Fabrikant v Surefoot, L.C.
2009 NY Slip Op 31092(U)
May 4, 2009
Supreme Court, New York County
Docket Number: 127154/02
Judge: Emily Jane Goodman
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SCANNED ON 5/11/2009

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN, Justice — PART 17

Index Number : 127154/2002

FABRIKANT, JAY

vs.

SUREFOOT, L.C.

SEQUENCE NUMBER : 005

SUMMARY JUDGMENT

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. ______

MOTION CAL. NO. ______

this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is decided per attached

FILED
MAY 11 2009
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 5/4/09

______, J.S.C.
EMILY JANE GOODMAN

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17
--X
JAY FABRIKANT and AMY FABRIKANT,

Plaintiffs,

-against-

Index No. 127154/02

SUREFOOT, L.C., KEITH NORBERT and "JOHN DOE" 1-5,

Defendants.
--X
EMILY JANE GOODMAN, J.S.C.:

Plaintiff, Jay Fabrikant, alleges that he was injured while wearing ski boots and custom orthotics purchased from defendants Surefoot, L.C. (Surefoot), a ski boot retailer, and Keith Norbert, an employee of Surefoot. As a result, plaintiff allegedly suffered compartment syndrome and was required to have emergency fasciotomy surgery. Plaintiff and his wife, Amy Fabrikant, suing derivatively, thereafter brought this action seeking recovery under theories of strict products liability, breach of warranty, and common-law negligence. Pursuant to CPLR 3212, Surefoot and Norbert now move for summary judgment dismissing the complaint.

BACKGROUND

Surefoot is a retailer of athletic footwear, including ski boots and orthotics. Norbert was the manager of Surefoot's store located in Manhattan. Plaintiff testified at his deposition that, on February 16, 2002, he went to Surefoot's store in Manhattan to buy a new pair of ski boots (Slattery Affirm., Exh. B [Plaintiff Dep., at 10]). Plaintiff had previously visited Surefoot's website, and learned that Surefoot guaranteed ski boots to fit properly or he would get a new pair of boots (*id.* at 19-20). He told the salesman that he was an intermediate skier, and had been

skiing for 30 years (*id.* at 13). After plaintiff's foot was measured, he stood on a platform to be measured for a custom orthotic or sole (*id.* at 15-17). The salesman showed plaintiff two or three pairs of ski boots, in addition to the Lange V8 boots that he ultimately purchased (*id.* at 14). At that point, the salesman made markings on the boots (*id.* at 16). Plaintiff was also advised of Surefoot's guarantee, which is described in one of its brochures as follows:

> "Our guarantee: if you are ever dissatisfied with any Surefoot product or service, we will repair it, replace it, or refund your money at your discretion."

(*id.* at 20-21; Robbins Affirm., Exh. B). Plaintiff left the store while the orthotics were being milled (*id.* at 19-21). When plaintiff returned about an hour later, the salesman spent an additional hour adjusting plaintiff's boots (*id.* at 39). The salesman made additional adjustments to the boots until they were no longer uncomfortable (*id.* at 23-24).

According to plaintiff, he first used the boots when he took a family skiing trip to Vail, Colorado on March 15, 2002 (*id.* at 25). He went skiing that same day (*id.* at 27). Plaintiff felt pain when he started to ski, and unbuckled the top two or three buckles of the boot to continue skiing down the mountain (*id.* at 29). He described the right boot in particular as "unbearable to ski" in; he felt pain from his mid-calf down the front of his leg (*id.* at 28, 39). Plaintiff testified in a medical malpractice action that the boots were not "tight" when he buckled them, but felt pressure on his shin while skiing (Slattery Affirm., Exh. D [Plaintiff Dep. in *Fabrikant v Ojeda* Action, 04-26802-CA-09, at 95-96]). When he reached the bottom, plaintiff went to Surefoot's Vail store to have the boots adjusted (Plaintiff Dep., at 30). Plaintiff told the salesman that as soon as he put pressure on the boots, they were very uncomfortable (*id.* at 32). After the salesman made adjustments to the boots, plaintiff left the store with the boots (*id.* at 33).

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Plaintiff testified that on the following day, March 16th, he skied again, but had to stop because they "just did not fit" and were "uncomfortable" (*id.* at 42). He had left the top two buckles open (*id.* at 38-40). Plaintiff once again went to Surefoot's store for repairs, when he spoke to the store's manager (*id.* at 44, 46). On the following four days, plaintiff had similar experiences – he skied with the boots after Surefoot made adjustments to the boots, but had to stop each day because of pain in his right leg (*id.* at 53, 56-57, 59, 64-65). On the evening of March 22nd, when the pain in plaintiff's right leg did not subside, plaintiff went to the hospital in Vail (*id.* at 68). Plaintiff was diagnosed with a high ankle sprain, and was instructed to keep ice on his foot (*id.* at 72). The next day, plaintiff traveled to Miami, Florida to visit his family, where he again went to the hospital, still experiencing significant pain in his right leg (*id.* at 73-74). The doctor splinted his right leg, gave him crutches, and then discharged him (*id.* at 78). Plaintiff then returned to New York, where he was diagnosed with compartment syndrome and underwent an emergency fasciotomy to relieve the pressure in his leg (*id.* at 81-82).

Surefoot's president, Robert Shay, testified that when plaintiff came into Surefoot's Manhattan store, he was serviced by the store's manager, Keith Norbert (Slattery Affirm., Exh. E [Shay Dep., at 11-12, 13]). After examining the boot, Shay stated that it did not appear that any modifications had been made to either the boot or orthotic (*id.* at 86-88). Two employees of Surefoot's Vail store in March 2002, Matt Redman and Steven Wolfe, similarly testified that it appeared that nothing had been done to the boot (*id.*, Exhs. G, H [Redman Dep., at 48; Wolfe Dep., at 18]). At Norbert's deposition, he testified that he did not remember plaintiff, but stated that he was trained to examine a customer's feet and calves to determine proper fitting, and to use an AMFIT platform to make measurements for ski boots (*id.*, Exh. F [Norbert Dep., at 10-11,

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13, 25-27, 36-37]).

The amended complaint asserts four causes of action: (1) negligence; (2) strict products liability; (3) breach of express warranty; and (4) breach of implied warranty. Mrs. Fabrikant asserts an additional cause of action for loss of consortium. More specifically, the bill of particulars allege that the ski boots and orthotics were defectively manufactured, designed, fit, selected, installed, and adjusted; were not adequately tested, serviced, or repaired; failed to conform to industry regulations and standards; and were not fit for their intended purposes, specifically, skiing (Verified Bill of Particulars, ¶¶ 27-28).

In moving for summary judgment, defendants contend that the Lange V8 ski boots met all standards for design and manufacture, were not defective, and were fit for all their intended uses, including the kind of downhill skiing performed by plaintiff in March 2002. They also argue that the ski boots were properly selected, tested, and fitted. Although plaintiff claimed that the right boot was "uncomfortable," it was never "tight." Additionally, plaintiff's discomfort only occurred when the boots were fully buckled and plaintiff leaned forward. Defendants also note that even with appropriate adjustments to ski boots, discomfort can often persist. Finally, defendants maintain that the ski boot did not cause his compartment syndrome.

Plaintiffs contend, in opposition to the motion, that there are issues of fact as to whether Surefoot was negligent in the fitting and maintenance of the ski boot. They also contend that defendants may be liable on a theory of breach of express warranty. According to plaintiffs, defendants failed to repair, replace, or refund plaintiff's money after he repeatedly brought the boots back to Surefoot for repair. Plaintiffs also maintain that Surefoot failed to warn him of the potential for further pain and permanent injury resulting from the poorly-fitting boots. Plaintiffs,

however, do not oppose summary judgment as to defective design and manufacture. Rather, the gravamen of this action is that the custom made boots were not properly fitted to Plaintiff's feet, that Plaintiff was not properly instructed on using them, and that the boots were not properly repaired/maintained, after Plaintiff made complaints.

DISCUSSION

It is well settled that summary judgment is proper where there are no issues of fact for trial (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The movant on a motion for summary judgment must "make a prima facie showing of entitlement to judgment as a matter of law, [by] tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the movant has made a prima facie showing, the burden shifts to the motion's opposing party to lay bare its evidentiary proof and present a genuine, triable issue of fact (*id.*). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

A plaintiff injured by an allegedly defective product may proceed on four theories: (1) negligence; (2) breach of express warranty; (3) breach of implied warranty; and (4) strict products liability (*see Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 106 [1983]).

Strict Products Liability

In strict products liability, a plaintiff may assert that the product was defectively manufactured, defectively designed, or that there were inadequate warnings regarding the use of the product (*id.* at 107). A "defectively designed product is one which, at the time it leaves the

seller's hands, is in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its intended use; that is one whose utility does not outweigh the danger inherent in its introduction into the stream of commerce" (*Robinson v Reed-Prentice Div. of Package Mach. Co.*, 49 NY2d 471, 479 [1980], citing Restatement of Torts 2d § 402A). In order to recover, the plaintiff need only prove that the product was defective, and that the defect was a substantial factor in causing the injury (*Speller v Sears, Roebuck & Co.*, 100 NY2d 38, 41 [2003]). As noted above, plaintiffs do not contend that the ski boots or orthotics were defectively manufactured or designed. Indeed, with respect to their strict products liability claim, plaintiffs only argue that defendants may be liable based upon a failure to warn.[1]

"A manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known" (*Liriano v Hobart Corp.*, 92 NY2d 232, 237 [1998]; *see also Rastelli v Goodyear Tire & Rubber Co.*, 79 NY2d 289, 297 [1992]). This rule applies equally to distributors and retailers (*Anaya v Town Sports Intl., Inc.*, 44 AD3d 485, 487 [1st Dept 2007]; *Godoy v Abamaster of Miami*, 302 AD2d 57, 60 [2d Dept], *lv dismissed* 100 NY2d 614 [2003]). Additionally, a manufacturer, distributor or retailer has a duty to warn of the danger of unintended uses, provided that those uses are reasonably foreseeable (*Liriano*, 92 NY2d at 237). However, there is no duty to warn of an open and obvious danger of which the user is actually aware or should be aware as a result of ordinary observation or as a matter of common sense (*see id.* at 241; *Lamb v Kysor Indus. Corp.*, 305 AD2d 1083, 1084 [4th Dept 2003]; *Felle v W.W. Grainger, Inc.*, 302 AD2d 971, 972 [4th Dept 2003]). In other words,

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[1]The court notes that where liability is based upon a failure to warn, negligence and strict liability claims are the same (*Martin v Hacker*, 83 NY2d 1, 8 n 1 [1993]).

"when a warning would have added nothing to the user's appreciation of the danger, no duty to warn exists as no benefit would be gained by requiring a warning" (*Liriano*, 92 NY2d at 242).

In *Liriano* (92 NY2d at 243, *supra*), the Court of Appeals emphasized that "[f]ailure to warn liability is intensely fact-specific," including such issues as obviousness of the risk from actual use of the product, knowledge of the product user, and proximate cause. "Because of the factual nature of the inquiry, whether a danger is open and obvious is most often a jury question. Where only one conclusion can be drawn from the established facts, however, the issue of whether the risk was open and obvious may be decided by the court as a matter of law" (*id.* at 242 [citation omitted]).

Here, defendants have not submitted any evidence to demonstrate that the risk of injury from wearing the ski boots was open and obvious. In any event, plaintiffs have raised an issue of fact as to whether Surefoot should have warned him of the danger of injury from an improperly-fitting ski boot. Plaintiffs submit an affidavit from John H. Hanst, a boot retailer and fitter, who states that "[a] danger well known to equipment manufacturers, retailers, and boot fitters is that [the ski boot] should not be so tight as to cause injury to the foot and skin," and that a tight boot can function as a tourniquet and therefore produce injury (Robbins Affirm., Exh. C [Hanst Aff., at 6, 8]). Although, as pointed out by plaintiffs in their reply, pain is the body's common sense warning that damage is occurring, it cannot be said that skiers should be aware of the risk of developing compartment syndrome from wearing ski boots as a matter of common sense. Therefore, the court declines to determine, as a matter of law, that this danger was obvious to a skier such as plaintiff (*see McArdle v Navistar Intl. Corp.*, 293 AD2d 931, 933 [3d Dept 2002] [issue of fact as to whether manufacturer of street sweeper had duty to warn worker whose hand

was severed while inspecting leak in water tank]; *Rogers v Sears, Roebuck & Co.*, 268 AD2d 245, 246 [1st Dept 2000] [issue of fact where risk of explosion and fire while replacing empty propane tank was not manifest]). Accordingly, plaintiffs have a valid strict products liability claim to the extent it is based upon a failure to warn, and is otherwise dismissed.

<u>Negligence</u>

To establish a prima facie case of negligence, the plaintiff must show: (1) the existence of a duty of care owed by the defendant to the plaintiff; (2) breach of that duty; (3) that such duty was the proximate cause of the resulting injury; and (4) actual loss, harm, or damage (*see Baptiste v New York City Tr. Auth.*, 28 AD3d 385, 386 [1st Dept 2006]; *Merino v New York City Tr. Auth.*, 218 AD2d 451, 457 [1st Dept], *affd* 89 NY2d 824 [1996]).

Defendants contend that their actions were entirely appropriate and not negligent under the circumstances. To support their position, defendants submit an affidavit from Kelly Timmons, who is the president of K.T., Inc. (a company that specializes in custom fitting ski boots and orthotics), and is also the past director of competition for Lange USA, the ski boot manufacturer (Slattery Affirm., Exh. N [Timmons Aff., ¶ 1]). Timmons states that the selection and fitting of the Lange V8 ski boot complied with accepted practices (*id.*, ¶ 3). Timmons further states that the creation and fitting of the orthotics purchased by plaintiff conformed to accepted means, methods, customs, and practices (*id.*). In support, Timmons asserts that, according to plaintiff's deposition testimony, plaintiff was asked a variety of questions regarding his height, weight, and skiing ability, was shown several pairs of ski boots, and was measured on the AMFIT platform for the custom orthotic (*id.*, ¶ 4). Additionally, Timmons states that the

Lange V8 ski boot is designed for an intermediate skier, has a large interior cavity to accommodate a wide forefoot and calf, and has an average "lean" (*id.*). Timmons also states that Norbert examined plaintiff's feet, listened to plaintiff's responses to his questions regarding the fit, and examined plaintiff's calf inside the boot (*id.*, ¶ 5). According to Timmons, Norbert advised plaintiff to wear only ski socks when wearing the boot, and how to adjust the buckles as the fit changed over time (*id.*). Timmons states that various adjustments were made to the boots after they were milled, and that plaintiff left the store satisfied (*id.*, ¶ 6).

By contrast, plaintiffs maintain that defendants were negligent in the fitting and maintenance of the ski boots. In support, plaintiffs submit the affidavit from Hanst, who states that "[t]he clearest indication of a problem with the fit is the presence of pain in the user" (Robbins Affirm., Exh. C [Hanst Aff., at 6]). Hanst states that when a skier complains of pain, the tongue of the boot or the orthotics can be modified (*id.* at 7). Moreover, Hanst asserts that pressure point padding or cants may be added (*id.*). According to Hanst, none of these changes were made in this case (*id.*). Hanst further asserts that, if none of these adjustments can be made, the boot fitter should provide the skier with a different boot (*id.*). In sum, Hanst asserts that Surefoot neither provided plaintiff with a boot that fit, nor adequately responded to his complaints about the poor fit (*id.* at 9).

Defendants urge the court to disregard Hanst's affidavit because it fails to identify any violations of industry standards and contradicts plaintiff's deposition testimony. As noted by the Court of Appeals in *Cassano v Hagstrom* (5 NY2d 643, 646, *rearg denied* 6 NY2d 882 [1959]), "[i]t is settled and unquestioned law that opinion evidence must be based on facts in the record or personally known to the witness." Furthermore, "[a]n expert may not reach a conclusion by

assuming material facts not supported by the evidence, and may not guess or speculate in drawing a conclusion" (*Shi Pei Fang v Heng Sang Realty Corp.*, 38 AD3d 520, 521 [2d Dept 2007], quoting *Quinn v Artcraft Constr.*, 203 AD2d 444, 445 [2d Dept 1994]; *see also Santoni v Bertelsmann Prop., Inc.*, 21 AD3d 712, 715 [1st Dept 2005]).

While plaintiffs do not submit any evidence to establish that defendants were negligent in the selection of the ski boots or creation of the custom orthotics, Hanst's opinion is sufficient to raise issues of fact as to whether defendants were negligent in fitting, maintaining, and repairing plaintiffs' ski boots. Hanst states that boot fitters should make adjustments to ski boots when users complain of pain, and opines that Surefoot fell below this standard because no modifications were made to plaintiffs' boots after he repeatedly brought them in for repair (Hanst Aff., at 7, 9). Hanst further opines that Surefoot did not provide plaintiff with a boot that fit, or adequately address his complaints about the fit (*id.* at 9). These statements are based upon facts in the record, and are neither speculative nor conclusory (*see Cassano*, 5 NY2d at 646). Indeed, plaintiff testified that when he initially buckled his boots, they were not tight, but felt pain when he applied pressure to the boots while skiing (Plaintiff Dep. in *Fabrikant v Ojeda* Action, at 95-96). Plaintiff further testified that he continued to feel significant pain after he brought his boots in for repair on several occasions (Plaintiff Dep., at 53, 57, 59, 64-65). Surefoot's president and two Surefoot employees also testified that it appeared that plaintiff's ski boots had not been adjusted (Shay Dep., at 86-88; Redman Dep., at 48; Wolfe Dep., at 18). Negligent repair may be inferred from the failure of equipment to operate satisfactorily within a short time after it was repaired (*see e.g. Sles v Heidelberg Eastern*, 78 AD2d 521, 522 [2d Dept 1980], *lv denied* 52 NY2d 703 [1981] ["defendant was under a duty to repair that which it had undertaken to repair

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and breach of that duty gives rise to liability"]). Therefore, defendants' motion is denied on the negligence cause of action insofar as it based on negligent fitting, maintenance, and repair.

Breach of Express/Implied Warranties

The Uniform Commercial Code (UCC), as adopted in New York, provides that "[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis for the bargain creates an express warranty that the goods shall conform to the affirmation or promise" (UCC 2-313 [1] [a]). To establish a claim for breach of express warranty, the plaintiff must show that there was an "'affirmation of fact or promise by the seller, the natural tendency of which [was] to induce the buyer to purchase,' and that the warranty was relied upon" (*Schimmenti v Ply Gem Indus.*, 156 AD2d 658, 659 [2d Dept 1989], quoting *Friedman v Medtronic, Inc.*, 42 AD2d 185, 190 [2d Dept 1973]; *see also Schneidman v Whitaker Co.*, 304 AD2d 642, 643 [2d Dept 2003]). It is ordinarily a question of fact for the jury whether a seller made statements amounting to a warranty (*see Friedman*, 42 AD2d at 190). Here, plaintiff testified that he purchased the ski boots and orthotics after visiting Surefoot's website, and learned of Surefoot's guarantee that if he was ever dissatisfied with the boots, Surefoot would repair them or would get a new pair of boots (Plaintiff Dep., at 19, 20). There is also evidence in the record that the ski boots were not repaired. According to Surefoot's president, it appeared that plaintiff's ski boots had not been modified (Shay Dep., at 86-88). In view of this evidence, there are triable issues of fact as to whether Surefoot created an express warranty, whether it breached that warranty, and whether plaintiff relied on it in purchasing the ski boots and orthotics from Surefoot.

UCC 2-314 provides that a warranty of merchantability is implied in a contract for the sale of goods if the seller is a merchant with respect to the goods of that kind. To be merchantable, the goods must be, among other things, "fit for the ordinary purposes for which such goods are used" (UCC 2-314 [2] [c]). "To establish that a product is defective for purposes of a breach of implied warranty of merchantability claim, a plaintiff must show that the product was not reasonably fit for its intended purpose, an inquiry that focuses on the expectations for the performance of the product when used in the customary, usual and reasonably foreseeable manners," and that the defect was a proximate cause of the plaintiff's injury (*Wojcik v Empire Forklift, Inc.*, 14 AD3d 63, 66 [3d Dept 2004] [internal quotation marks and citation omitted]). "A warranty of fitness for ordinary purposes does not mean that the product will fulfill [a] buyer's every expectation" (*Denny v Ford Motor Co.*, 87 NY2d 248, 258 n 4 [1995], *rearg denied* 87 NY2d 969 [1996] [internal quotation marks and citation omitted]). Rather, recover is warranted based "upon a showing that the product was not minimally safe for its expected purpose" (*id.* at 259).

The court concludes that there are triable issues of fact as to whether Surefoot may be liable for breach of implied warranty. Plaintiff testified that his ski boots were "unbearable to ski" in, and so "uncomfortable" that he had to stop skiing on several days (Plaintiff Dep., at 39, 51, 61). Plaintiff's description of the accident is sufficient to demonstrate that the ski boots and orthotics did not perform as intended while engaged in ordinary skiing (*see Taft v Sports Page Shop*, 226 AD2d 974, 976 [3d Dept 1996] [issue of fact as to whether ski bindings were defective duc to failure to perform their retention function during ordinary skiing]).

Proximate Cause

Defendants also contend that none of their acts or omissions caused plaintiff's injury. In order to establish proximate causation, the defendant's act or failure to act must be a "'substantial cause of the events which produced the injury'" (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 562 [1993], quoting *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315, *rearg denied* 52 NY2d 784 [1980]; *see also* Restatement (Second) of Torts § 431 [the word "substantial" is used in the sense that reasonable people would regard it as a cause]). A plaintiff's evidence must be sufficient to permit a finding of proximate cause based on logical inferences from the evidence, rather than mere speculation (*Sieling v New York Convention Ctr. Dev. Corp.*, 35 AD3d 227 [1st Dept 2006], *lv denied* 8 NY3d 812 [2007]; *Reed v Piran Realty Corp.*, 30 AD3d 319, 320 [1st Dept 2006], *lv denied* 8 NY3d 801 [2007]).

Here, defendants submit an affidavit from Roger Bonomo, MD, who examined plaintiff on two occasions on June 29, 2004 and November 15, 2006 and reviewed photographs of the ski boot that plaintiff was wearing (Slattery Affirm., Exh. O [Bonomo Aff., ¶¶ 2-3]). Bonomo notes that the top of the ski boot is 10 inches from the bottom of the boot's interior, and that plaintiff's fasciotomy scar is 11 to 11 ½ inches above the bottom of plaintiff's foot (*id.*, ¶ 3). According to Bonomo, the area of plaintiff's leg covered by the ski boot has little muscle and is composed primarily of bones, ligaments, and tendons (*id.*, ¶ 5). However, the area where the fasciotomy was performed contains the majority of the muscle in the leg (*id.*). Bonomo opines that it was this area that became swollen, necessitating the fasciotomy, and that, therefore, the ski boot did not cause plaintiff's compartment syndrome (*id.*, ¶¶ 5-6).

In response, plaintiffs offer an affirmation from plaintiff's treating physician, Jeffrey

Stein, MD, who examined plaintiff after he returned from Vail and performed the fasciotomy surgery (Robbins Affirm., Exh. D [Stein Affirm., ¶ 4]). Stein states that compartment syndrome is a disorder caused by a build-up of pressure in a closed area, which compresses and damages the structures within that area (*id.*, ¶ 6). According to Stein, the legs contain four such closed areas or compartments, and the surgical means for reducing this pressure is called a fasciotomy (*id.*). Stein asserts, citing an article published in a medical journal, that repeated trauma injury to blood vessels has been reported as the result of wearing ski boots (*id.*, ¶ 7).[2] Based upon his observations and discussions with plaintiff, Stein opines, to a reasonable degree of medical certainty, that plaintiff's compartment syndrome was caused by repeated traumatic episodes of wearing the ski boots during his trip to Vail (*id.*, ¶ 8). During surgery, Stein found a build-up of fluid, including dark bloody material, which damaged his muscles and nerves (*id.*). In disagreeing with Bonomo's conclusion, Stein states that:

> "Based upon my observations of Mr. Fabrikant's legs, and where I found the injury, the areas where he had damage, which led to the compartment syndrome do correspond with the locations of pressure and pain produced by Mr. Fabrikant's wearing of the ski boots. The fact that the damage in the compartment extended to areas in the compartment even above where the boot was only reflects that the damage was done by the build up of pressure from the compartment syndrome, as opposed to a direct pressure caused by contact with the boot. In other words, the muscle and nerve damage was not caused by the trauma of contact with the tight boot, but rather by the pressure that built up in the compartment."

(*id.*, ¶ 9).

Given the dispute as to whether the ski boots caused plaintiff's compartment syndrome, the issue of causation is one for the jury (*see Ocampo v Abetta Boiler & Welding Serv., Inc.*, 33

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[2]Hoflin, F, Thomi, A, and Walter, F, *Pulmonary Embolism Caused by High Ski Boots*, NEJM, 1989, p. 1965.

AD3d 332, 333 [1st Dept 2006] [conflicting opinions of experts raised issues of fact and credibility which could not be determined on a motion for summary judgment]; *Bradley v Soundview Healthcenter*, 4 AD3d 194 [1st Dept 2004] [same]).

CONCLUSION

Accordingly, for these reasons, it is

ORDERED that the motion (sequence number 005) of defendants Surefoot, L.C. and Keith Norbert for summary judgment is granted to the extent of dismissing the strict products liability claim except as to failure to warn, and the negligence claim except as to negligent fitting, repair, and maintenance, and is otherwise denied; and it is further

ORDERED that a pre-trial conference will be held in Part 17, Room 422 on June 4, 2009 at which time a firm trial date will be set.

Dated: May 4, 2009

ENTER:

J.S.C

EMILY JANE GOODMAN