offer any new opinions from those disclosed previously).

In this case, Morse's October 20, 2021 Affidavit was filed more than three months after Plaintiff's July 1, 2021 expert disclosure deadline had passed, and more than six weeks after the September 1, 2021 discovery period closed. The CMSO had established these deadlines on July 31, 2020, giving Plaintiff a year to serve or supplement her expert's report before the deadline. (*See* Doc. 18 at 1-2). "[W]hen 'a party fails to provide information or identify a witness as required by [Fed. R. Civ. P.] 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." *Mitchell v. Ford Motor Co.*, 318 F. App'x 821, 824 (11th Cir. 2009) (affirming exclusion of testimony of expert witness where the plaintiffs failed to fully disclose the scientific bases for his expert opinions or supplement the insufficient disclosures for seventeen months) (citing Fed. R. Civ. P. 37(c)(1)).

In this case, Morse's Affidavit was filed only after Defendants had already filed their *Daubert* Motion to exclude his opinions and their Motion for Summary Judgment, with both documents pointing out the dearth of explanation of the methodologies Morse used to reach his opinion the Stepstool was defective. Plaintiff cannot belatedly introduce an affidavit from her expert well after the discovery deadline to patch the holes in the expert's methodology within in his original Report, and only after Defendants have filed their Motion to exclude his testimony. *See, e.g.*, *Brown v. NCL (Bahamas) Ltd.*, 190 F. Supp. 3d 1136, 1140 (S.D. Fla. 2016) (excluding testimony of expert where plaintiff had violated Rules 26(a)(2) by failing to provide a complete statement of all opinions expert would express and the basis and reasons for them and violated Rule 26(e) for failing to timely supplement or correct his initial evaluation which deprived the defendant of an opportunity to arrange for a targeted rebuttal).

Thus, the Court's *Daubert* analysis of Dr. Morse's opinions will be limited to his methodologies and the opinions set forth in his timely produced October 23, 2020 Report. Dr. Morse opines in pertinent part:

> 2) It is my opinion that the steps tilted backward while Ms. Brosius was climbing the step stool, causing her to fall.
>
> 3) It is my opinion that the force to engage the latch on the incident step stool is too large.

> 4) It is my opinion that the step overhang on the incident step stool is too high.[11]
>
> 5) It is my opinion that there exist safer alternative designs that have substantially smaller step overhangs and/or have latches that require substantially less force to latch.
>
> 6) It is my opinion that these safer alternative designs were technologically and economically feasible at the time of manufacture of the incident step stool.
>
> 7) It is my opinion that the large step overhang and large latching force requirement are defects in the incident step stool.
>
> 8) It is my opinion that if the features on the safer alternative designs for step overhang and latching force had been present on the incident step stool, this incident would not have occurred.
>
> 9) It is my opinion that the incident step stool is defective and unreasonably dangerous.
>
> 10) It is my opinion that the defects in the step stool caused [Plaintiff's] fall and injuries.

(Doc. 34-2 at 13). His review of materials included examination, photographs, measurements, testing of incident step stool and exemplar step stools; photographs and measurements of incident scene; virtual examination of incident scene; literature concerning ladder/climbing equipment recalls; and industry-related resources. (*Id.* at 14).

2. Daubert and Rule 702 Requirements

Defendants contend that Dr. Morse should not be permitted to testify based upon *Daubert* and the requirements of Rule 702. They argue that his opinions fail to

[11] Dr. Morse discusses the overhang as being "too large" (at 1.25 inches) rather than "too high" in ¶ 7 and in other sections of his Report.

meet the standard required by *Daubert* and should be excluded because he employed no methodology, much less a scientifically reliable one, and his "purely visual inspection" of the Stepstool is not a generally accepted method of determining defect or causation in the scientific community. (Doc. 34 at 2). Defendants further contend that Dr. Morse also failed to conduct any background research or scientifically verify his theories; failed to seek peer review of the theories; and failed to calculate an error rate for the theories.[12](Doc. 34).

Plaintiff responds that Dr. Morse employed a sufficiently reliable methodology employing the scientific method and that Defendants are merely faulting Dr. Morse for not employing their own preferred methodology. (Doc. 39 at 3). Plaintiff contends that Defendants' arguments about Dr. Morse's methodology go to the weight of his opinions, not their admissibility, and his opinions will greatly assist the trier of fact in this case. (*Id.*).

The Court has reviewed Dr. Morse's October 23, 2020 Report to determine if his expert witness opinions meet the requirements set forth by Daubert and Rule 702 by a preponderance of the evidence. The Court addresses the motions and the merits, taking up each argument in turn.

a. Qualifications

[12] Defendants criticize Morse's October 20, 2021 Affidavit for stating that it is not possible to calculate an "error rate" for the "entire process" of "fact gathering, body of knowledge and analysis in this instance." However, the Court did not consider the October 20, 2021 Affidavit.

Dr. Morse holds a Ph.D. in mechanical engineering from Louisiana State University; he is a Licensed Professional Engineer in five states and is a member in several mechanical engineering societies; he has authored more than thirty scientific articles in peer-reviewed journals and authored presentations for engineering conferences. (*See* Doc. 39-3). His curriculum vitae ("CV") lists "design/analysis experience" in a variety of engineering subjects from shopping cart design safety to hazardous waste minimization. (*Id.* at 2).

Federal Rule of Evidence 702 permits a person to qualify as an expert based upon knowledge, skill, experience, training, or education. *United States v. Frazier*, 387 F.3d 1244, 1260–61 (11th Cir. 2004). Whether a witness is qualified as an expert "requires the trial court to examine the credentials of the proposed expert in light of the subject matter of the proposed testimony." *Jack v. Glaxo Wellcome, Inc.*, 239 F.Supp.2d 1308, 1314–16 (N.D. Ga. 2002). "This inquiry is not stringent, and so long as the expert is minimally qualified, objections to the level of the expert's expertise [go] to credibility and weight, not admissibility." *Id.* (citation omitted).

Defendants do not challenge Dr. Morse's education or his general mechanical engineering qualifications based on his CV. Rather, they argue that Dr. Morse has no specific experience in manufacturing or designing ladders (Doc. 34 at 5). However, Morse's CV lists "design/analysis experience" specifically in a variety of "ladders" which include: "articulated, extension, fixed, *step*, orchard, combination, telescoping, folding stairways, rolling stairs, accessories." (*Id.* at 16) (emphasis

added). His Report also states that he has investigated more than "525 ladder and climbing equipment accidents involving extension ladders, step ladders, stepladders, articulated ladders, step stools, orchard ladders, fixed ladders, telescoping ladders, combination ladders, rolling ladder stands, retracting stairways, fixed stairways and scaffolds." (*Id*. at 2). He has taught seven seminars on human factors to engineering students at the University of Arkansas-Fort Smith, including seminars about warnings. (*Id*. at 2-3). His CV also lists two co-authored publications on extension ladder safety in 1999 and 2004. (Doc. 34-2 at 17).

In *Rupolo v. Oshkosh Truck Corp*., the district judge rejected the manufacturer's argument that the plaintiff's expert was unqualified to testify about ladder truck where the expert had never designed a truck or a ladder for a truck and had never worked for a truck manufacturer. 749 F. Supp.2d 31 (E D. 2010). The judge found that the expert was qualified because he had investigated more than 100 accidents involving falls from ladders, had published technical papers in peer-reviewed journals dealing with ladder safety and biomechanics, taught courses in mechanics and design at Columbia University, had achieved the highest level of membership in the American Society of Mechanical Engineers, and had been a full voting member of ANSI's Ladder Safety Committee for over a decade. *Id*. at 40. The court found that, with "a broad educational background, he can through reading, calculations, and reasoning from known scientific principles make himself very much an expert in the particular product even though he has not had actual

knowledge in its manufacture." *Id*. (quotation marks omitted)*; see Lappe v. Am. Honda Motor Co.,* 857 F.Supp. 222, 226-27 (N.D.N.Y. 2000) ("[A]n expert witness is not strictly confined to his area of practice, but may testify concerning related applications; a lack of specialization affects the weight of the opinion, not its admissibility."). In this case, Dr. Morse is qualified to opine about the Stepstool without having had specific design and manufacture experience.

However, accepting an expert's qualification to testify competently does not guarantee that his testimony is admissible. *See Oliver v. City of Orlando*, 2011WL 2174010, *4 (M.D. Fla. May 31, 2011) (Antoon, J.). *Daubert* and Rule 702 require that courts apply their gatekeeping function to an expert to determine if the testimony is scientifically valid and whether the reasoning or methodology can be applied to the facts at issue. *Id*. (citing *Daubert*, 509 U.S. at 592).

b. Reliability

District courts "have substantial discretion in deciding how to test an expert's reliability." *Rink v. Cheminova, Inc*., 400 F.3d 1286, 1292 (11th Cir. 2005) (quoting *United States v. Majors*, 196 F.3d 1206, 1215 (11th Cir. 1999)). In assessing the reliability of an expert's opinions, courts consider: (1) whether the expert's theory can be and has been tested; (2) whether the theory has been subjected to peer review and publication; (3) the known or potential rate of error of the methodology; and (4) whether the technique is generally accepted in the proper scientific community. *McDowell v. Brown*, 392 F.3d 1283, 1298 (11th Cir. 2004) (citing *Daubert*, 509 U.S.

at 595). These factors apply most comfortably in cases involving scientific testimony, but may offer little help in other cases, particularly those involving non-scientific experts. *See Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 150-51 (1999). Accordingly, the factors may guide a district court's reliability inquiry, but the district court ultimately has "broad latitude" as to how it determines reliability. *Id*. at 152. Whatever factors are considered, the Court's focus should be solely on principles and methodology, not the conclusions they generate. *McDowell*, 392 F.3d at 1298; *Allison v. McGhan Medical Corp.*, 184 F.3d 1300, 1312 (11th Cir. 1999) (internal quotes omitted). Another judge of the Middle District has cautioned:

> It is therefore error to conflate admissibility with credibility, as by considering the relative weight of competing experts and their opinions. *Quiet Technology*, 326 F.3d at 1341 . . . . With respect to the third reliability criterion of Rule 702, errors in an expert's application of a reliable method generally implicate credibility rather than reliability. *See Quiet Technology*, 326 F.3d at 1345 46 (using incorrect numbers in a reliable formula is not grounds for exclusion under *Daubert*).

Furmanite America, Inc. v. T.D. Williamson, Inc., 506 F.Supp.2d 1126, 1130 (M.D. Fla. 2007) (Fawsett, J.).

Defendants challenge the reliability of Dr. Morse's opinions, arguing that he is an "expert for hire." Defendants argue that his opinion about the design of the Stepstool in this case should be subject to a more rigorous reliability inquiry because his opinions were generated solely for litigation and were not the product of independent research. They contend that Dr. Morse has general litigation experience in a wide variety of products, 62 categories which include ladders, shopping carts,

"patent writing and consultation" for "undisclosed types of products, oil/gas industry products, hazardous waste incineration" products, "alternate fuels for internal combustion engines, bioremediation of hazardous waste, waste minimization, & computational fluid dynamics." (Doc. 34 at 6 (citing *Tokio Marine & Fire Ins. Co. v. Grove Mfg. Co.,* 958 F.2d 1169, 1174-75 (1st Cir. 1992) ("In a field like accident reconstruction that is more art than science, the trial judge has particular liberty to eschew 'professional witnesses.'"); *Newell Rubbermaid, Inc. v. Raymond Corp.,* 676 F.3d 521, 527 (6th Cir. 2012) (an opinion prepared solely for litigation is a "[r]ed flag[] that caution[s] against certifying [the] expert.")). Plaintiff does not directly respond to this argument other than to argue Morse's methods were reliable.

Rule 702 lists in the advisory committee notes additional factors for courts to consider, which include: "[w]hether the expert is proposing to testify about matters growing naturally and directly out of research he has conducted independent of the litigation, or whether he has developed his opinion expressly for purposes of testifying"; "[w]hether the expert is being as careful as he would be in his regular professional work outside his paid litigation consulting"; and whether he has "unjustifiably extrapolated from an accepted premise to an unfounded conclusion." Fed. R. Evid. 702, advisory committee notes; *see Smith v. Sears Roebuck & Co*., 232 F. App'x 780, 783 (10th Cir. 2007) (holding that it was proper for the district judge as part of its "gatekeeping role" to weigh whether an expert witness was qualified but had "many of the attributes of an 'expert for hire'" rather than someone with

"independent credentials in the field of engineering").

As the Sixth Circuit has explained, if a proposed expert's "testimony is not based on independent research, the party proffering it must come forward with other objective, verifiable evidence that the testimony is based on scientifically valid principles." *Johnson v. Manitowoc Boom Trucks, Inc*., 484 F.3d 426, 434–35 (6th Cir. 2007) (quotation and citation omitted). Additionally, "if a proposed expert is a 'quintessential expert for hire,' then it seems well within a trial judge's discretion to apply the *Daubert* factors with greater rigor." *Id.* at 435.

In this case, Dr. Morse's CV lists a great deal of experience with ladders, especially extension ladders, and general ladder safety, as well as audible warning devices for a transit authority, but he does not set forth in his Report his specific experience, independent research, or publications with testing step stools (or step ladders) for safety. (Doc. 34-2 at 2 "Qualifications"). *See, e.g., Hayes v. MTD Products, Inc.*, 518 F. Supp. 2d 898, 901 (W.D. Ky. 2007) (holding that although the plaintiff's expert was "well-credentialed, with his service on the Consumer Product Safety Commission and years of consulting work," he was not an expert on riding lawn mowers but on "consumer product safety generally, manufacturer and seller responsibility, and the consideration of dangerous products" by the Commission); *Bowers v. Norfolk S. Corp*., 537 F. Supp. 2d 1343, 1355 n.8 (M.D. Ga. 2007) (holding that orthopedic surgeon who practiced 460 miles away out of state, did not treat the plaintiff, did not usually perform back surgery, and had seen "hundreds" of

patients on referral from attorneys for plaintiffs in lawsuits, was a "hired gun expert"), *aff'd*, 300 F. App'x 700 (11th Cir. 2008). Therefore, it is appropriate in this case to "apply the *Daubert* factors with greater rigor" to Dr. Morse's opinions.

Defendants argue that Dr. Morse's October 23, 2020 Report (Doc. 34-2) does not sufficiently explain the methodology he used to reach his conclusions regarding the "too large" step overhang and the "excessive" latch pressure.[13] They argue that he failed to perform ANSI A14.2 tests on an exemplar ladder, and despite the prevalence of ladder testing, and he did not provide any articles or papers that show that other engineers in the ladder industry rely on the force tests Morse performed to determine whether a step stool's platform is defective because it requires "too much" force to latch of the steps have too much overhang. *See Kumho Tire Co*., 526 U.S. at 157 (excluding expert's testimony because his methodology in analyzing the data obtained in his visual/tactile inspection, and the scientific basis for such an analysis was unreliable where he failed to show that other tire experts used his method or that industry articles or papers validated his approach).

The "Analysis of Incident" section of Dr. Morse's Report is based on Plaintiff's description of the incident that "the step stool was folding up when she was climbing it":

> In order for the step stool to fold up, the latch must not be latched. Inasmuch as [Plaintiff] was not holding the latch in the open position,

[13] Dr. Morse's October 2021 Affidavit, which attempted to supplement the Report with an explanation of his methodology, is untimely as explained *supra*.

> it must not have latched when she set the step stool up, even though she believed it was latched at the time. Folding of an unlatched step stool can be accomplished by pulling on the top rail or upper portions of the side rail, or by stepping on the overhang of the steps. There is no evidence that [Plaintiff] was pulling on the step stool in a direction to cause it to fold up. The plausible scenario, therefore, is that [Plaintiff] was applying force to the overhang on one or more steps by stepping on them.

(Doc. 34-2 at 5). Dr. Morse's description in the section of his Report on "Safety Engineering" lists general principles from the National Safety Council's Accident Prevention Manual[14] and the "design priority list" of the American Society of Mechanical Engineers.[15] (Id. at 5, 7). He states nothing about the design of step stools generally or the Stepstool in this incident specifically.[16]

In § 9 of his Report, Morse describes his "hazard analysis" of the Stepstool based on his presumption that the folding of a step stool while it is in use is a "failure

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[14] "The first formal step is a hazard evaluation/risk assessment. The process involves five basic steps and an optional sixth step: 1. Establish the boundaries; 2. Identify the hazards; 3. Determine the failure modes that can lead to realization of a hazard; 4. Evaluate the exposure of the hazard; 5. Identify the consequences of realizing the hazard; 6. Find the probability of the hazard being realized." (Doc. 34-2 at 5).

[15] "There are six basic guidelines which a designer can apply in order to maximize the safety level of his products or manufacturing processes. The National Safety Council has published this list in descending order of effectiveness. One should rely upon the highest concept attainable, but if this is not possible, the very next one shown should be used. In brief these are: l. Eliminate the hazard from the product or process by altering its design, material, usage or maintenance method. 2. Control the hazard by capturing, enclosing or guarding it at its source. 3. Train personnel to be aware of the hazard and to follow safe procedures to avoid it. 4. Provide adequate warnings and instructions in appropriate forms and locations. 5. Anticipate common areas and methods of abuse and take steps to eliminate or minimize the consequences associated with such actions. 6. Provide personal protective equipment to shield personnel against the hazard." (Doc. 34-2 at 7).

[16] Dr. Morse's Report summarizes his review of "Advertising for Tricam GLS-3HD-2"—a completely different model of stepstool—which he has not established is relevant to the Stepstool at issue in this case. (Doc. 34-2 § 8).

mode" folding. (*Id*. at 8). He opines:

> The subject step stool has a large overhang on the steps, and also a large actuation force on the latch. The step overhang is about 1.25 inches on the steps on the incident step stool, near the outboard ends. The step stool latch requires about 10 to 11 pounds of force to latch into place, and its condition is not visible from the top surface of the platform/top step. The National Safety Council design priorities were not followed by Tricam in the design of this step stool. Thus the failure mode of the step stool folding while in use was not taken care of. The incident step stool does not follow accepted safe design practices for step stools. Step stools are known to be prone to folding or starting to fold while they are being climbed. Users can step on overhangs on steps and cause the step stool to start to fold. Thus one safe design practice is to eliminate the overhang on the steps or reduce it as low as practical.
>
> The second safe design practice is to use an acceptable latch on the step stool to keep it from folding up while in use. Such latches are used on many step stools. In contrast, the latch on the incident step stool has a fairly powerful spring on it. This spring and the cam design of the latch combine to require substantial force by the user to lock the latch. This high engagement force or resistance to movement can make the user believe that the step stool is fully open, and the latch is locked, when in fact the step stool is not fully locked. If a user is pushing on the platform and then suddenly the platform stops moving even under nearly ten pounds of force, the user may well conclude that the latch has locked and they are simply pushing the platform against the rear crossbar.

(Id. at 8-9). He concludes by opining that "[t]he incident was caused by the defective and unreasonably dangerous step stool manufactured by Tricam." (*Id*. at 12) He opines that the "step overhang is too large"[17] and the "force required to engage the latch is too large. These conditions are both defects in the step stool. These defects were the cause of the step stool folding while in use and the cause of [Plaintiff's] fall

[17] In the "Opinions" section Morse opines—without explanation—that the "step overhang on the incident step stool is too *high*" rather than "too large." (Doc. 34-2 at 13).

and injuries." (*Id.* at 13). However, as Defendants point out, there is no explanation in the Report that describes the methodology Dr. Morse used to reach his conclusions that the "step overhang is too large" or the "force required to engage the latch is too large."[18]

In responding to Defendants' arguments about the lack of Dr. Morse's methodology in his Report, Plaintiff relies almost entirely on Morse's October 20, 2021 Affidavit (Doc. 39 at 7-9). The pertinent portion of Plaintiff's response discussing Morse's methodology cites almost exclusive his Affidavit—a total of fifteen times—and his Report only twice for the conclusions:

> In his report and *affidavit*, Dr. Morse describes in detail, his investigation of the subject step stool and the incident that caused [Plaintiff's] injuries. . . . Dr. Morse describes in detail his physical testing of the subject step stool and several exemplars. *(Morse Aff. ¶ 9, 10).* In accordance with the scientific methodology, Dr. Morse formulated a hypothesis that the failure mode of the subject step stool is the folding of the step stool during use which involves the safety latch, its characteristics, and the step overhangs. *(Morse Aff. ¶ 14).* Dr. Morse tested the latching force of the subject step stool and calculated that the force required to lock the safety latch into place measured between 10 and 11 pounds. *(Morse Aff. ¶ 9-j*). . . . Dr. Morse has gone into detail to explain how the latch force measurements were taken. *(Morse Aff. ¶ 10).* Dr. Morse used a Landtek digital force gauge model FM-204 to take the latch force measurements. *(Id.)* A standard in the engineering field. Prior to conducting the measurements, the gauge Dr. Morse calibrated the gauge using 10-pound and 25-pound Rice Lake ASTM test weights. *(Id.).* To conduct the tests, each step stool tested

[18] Defendants' expert, Jon Ver Halen, points out that "there has been no effort to quantify what could be called excessive force and there is no evidence that ordinary people would not apply a 10 lb. force when opening the ladder" and "the user's weight, predominantly on the back portion of the step would cause the latch to move into its locked position." (Doc. 36-2 at 3). The Court does not assess the credibility of competing opinions at the summary judgment stage. *See Feliciano v. City of Mia. Beach*, 707 F.3d 1244, 1252 (11th Cir. 2013).

was placed on a wooden floor and downward force was applied until the safety latch engaged. *(Id.)*. Dr. Morse conducted multiple force readings to each step stool tested and average the results to ensure accuracy. *(Id.)*.

Contrary to Defendants' arguments, Dr. Morse calculated that the error rate for a measurement of 10 pounds is approximately 0.1 pounds/10 pounds or one percent. *(Morse Aff. ¶ 19)*.

When he had possession of the subject step stool, Dr. Morse physically measured the "overhang" of the steps to be 1.25 inches at its widest point. (Morse Expert Report, pp. 3). Dr. Morse [sic] that his measurements to the overhangs of the steps were accurate to approximately 1/16 inch, so the error rate depends on the size of the measurement. For a measurement of 1.25 inches, the error rate is 1/16 inch divided by 1.25 inches, or 5 percent. *(Morse Aff. ¶ 18)*.

As a result of his analysis, Dr. Morse reached several ultimate conclusions, listed on page 13 of his report. In general terms, Dr. Morse concludes that the subject step stool is defective for several reasons, and that its defective condition caused Ms. Brosius' injuries. After evaluating, testing, and measuring the subject step stool's safety latch and step overhangs, Dr. Morse found that the force to engage the safety latch on the subject step stool is dangerously excessive and the subject step stool's overhang on the steps is too large. (Morse Expert Report, pp. 8-10; *Morse Aff. ¶ 16, 17)*.

Based on his examination/testing, Dr. Morse concluded that the force required to lock the subject step stool's safety latch into place is five to five and half times larger than that of the exemplar tested with the highest latching force. *(Morse Aff. ¶ 12)*. Based on his measurements of the subject step stool and the exemplars measured, the overhang on the subject step stool's steps were twice as large as the exemplar with the largest overhang. *(Morse Aff. ¶ 11)*. As explained in his expert report and affidavit, Dr. Morse concluded that the subject step stool had multiple failure modes. Excessive force required to lock the safety latch being one. *(Morse Aff. ¶ 17)*. The other being the large overhangs which allow the leverage of a user's weight to partially fold the step stool if the safety latch is not locked into place. *(Morse Aff. ¶ 16)*.

(Doc. 39 at 7-9 (emphasis added)).

Plaintiff cannot point to any explanation in Morse's Report of his methodology. She contends that Dr. Morse "applied the same intellectual rigor as any engineer" by "utiliz[ing] the scientific method." (Doc. 39 at 3). However, she does not cite to the portion of Morse's Report which explains the methodology Morse used to determine that "the force to engage the safety latch" was "dangerously excessive" or how he determined that the Stepstool's "overhang" was "too large" or "too high." Instead, she argues that his "methodology was based on his extensive experience as a mechanical engineer in which he has procured over $300,000 in grant and contract funds for research" and his experience in "construct[ing] two laboratories where he has designed, built & tested numerous bioreactor prototypes and test devices." (Doc. 39 at 11). None of those experiences explain the method he used to reach his conclusions about the Stepstool in this case.

Plaintiff argues that "[i]f Defendants had taken the time to depose Dr. Morse, they would have heard about [the testing] from him much earlier in the litigation." (Doc. 39 at 12). However, the burden is on Plaintiff, as the proponent of the challenged expert's testimony, to establish the reliability of the expert's opinions—such as whether the methods could be tested, retested, and the rate of error of the expert's technique. *See McDowell*, 392 F.3d at 1298 (citing *Daubert*, 509 U.S. at 595).

As Defendants point out, "by supplying a supplemental affidavit, [Plaintiff] implicitly concedes" that Morse's Report was insufficient on the issues the October

2021 Affidavit addressed. (Doc. 34-2 at 2 (citing *Fosberg v. Tricam Indus*., Inc., No. 4:20-CV-126-A, 2021 WL 489060, at *2 (N.D. Tex. Feb. 10, 2021) (declining to consider experts' declarations submitted after expert report deadlines). In responding to the *Daubert* Motion, Plaintiff repeatedly cited to Morse's Affidavit, rather than Morse's Report which failed to explain how he reached the conclusions that the force to engage the safety latch was "dangerously excessive" or the overhang was "too large." (Doc. 39 at 8-9 (citing Doc. 34-2 at 38-10) (emphasis added)). Morse's Report completely fails to describe the methodology used to test the force to engage the latch, the size of the step "overhang" leading the step to pivot, or the error rate for either measure. Accordingly, Dr. Morse's opinions on the two design defects—the force to engage the latch was "dangerously excessive" and the "overhang was too large" will not assist the trier of fact and will be excluded.

To survive summary judgment, after the moving party properly demonstrates the absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings to designate specific facts showing that a genuine issue exists for trial. *Celotex*, 477 U.S. at 324. With Dr. Morse's opinion on the design defect excluded, Plaintiff's claims for strict liability for the design defect fail because "[d]esign defects must be proven by expert testimony." *See Alvarez*, 2009 WL 248264 at *4; *Principi v. Survivair, Inc*., 231 F.R.D. 685, 687 (M.D. Fla. 2005) (holding that expert testimony is necessary to prove a product defect); *Kalfakis v. Chickasaw-Oxford Assocs. Ltd. P'ship*, No. 6:07-cv-776-ORL-22KRS, 2008 WL 11435672, at *1 (M.D.

Fla. Jan. 7, 2008) (same) (citing *Alexander v. Danek Med., Inc*., 37 F.Supp.2d 1346, 1349 (M.D. Fla. 1999)). "Absent proof of a [design] defect" in a ladder, there are "no grounds upon which to find defendants negligent." *See Ashby Div. of Consol. Aluminum Corp. v. Dobkin*, 458 So.2d 335, 337 (Fla. 3d DCA 1984). Thus, summary judgment is warranted on Plaintiff's design defect claims. [19]

B. **Inadequate Warning**

1. Wording of the Warning

Defendants also seek summary judgment on Plaintiff's remaining claims that the warnings on the Stepstool were inadequate. Plaintiff argues that summary judgment should be denied because both the adequacy of the warnings and proximate cause are questions of fact that the jury should resolve.

Under Florida law, "[a] product may be in a defective condition due to a . . . defective warning." *Veliz v. Rental Serv. Corp*., 313 F. Supp.2d 1317, 1324 (M.D. Fla. 2003) (Conway, J.) (quoting *Brown v. Glade & Grove Supply, Inc*., 647 So.2d 1033, 1035 (Fla. 4th DCA 1994) (internal citations omitted)). Consequently, a manufacturer may be liable in tort for introducing an otherwise safe product into the stream of commerce solely by virtue of inadequate warnings. *Id*. (citing *Ferayorni v. Hyundai Motor Co*., 711 So.2d 1167, 1170 (Fla. 4th DCA 1998)). In such a case,

[19] To the extent Defendants argue that Plaintiff failed to oppose summary judgment on her negligent design claim by responding with the "consumer expectation" test which applies to only strict liability claims, the Court need not reach this issue given the grant of summary judgment based on the lack of admissible expert evidence of a design defect.

a plaintiff may proceed under a theory of negligence, strict liability, or both. *Id.* (citing *Griffin v. Kia Motors Corp.*, 843 So.2d 336, 339 (Fla. 1st DCA 2003)). "To demonstrate a product liability claim based on failure to warn, a plaintiff must demonstrate that the failure to warn was the proximate cause of the injury." *Cooper v. Old Williamsburg Candle Corp.*, 653 F.Supp.2d 1220, 1225 (M.D. Fla. 2009).

Defendants argue that Plaintiff cannot show that the failure to warn in this case was the proximate cause of her injury because she concedes that she did not read the warning label on the Stepstool. (Doc. 40 at 14). They argue in the alternative that Plaintiff has failed to present sufficient evidence from her expert, Dr. Morse, that the Stepstool contained a warning "defect." Dr. Morse's Report in § 11 singled out one instruction on the warning label which states: "Make sure step stool is fully open, spreaders secure, pail shelf in position." (Doc. 34-2 at 10). He opines that there are "several issues with this instruction," notably, that the language comes from a standard intended for stepladders rather than the one for step stools. He also points out that the Stepstool model does not have a "pail shelf" to "put into position" or "spreader bars," a mechanism attaching the front and rear sections of the step stool meant to be pushed down into position—there is a platform and attaching braces are used instead. (*Id.*).

Dr. Morse opines that the instructions do not state "to make sure the platform is locked in position" or even mention a platform. In his opinion, the word "open" in the first phrase of the instruction refers to getting the front and rear feet as far

apart as they will go, not getting the platform "latched" into position. He opines that "[t]here is no warning that the step stool can fold up while in use if it is not locked. The step stool instructions are defective, inadequate and ineffective."

Defendants contend that Dr. Morse merely criticized the wording of the Stepstool's warnings because they use the word "ladder" instead of "step stool" and because they instruct the user to ensure the step stool is "fully open," even though there are no spreader bars to "open." (Doc. 34-2 at 10). Defendants argue this opinion is inconsistent because he notes later in the Report that another design is used in place of the spreader bars. (*See id.* at 10, 13).

Plaintiff concedes that her failure to read the warning label is fatal to her failure to warn claim based on negligence. However, she argues, Defendants have "misconstrued the nature" of her claim and her failure to read the warning should not bar her strict liability claim for failure to warn. Plaintiff erroneously relies on what appears to be dicta[20] from a footnote in the 1992 opinion in *Stanley Indus., Inc. v. W.M. Barr & Co., Inc*.—which contains no citation to authority—as standing for the proposition that a strict liability claim does not depend on the "failure of the parties to act." 784 F. Supp. 1570, 1573 n.2 (S.D. Fla. 1992). This Court has previously expressed that it finds the reasoning in *Stanley* unpersuasive. *Medina v.*

[20] The district judge specifically noted that the summary judgment motion under consideration "only addressed the liability for negligent failure to warn." *Stanley Indus*., 784 F. Supp. 1573.

Louisville Ladder, Inc., 496 F. Supp. 2d 1324, 1329-30 (M.D. Fla. 2007) (Conway, J.) ("Respectfully, this Court disagrees with *Stanley* and declines to follow it.").

Under Florida product liability law, a manufacturer is required to give appropriate warnings about particular risks of the product which the manufacturer knew or should have known are involved in the reasonably foreseeable use of the product. Florida Pattern Civil Jury Instruction 403.10. Failure to do so constitutes a negligent failure to warn. *Id.* Strict liability failure to warn is related: "A product is defective when the foreseeable risks of harm from the product could have been reduced or avoided by providing reasonable instructions or warnings, and the failure to provide those instructions or warnings makes the product unreasonably dangerous." Florida Pattern Civil Jury Instruction 403.8.

Under either negligent or strict liability failure to warn, the plaintiff must prove damages and proximate cause. Under Florida law, "[s]trict liability and negligent failure to warn cases boil down to three elements that a plaintiff must prove: 1) that the warnings accompanying the item were inadequate; 2) that the inadequacy of the warnings proximately caused Plaintiff's injury; and 3) that the plaintiff in fact suffered injury by using the product." *Colville v. Pharmacia & Upjohn Co., LLC*, 565 F. Supp. 2d 1314, 1320 (N.D. Fla. 2008); *Alvarez v. General Wire Spring Co*., No. 8:07-CV-1319-T-33TGW, 2009 WL 248264, *10 (M.D. Fla. Feb. 1, 2009).

Courts in this district applying Florida law have held as a matter of law that a plaintiff's failure to read the warning label extinguishes proximate cause in a failure to warn claim under both strict liability and negligence. *See Cooper*, 653 F. Supp. 2d at 1225 (granting summary judgment on plaintiff's strict liability and negligence failure to warn claims where she admitted that she had never read the warnings on the label and she could not demonstrate proximate cause) (citing *Lopez v. Southern Coatings, Inc*., 580 So.2d 864, 865 (Fla. 3d DCA 1991) ("Where the person to whom the manufacturer owed a duty to warn . . . has not read the label, an inadequate warning cannot be the proximate cause of the plaintiff's injuries.")); *Pinchinat v. Graco Children's Products, Inc.*, 390 F. Supp. 2d 1141, 1148 (M.D. Fla. 2005) (finding that the plaintiff could not prevail on her strict liability failure to warn claims where her failure to read the warning label extinguished proximate cause); *Alvarez*, 2009 WL 248264 at *10 (finding the plaintiff was barred from pursuing failure to warn claim where the plaintiff admittedly did not read the instruction manual or warnings on electronic drain-cleaning snake).

"Florida law is clear that [the plaintiff]'s failure to read the warning cuts off [defendant]'s liability based on the alleged inadequacy of the warning." *Leoncio v. Louisville Ladder, Inc.,* 601 Fed. App'x 932, 933 (11th Cir. 2015) (per curiam) (affirming the district court's grant of summary judgment to the manufacturer on failure to warn claim where the plaintiff admitted that he failed to read the warnings). The Court finds that even when the evidence is viewed in the light most favorable

to Plaintiff, she cannot establish proximate cause since she did not read the labels; therefore, Defendants are entitled to summary judgment on Plaintiff's inadequate warning claims.

2. **Placement of the Warning**

Plaintiff alludes in her summary judgment Response (Doc. 40)—for the first time—to a failure to warn claim based on *where* the warning label was placed, *i.e.*, on the underside of the second step, which is visible when the Stepstool is closed. (Doc. 40 at 14-15 (with photo)). She contends that expert testimony is "not necessarily required" for a failure to warn claim based on a warning that was improperly located. (*Id.*) (citing *Salozzo v. Wagner Spray Tech. Corp.*, 578 So. 2d 393, 394 (Fla. 3d DCA 1991)).

Defendants argue that the only detailed warning-defect theories in the Complaint relate solely to the warnings' content and they were never given notice that Plaintiff was asserting a claim based on the warning's placement. (Doc. 45 at 6-7). They point to the negligence counts in the Complaint which alleged that Defendants: "[f]ail[ed] to provide adequate warnings and instructions with the [Stepstool] advising consumers and users about the proper use of [it], about [its] defective condition(s), and about how to avoid being injured by the [Stepstool's] defects." (Doc. 1-1 ¶¶ 55b, 78b). Defendants argue that the strict liability sections did not allege any warning defect claim with specificity that would have put Defendants on notice that *placement* of the warning label was at issue. (*Id.* ¶¶ 43–

44, 65).[21] Additionally, they argue, that even if Dr. Morse's opinion had not been excluded, he did not express any opinion regarding the placement of the warning and Plaintiff has presented no other evidence on the issue. (*See* Doc. 34-2 at 10, 12–13).

The Court agrees that Plaintiff failed to allege any warning defect claim based on placement of the warning label. A plaintiff cannot, for the first time in response to a summary judgment motion, raise a new alternative ground or identify a new factual basis that was not alleged in the complaint. *See Gadsby v. Am. Golf Corp. of Cal.*, 557 F. App'x 837, 839 (11th Cir. 2014); *see also Hall v. Dekalb Cnty. Gov't*, 503 F. App'x 781 (11th Cir. 2013) (refusing to consider alternative theories of relief that were not raised in the complaint); *Orr v. Credit Prot. Ass'n, L.P.*, No. 3:13-cv-1530-TJC-MCR, 2015 WL 439343, at *1–2 (M.D. Fla. Feb. 3, 2015) (same); *Fla. Found. Seed Producers, Inc. v. Ga. Farms Servs.*, No. 1:10-cv-125-WLS, 2012 WL 4840809, at *20 (M.D. Ga. Sept. 28, 2012) (refusing to consider two new grounds for breach of contract at summary judgment not raised in the complaint); *Washington v. Sch. Bd. of Hillsborough Cty.,* 731 F. Supp. 2d 1309, 1322 (M.D. Fla. 2010) (plaintiff could not raise new claims in response to summary judgment). Moreover, Plaintiff has presented no evidence whatsoever, expert or her own, in support of a

[21] Plaintiff's strict liability claim for failure to warn says in its entirety: "The Subject Ladder is defective in its design, manufacture, and instructions/warnings." (Doc. 1-1 ¶ 64 (Count III). The allegation in the strict liability Count against Home Depot was identical. (*Id.* ¶¶ 41).

claim for failure to warn based on a defective placement of the label—which was clearly displayed on the second step of the folded Stepstool. Accordingly, even if Plaintiff had timely and sufficiently alleged such a claim, she has failed to meet her burden in response to Defendants' Summary Judgment Motion where she fails to cite any evidence in response. Thus, summary judgment is warranted on any potential failure to warn claim based on placement of the label.

CONCLUSION

For the reasons explained above, the Court finds that Plaintiff's expert testimony regarding design defect should be excluded. Without expert testimony, Plaintiff cannot prove her design defect claims. Plaintiff also cannot prove a warning defect because she concedes that she did not read the label and she never asserted a claim regarding placement of the label. Accordingly, summary judgment will be granted on all counts in the Complaint.

Based on the foregoing, it is ordered as follows:

1. Defendants' *Daubert* Motion to Exclude Plaintiff's Expert John Morse's Testimony (Doc. 34) is **GRANTED**.

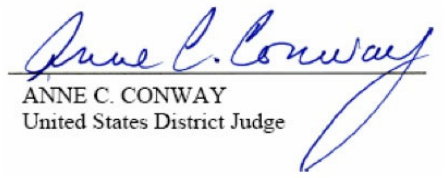
2. Defendants' Motion for Summary Judgment (Doc. 36) is **GRANTED**.

3. All other pending motions (Docs. 41, 42, 43, 44) are **DENIED as moot**.

4. The Clerk is directed to enter judgment that Plaintiff Beverly Brosius take nothing on her claims, and Defendants are entitled to their costs.

5. The Clerk is directed to close the case.

DONE and **ORDERED** in Chambers, in Orlando, Florida on February 7, 2022.



Copies furnished to:

Counsel of Record