

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

Case No: 2008-CP-14-0461
Appellate Case No.: 2011-199928

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FEB 10 2014

SC Court of Appeals

Andreal Holland by his Guardian Ad Litem Peggy Knox..... Appellant,

v.

Morbark, Inc. Respondent.

RESPONDENT'S RETURN
TO APPELLANT'S PETITION FOR REHEARING

Pursuant to Rules 221 and 240 of the South Carolina Appellate Court Rules, and in accordance with the Court's January 30, 2014 request, Respondent Morbark, Inc. ("Morbark") submits this return to the Petition for Rehearing ("Petition") filed by Appellant Andreal Holland by his Guardian Ad Litem Peggy Knox ("Holland").

In a thorough and well-reasoned opinion, this Court affirmed both: (1) the circuit court's denial of Holland's belated request to amend his complaint with a new Canadian OSHA-brake theory; and (2) the circuit court's grant of summary judgment in favor of Morbark on Holland's legally insufficient design defect and failure to warn claims.

(Opinion No. 5186) Holland's Petition merely regurgitates the same facts and arguments raised in his original briefing and impermissibly seeks "to have the case tried in the appellate court a second time." *Kennedy v. S. Carolina Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322 (2001). As outlined below, none of the three issues outlined in Holland's Petition demonstrate that this Court "overlooked or misapprehended" any material facts or law, *see* Rule 221(a), SCACR, and the Petition is due to be denied.

Holland's Issue One: "Court's Opinion Regarding The Pleadings And Plaintiff's Motion to Amend And Supplemental Complaint"

This Court properly affirmed the circuit court's denial of Holland's request for an eleventh hour amendment in January 2011 – an amendment that not only asserted a new theory of defect based upon facts previously known to Holland but would require the re-opening of discovery at significant cost to Morbark after transfer to the trial roster. Holland's Petition merely rehashes his disagreement with Morbark that assertion of a new theory would at least require the hiring of rebuttal experts and the completion of additional depositions; in Holland's opinion, that additional discovery just was not necessary. (*See* Petition, Issue I (2), pp. 2-3 (disagreeing with any concern about delay as a result of the amendment because "[t]here were no new 'discovery' issues," and "the remaining issues were fully addressed in the depositions"))

There was no misapprehension by this Court regarding the facts or law underlying Holland's untimely motion to amend. Holland's suggestion that Morbark was expected to predict any and all new claims he might assert and then attempt to refute those hypothetical claims months in advance of any proposed amendment was fully explored in the briefs submitted to the Court and properly rejected by the Court because of the

prejudice to Morbark that would result from such an untimely amendment.¹

Holland's Issue Two: "Court's Opinion Addressing The Issue Of Warnings"

Holland's Petition next describes what he terms a "fundamental misunderstanding" about the cause of the wood chipper accident, and he cites to portions of the Record that allegedly prove the wood chipper malfunctioned. (Petition, pp. 3-5) Although it is not clear from the Petition whether Holland believes that this "misunderstanding" affected the Court's ruling on his design defect claim or its ruling on his failure to warn claim (or both), it ultimately does not matter.

The Court affirmed summary judgment in favor of Morbark on Holland's two claims because they failed as a matter of law *for reasons unrelated to the cause of the accident*. The Court did not misunderstand the evidence to which Holland cites; Holland miscalculates the significance of that evidence in the Court's decision. After considering the necessary elements of Holland's design defect claim, the Court found that he failed to present evidence of a reasonable alternative design sufficient to withstand summary judgment and "decline[d] to address Holland's remaining claims of error pertaining to his design defect cause of action." (Op. pp. 9-10) Even a showing that the product malfunctioned (which it did not²) could not have salvaged Holland's design defect claim

¹ It is not entirely clear from Holland's Petition whether he continues to assert that his first motion to amend, filed in July 2010, was never granted. (*See* Petition, Issue I (1), p. 2 ("Either the Complaint was amended [in July 2010] to include those additional allegations or it was never amended. . . .")) To the extent this claim is part of Holland's Petition, it too is without merit. As this Court correctly found, "evidence in the record establishes that the circuit court permitted, and the parties consented to, Holland's [2010] amendments," including: (1) Holland's own reliance on those amendments in his opposition to Morbark's summary judgment; (2) the circuit court's acknowledgment in its order denying Holland's second motion to amend that it had already granted Holland's first motion to amend; and (3) dismissal of the other former defendants. (Op. p. 6)

² It is perplexing that Holland suggests the chipper must have malfunctioned because

in the absence of a reasonable alternative design.

The same can be said for Holland's failure to warn claim, which failed for the same reasons as his design defect claim. (Op. p. 10) Moreover, the Court enumerated additional reasons why Morbark was not liable for failure to warn, none of which would have been impacted by a product malfunction: (1) the warnings affixed by Morbark were sufficient; (2) the warnings at issue were designed by Precision Husky, not Morbark; (3) Morbark sold the machine ten years prior to the accident; and (4) no warning was necessary because Holland demonstrated that he appreciated the danger associated with the chipper by admitting that he was aware he could be hit in the head by the hood if he opened the hood prematurely. (Op. pp. 10-11) As this Court recognized, "[w]hether Holland knew the blades were turning when he opened the hood on the day in question is immaterial to his failure to warn claim because Morbark did not have a duty to warn Holland of a danger he already recognized." (Op. p. 10)

Holland also reasserts his challenge to the Court's application of *Branham v. Ford*

"[n]othing 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." (Petition, p. 4) There can be no doubt that the injury Holland alleges is exactly the type of injury the warning decals Precision Husky placed on the hood of the chipper caution against:



(R. pp. 1301 - 1302; p. 448; p. 258, l. 18 – p. 261, l. 6).

Motor Co., 390 S.C. 203, 701 S.E.2d 5 (2010), to this case. This Court did not misapprehend the law when applying *Branham*: (1) the South Carolina Supreme Court was unequivocal in *Branham* that the requirement of proving a reasonable alternative design in a design defect case is mandatory, *Branham*, 390 S.C. at 225, 701 S.E.2d at 16; (2) this Court recently concluded that *Branham* applies retroactively, *Miranda C. v. Nissan Motor Co., Ltd.*, 402 S.C. 577, 586, 741 S.E.2d 34, 39 (Ct. App. 2013); and (3) the Supreme Court inferred the same in *Branham* by denying a petition for rehearing on this very same issue, *Miranda C.*, 402 S.C. at 587, 741 S.E.2d at 40. This well-settled law does not merit a rehearing.

Holland’s Issue Three: “Court’s Opinion Addressing Alternative
Machine Design and OSHA”

The last issue raised by Holland’s Petition appears to be an attempt to rely on OSHA “design standards” as evidence of Morbark’s “failure to provide a guard that would prevent the hood-guard from slamming open.” (Petition, p. 6) As with Issue Two above, it is not clear how this discussion demonstrates that the Court misapprehended or overlooked evidence. A cognizable design defect claim under South Carolina law requires proof of a reasonable alternative design, and Holland cannot satisfy that requirement with evidence of OSHA “design standards” or product failure.

As this Court recognized, Holland was required to provide evidence of an actual, feasible design – not merely a conceptual design theory – and he utterly failed to do so. (Op. pp. 9-10 (collecting cases)) Holland’s own expert, Roger Davis, argued that every chipper in the world that lacks an interlock violates OSHA guarding requirements and is defective, including the Precision Husky machine hood lock Holland touts in his Petition.

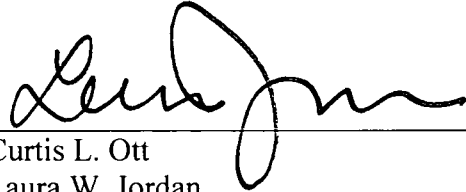
(R. p. 335, l. 17 - p. 337, l. 6).³ No alternative design other than the interlock sufficed for Holland's own expert. Yet, Davis admitted that he is not aware of any manufacturer that incorporates the interlock or even another human who shares his opinion. (R. p. 333, l. 8 - p. 334, l. 14). This conceptual design – which was unquestionably the only design offered by Holland's expert – failed to meet Holland's burden of proof. The trial judge properly ordered summary judgment based on this legal failure, and this Court properly affirmed.

CONCLUSION

Holland has not carried his burden of demonstrating that this Court “overlooked or misapprehended [his] argument.” *Kennedy*, 349 S.C. at 532. On the contrary, by applying longstanding rules and case law of this State, the Court properly affirmed the circuit court's rulings on Holland's motion to amend and Morbark's motion for summary judgment. For the foregoing reasons, this Court should deny Holland's Petition for Rehearing.

Feb. 10, 2014

By: _____


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ATTORNEYS FOR RESPONDENT

³ Contrary to the inference raised by Holland's Petition, Davis did not assert that Morbark's chipper violated OSHA guarding requirements. He argued that every chipper in the world that lacks an interlock violates OSHA guarding requirements because the operator can open the hood while the drum is still moving.

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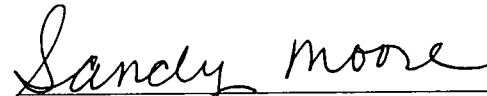
v.

Morbark, Inc. Respondent.

PROOF OF SERVICE

I, Sandy Moore, the undersigned employee of the Gallivan, White & Boyd P.A. attorney for Respondent Morbark, Inc., do hereby certify that I have served a copy of the foregoing **Respondent's Return to Appellant's Petition for Rehearing**, in connection with the above-referenced case by mailing a copy of the same on February 10, 2014, by United States Mail, postage prepaid, to the following address:

Donald E. Jonas, Esquire
Cotty and Jonas
P.O. Box 99
Lexington, SC 29071


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VIA HAND DELIVERY

Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: *Andreal Holland v. Morbark, Inc.*
Lower Court Case No.: 2008-CP-14-0461
Appellate Case No.: 2011-199928

Dear Ms. Kitchings:

Please find enclosed the original and eight copies of Respondent's Return to Appellant's Petition for Rehearing. Please file these documents and return clocked copies to this office via our courier.

By copy of this letter, and as evidenced on the attached Proof of Service, I am serving counsel of record with the same.

If you have any questions, do not hesitate to contact me.

Very truly yours,

Laura W. Jordan
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E-Mail: ljordan@gwbfirm.com

LWJ/sm
Enclosures
cc: Donald E. Jonas