THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CLARENDON COUNTY
COURT OF COMMON PLEAS

W. Jeffrey Young, Circuit Court Judge
And
George C. James, Circuit Court Judge

7/10/11

Appeal Case No. 2011-199928
Case No. 2008 CP 14-0461

Andreal Holland by his Guardian Ad Litem Peggy Knox,

Plaintiff/Appellant,

vs.

Morbark, Inc, Precision Husky Corporation, A & K Mulch, LLC, Watford Industry, Inc., Defendants, of whom Morbark, Inc. is the Respondent.

APPELLANT'S PETITION FOR REHEARING AND RECONSIDERATION

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Pursuant to SCACR Rule 221, the Appellant-Petitioner moves for rehearing and reconsideration of the Court's Opinion No. 5186, filed January 2, 2014, on the grounds that the Court overlooked or misapprehended the following matters.

Issue I- Court's Opinion regarding the pleadings and Plaintiff's Motion To Amend and Supplemental Complaint

1. The Court's extensive review of the details of the state of the pleadings in the case misapprehends the so called "second motion to amend and supplement the complaint" (1/13/11) and the Order of Judge James (04/15/10) that was served on the plaintiff's attorney on June 15, 2011, following the hearing held on March 11, 2011, months after the Motion for Summary Judgment was heard by Judge Young on May 27, 2011. (R. pp. 1, 15-19, 190) The hearing before Judge James was to address the allegations of the Complaint first proposed on July 30, 2010, in the first Motion To Amend and Supplement Complaint and was accompanied by a proposed Amended and Supplemental Complaint. (R. 194-198) The matter was further intended to include the additional allegations resulting from the information learned at the 30(b)(6) deposition of Bobby Ray Smith who was first identified by Defendant as an expert witness at his deposition on November 18, 2010, well after the scheduling order deadline and following the delayed answers to Request To Produce (12/17/10) were received from the Defendant. (R. pp. 1204-1215) The Court's Opinion in this matter apparently has the effect of granting a motion to amend the Plaintiff's Complaint (filed July 30, 2010) at a motion hearing over a discovery dispute on October 8, 2010, and thus concluding the request to amend and supplement was untimely. (See Appellant's Reply brief pp. 15-16) There is no doubt that the intent of the July 2010 motion was to remove the negligence cause of action from the complaint and to include the additional allegations added as paragraph 14 d, e, i, j contained in the proposed Amended and

Supplemental Cmplaint of July 30, 2010.[1] (R. pp. 195,196) Either the Complaint was amended to include those additional allegations or it was never amended, in which case the only pleadings that were properly before the Court were the Plaintiff's Amended Complaint dated February 29, 2009 (Record pp. 27-29) and Defendant's Answer dated April 10, 2009. (Record pp. 39-53) The voluntary dismissal of the Defendants A&K Mulch and Watford Industry, Inc., did not change or implicate any amendment of the pleadings.

2. The Court's discussion of the supposed prejudice related to granting the Plaintiff's Motion To Amend and Supplement Complaint (01/13/11) following the Defendant's first identification of Bobby Ray Smith as its expert witness at his deposition on November 18, 2010, well after the expiration of the scheduling order and following the Defendant's untimely answers to Request To Produce (12/17/10), misapprehends the issue presented by Plaintiff's so called "second Motion to Amend and Supplement Complaint". (R. pp. 190-222; 1204-1215) There were no new "discovery" issues presented that at hearing that were not the Defendant's own doing or which required all the concern expressed in the delayed order from that hearing. The issues presented that could be considered "new" were limited to the "brake mechanism" of the chipper that was testified to by Defendant's expert Bobby Ray Smith on November 18, 2010. (R. pp. 632-777) The remaining issues were fully addressed in the depositions of Plaintiff's

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[1] 14 d.In designing the wood chipper machine without a positive hood lock to prevent a hood kick back, even if the device securing the hood was mistakenly opened before the chipper disc had totally stopped;

14. e. In designing and manufacturing the wood chipper machine without prominently displayed cleaning and maintenance and operating instructions and warnings including warnings conveying the serious nature of being hit in the head in the event the pins securing the hood/cutter disc section were removed while the rotating chipper was still turning , even slowly turning;

14j. In promoting, selling and distributing the chipper machine here involved - - -without adequate operational and maintenance features and understandable instructions to assure the machine was safe to use and suitable for the expected and intended use.

expert witnesses Roger E. Davis, PS and David Clement, PhD. (R. pp. 815-907; 908-1269). Those allegations and particularly the allegations of a hood kick-back device and the inadequate Morbark designed warnings and the inadequacy of the Precision Husky warnings were all adequately referred to in the previously detailed Motion To Amend and Supplement with attached proposed complaint filed on July 30, 2010, that apparently the Court now concludes was granted without a written order. (R. pp. 193-198) Those matters and the factual errors contained in the Order denying the Motion To Amend and Supplement were addressed in Plaintiff's Motion For Reconsideration and at brief. (R. pp. 184, 199-222; Reply Brief pp. 5-7)

Issue II Courts Opinion addressing the issue of warnings

The Court's Opinion misapprehends that the Plaintiff was injured because he removed the pin from the chipper hood but overlooks the important fact that the Plaintiff, an individual with a low average IQ, lifelong reading comprehension and dyslexia never believed the chipper disc was turning at the time he removed the pin from the hood assembly.[2] (R. pp. 498, 514, 1127-1132, 1133, 1137, 1138, 1142, 1156) The hood of the chipper machine would not be thrown open simply because the pin was removed even if the disc was turning. Assuming the Plaintiff's testimony, the only witness to the accident was credited for the purpose of the summary judgment motion, then the clear implication is that the machine experienced an internal malfunction, likely from becoming "plugged" from the action of the vibrating conveyor feeding material to the chipper while the machine was powered off and eventually stalling the machine

[2] From Appellant's brief, p. 27 "The attempt to use the warning claims to create a misuse argument is a factually driven issue that is contested. Although knowing misuse, will bar recovery, the issue is usually considered a jury question. Fleming v. Borden, 316 S.C. at 458; Kosester v. Carolina Rental Cent., Inc., 313 S.C. 490, 443 S.E. 2d 392 (1994); Small v. Pioneer Mach. Co, 316 S.C. 479, 450 S.E. 2d 609 (Ct. App. 1994). Further, misuse of an allegedly defective product is an affirmative defense to liability that the defendant must plead and prove. 63 Am. Jur. 2d Products Liability Sect. 41 (1997); 63A Am. Jur. 2d Products Liability Sect. 1148 (1997); 72 C.J.S. Supp. Products Liability Sect. 47 (1975)"

or making it run erratically. This situation was described by Defendant's expert Bobby Ray Smith. (R. pp. 701-703) Nothing in the record establishes that merely opening the hood, even if the machine was running, would have done anything more than expose the Plaintiff to the potential of being cut by the turning disc. This is a fundamental misunderstanding. Neither does the Court's Opinion refer to the uncontested testimony that the bolts along the chipper hood had no bearing on the accident nor that the Morbark operators' manual does not show the bolts or make any attempt to instruct the operator as to their use as the Court's Opinion implies. (R. pp. 511, 512, 522; 793-795; 918, 999-1001, 1037-1044) Neither does the Opinion refer to the likely cause of the accident. As noted above, the sole and uncontradicted testimony was that at the time the Plaintiff went to inspect the machine it was being "fed" material from a vibrating conveyor after power to the chipper was turned off and that such material had the potential to "stall" the machine and make it run erratically. (R. pp. 534, 544-549; 703, 730-731)

The uncontradicted testimony of Plaintiff's expert human factors witness David Clement was that the original Morbark warnings, the operators handbook and the decals provided by Precision Husky did not meet the standards of ANSI Z535 and the established principles of the "Hierarchy of Safety". (Appellant's brief pp. 1718, 28-29) Specifically he opined that the design of the Morbark chipper was flawed because the hood/guard could be inadvertently opened before the disc had stopped turning and that such hazards could be avoided with effective warnings complying with ANSI Z535. (R. pp. 843-844, 846, 855, 856, 868-871)

The Court's Opinion apparently dismisses the Plaintiff's testimony and the testimony of expert witness Clement by noting that Holland failed to *establish a reasonable alternative design in his design defect claim - - - See Branham, 390 at 210, 701 S.E. 2d at 8.* It is not clear what the failure was that the Court was referring to or what its opinion was intended to convey about the

efficacy of ANSI Standards as proof. See Clement testimony and exhibits. (R. pp. 819-822, 841-875, 877-907) Although the date of this accident, the date when the Plaintiff's "first amended and supplemental complaint" was filed and Dr. Clement's deposition all predated the decision in Branham v. Ford motor Company, 390, 203, 701 S.E. 2d 5 (SC., August 17, 2010), reh. den. Nov. 17, 2010, the Court relied on its Opinion in Miranda C.v Nissan Motor Company, 402 S.C. 577, 741 S.E. 2d 34 (Ct App. March 27 2013) to conclude that the Branham case requirements, presumably abandoning the statutory requirement of SC Code 15-73-10 and the consumer expectation test of the Restatement Second of Torts Sect. 402A was properly applied retrospectively to this case. The Appellant believes the Court misapprehended the testimony of Dr. Clement and the Plaintiff's testimony by concluding that the danger of the hood unexpectedly slamming open when the pin was removed after the machine was powered off for an extended length of time, without the machine making vibration or noise was a danger that was "generally known and recognized". The Appellant further believes that the Court misapprehended the Supreme Court's decision in Branham in concluding that the so called "risk utility test" required by the Restatement (Third) of Torts Sect 402A, was intended to apply retroactively to claims filed prior to the final decision in Branham.

Issue III. Court's Opinion addressing alternative machine deign and OSHA

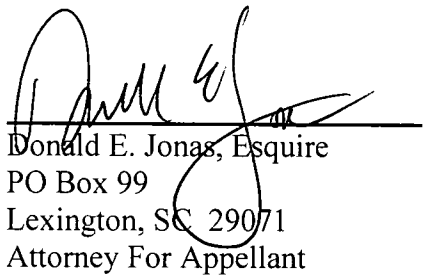
The Court's opinion recites the well established principle that OSHA only regulates employers and not manufacturers. The OSHA provisions addressed in the testimony by Plaintiff's expert mechanical engineer Roger Davis, PE, specifically referred to the failure to design a machine with a device that would prevent the chipper hood from opening unexpectedly and had nothing to do with his further opinions about machine interlocks. [R. pp. 913, 926-929, 943-944] See Opinion, Note 5 referring to 29 CFR Sect. 1910.212 (a)(2) "The guard shall be

such that it does not offer an accident hazard itself." Similar provisions are found at ANSI 1990 standard B-11-19; Point of Operation Safeguarding and Amendments; ANSI B11-19.7.1.4, Guards Design and Construction and the so called "Heirarchy of Safety" that have each have incorporated the guard design concerns addressed in the OSHA General Duty provisions since 1975. It is a misunderstanding to hold that such evidence of design standards are not substantial evidence simply because they originate or derive from the common industry standards incorporated in OSHA and elsewhere. Similarly Defendant's expert Bobby Ray Smith testified the Precision Husky chippers he manufactured complied with ODSA requirements because they were an industry standard and that both customers and dealers expected the machine to be in compliance. [R. p. 711] The defective guard "theory" of the case and the specific allegations regarding the failure to provide a guard that would prevent the hood-guard from slamming open was addressed in the proposed first Amended and Supplemental Complaint (7/30/10) as par. 14. d. (See note 1 supra. and Appellant's Reply Brief, p. 6) Defendant's expert Bobby Ray Smith also testified that the hood lock bar of the similar wood chipper machine manufactured by Precision Husky would prevent the hood from slamming forward and opening in the event of an internal malfunction of the machine as was the case here. The Precision Husky machine hood lock is an alternative design that would have prevented the chipper hood from slamming forward when the pin was removed as was addressed by both Plaintiff's expert and Defendant's expert. (R. pp. 724; photo at 1064; drawings at 766, 774, 11-712)

Conclusion

For all the reasons referred to the Court is requested to grant Appellant's Petition for Rehearing and amend and alter its opinion and remand the case for trial.

Lexington, South Carolina
January 17, 2014



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APPEAL FROM CLARENDON COUNTY
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Morbark, Inc, Precision Husky
Corporation, A & K Mulch, LLC,
Watford Industry, Inc., Defendants,
of whom Morbark, Inc. is the Respondent,

PROOF OF SERVICE

I certify that I have served one copy of the Appellant's Petition For Rehearing on the Respondents' Attorneys as shown below, by delivering said documents to the Respondent's attorneys at the listed address on the 17th day of January 2014; all in accordance with the *South Carolina Rules of Civil Procedure.*

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January 17, 2014

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Re: Petition For Rehearing
Andreal Holland by his Guardian Ad Litem, Peggy Knox v Morbark, Inc., Appellate Case No. 2011 -199928

Dear Ms. Kitchings:

Please find enclosed the original of the Appellant's Petition For Rehearing, the required copies, Affidavit of Service and filing fee.

Thanking you for your assistance in this matter, I am

Sincerely yours,

Donald E. Jonas
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DEJ/sl
Enclosures
cc: Curtis L. Ott, Esquire
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