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

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

v.

Morbark, Inc. .... Respondent.

INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF ISSUES ON APPEAL 1

INTRODUCTION 2

STATEMENT OF THE CASE 4

STATEMENT OF FACTS 6

ARGUMENT 11

I. The Circuit Court Correctly Denied Holland's Motion To Amend Because The Untimely Addition Of New Defect Theories Previously Known To Holland Would Have Prejudiced Morbark 11

A. Only One of Holland's Motions to Amend, the 2011 Request, Was Denied 11

B. The Circuit Court Properly Denied Holland's Untimely 2011 Motion To Amend 14

1. The Addition Of A New OSHA/Brake Theory So Late In The Case Would Have Unfairly Prejudiced Morbark 15

2. Holland Unduly Delayed Proposing The 2011 Amendment 18

II. The Circuit Court Properly Granted Summary Judgment On Holland's Design Defect Claim Because The Failure to Incorporate The Additional Safety Device Urged By Holland's Expert Does Not Render The Chipper Defective and Unreasonably Dangerous 20

A. The Summary Judgment Standard 22

B. The South Carolina Supreme Court Has Defined What Establishes "Defective And Unreasonably Dangerous" In The Context Of Defective Design 23

C. Holland's Efforts to Discredit *Branham* Should Be Disregarded 24

D. Failure To Incorporate The Additional Safety Device Urged By Davis Does Not Render The Wood Chipper Defective And Unreasonably Dangerous....25

E. Additional Theories Advanced by Holland At the Hearing Do Not Render The Wood Chipper Defective And Unreasonably Dangerous....31

III. The Circuit Court Properly Granted Summary Judgment On Holland's Design Defect Claim Because Holland Utterly Failed To Show The Requisite Alternative Feasible Design....32

A. No One Has Performed A Feasibility Analysis....33

B. The Circuit Court Properly Based Its Dismissal Of Holland's Design Defect Claims On Material Facts That Were Not Genuinely In Dispute....34

IV. The Circuit Court Properly Granted Summary Judgment On Holland's Failure to Warn Claim....38

A. Holland Was Aware Of The Inherent Dangers Of Using The Chipper....39

B. Holland's Accident Would Have Been Impossible If Morbark's Warnings Had Been Heeded....42

C. The Circuit Court Properly Determined That The Chipper Was Not In Essentially The Same Condition As When It Left Morbark's Hands....43

CONCLUSION....44

TABLE OF AUTHORITIES

Cases

Alamance Indus. v. Chesterfield Hosiery Mill, 239 S.C. 287, 290-91, 122 S.E.2d 648, 649 (1961) 20

Allen v. Long Mfg. NC, Inc., 332 S.C. 422, 505 S.E.2d 354 (Ct. App. 1998) 41

Anderson v. Green Bull, Inc., 322 S.C. 268, 273, 471 S.E.2d 708, 712 (Ct. App. 1996) 38, 39, 41, 42

Ball v. Canadian American Exp. Co., Inc., 314 S.C. 272, 275, 442 S.E.2d 620, 622 (Ct. App. 1994) 15, 17

Baughman v. American Telephone & Telegraph Co., 306 S.C. 101, 111, 410 S.E.2d 537, 545 (1991) 22

Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 539, 462 S.E.2d 321, 326 (Ct. App. 1995) 21, 24, 26, 29, 30, 32, 38

Branham v. Ford Motor Co., 390 S.C. 203, 210, 701 S.E.2d 5, 8 (2010) 21, 23, 24, 25, 26, 34

Byrne v. Liquid Asphalt Systems, Inc., 238 F.Supp.2d 491, 492-93 (E.D.N.Y. 2002) 17

Claytor v. General Motors Corp., 277 S.C. 259, 265, 286 S.E.2d 129, 132 (1982) 23, 24

Dunbar v. Carlson, 341 S.C. 261, 270-71, 533 S.E.2d 913, 918 (Ct. App. 2000) 20

Dyer v. Moss, 208 S.C. 208, 211, 325 S.E.2d 69, 70 (Ct. App. 1985) 22

Englert, Inc. v. Netherlands Ins. Co., 315 S.C. 300, 302, 433 S.E.2d 871, 873 (Ct. App. 1993) 22

Fleming v. Rose, 350 S.C. 488, 493-494, 567 S.E.2d 857, 860 (2002) 22

Foggie v. CSX Transp., Inc., 313 S.C. 17, 22-23, 431 S.E.2d 587, 590 (1993) 11, 15

Forrester v. Smith & Steele Builders, Inc., 295 S.C. 504, 369 S.E.2d 156 (Ct.App.1988) 11

Helms v. Sporicidin Int'l, 871 F.Supp. 837, 839 (E.D.N.C. 1994) 17

Holst v. KCI Konecranes International Corporation, 390 S.C. 29, 699 S.E.2d 715 (Ct. App. 2010) 26, 27, 30, 32, 33, 34

Humana Hospital-Bayside v. Lightle, 305 S.C. 214, 216, 407 S.E.2d 637, 638 (1991)... 22

Id. at 218, 701 S.E.2d at 13 25

Johnson v. Koppers Co., Inc., 524 F.Supp. 1182, *app. dismissed,* (D.C. Ohio 1981)...... 17

Main v. Corley, 281 S.C. 525, 527, 316 S.E.2d 406, 407 (1984) 22

Marchant v. Mitchell Distributing Co., 270 S.C. 29, 35-36, 240 S.E.2d 511, 513-14 (1977) 23, 26

Moore v. Barony House Restaurant, LLC, 382 S.C. 35, 41, 674 S.E.2d 500, 503 (Ct. App. 2009) 26, 38

Otto v. Specialties, Inc., 386 F.Supp. 1240 (D.C.Miss.1974) 17

Peterson v. West Am. Ins. Co., 336 S.C. 89, 94, 518 S.E.2d 608, 610 (Ct. App. 1999) 22, 23

Reed v. Tiffin Motor Homes, Inc., 697 F.2d 1192 (4th Cir.1982) 32

Rife v. Hitachi Constr. Mach. Co., 363 S.C. 209, 215, 609 S.E.2d 565, 568-69 .... 21, 43

Small v. Pioneer Mach., Inc., 329 S.C. 448, 462-63, 494 S.E.2d 835, 842 (Ct. App. 1997) 21

South Carolina State Highway Dep't v. Rural Land Co., 250 S.C. 12, 156 S.E.2d 333 (1967) 15, 17

Stanley v. Kirkpatrick, 357 S.C. 169, 175, 592 S.E.2d 296, 298 (S.C. 2004) 15, 18

Walton v. Mazda of Rock Hill, 376 S.C. 301, 307, 657 S.E.2d 67, 70 (Ct. App. 2008) ... 22

Watson v. Ford Motor Co., 389 S.C. 434, 444, 699S.E.2d 169, 174 (2010) 21

Statutes

29 U.S.C. § 653 17

S.C. Code Ann. § 15-73-20 41

S.C. Code Ann. § 15-73-30 (2005) 39

Rules

Rule 15, SCRCP 14, 15

Rule 56(c), SCRCP 22

Other Authorities

Restatement (Second) *of Torts* § 402A *cmt. j* (1965) 39

STATEMENT OF ISSUES ON APPEAL

I. DID THE CIRCUIT COURT CORRECTLY DENY HOLLAND'S MOTION TO AMEND BECAUSE THE UNTIMELY ADDITION OF NEW DEFECT THEORIES PREVIOUSLY KNOWN TO HOLLAND WOULD HAVE PREJUDICED MORBARK?

II. DID THE CIRCUIT COURT CORRECTLY GRANT SUMMARY JUDGMENT ON HOLLAND'S DESIGN DEFECT CLAIM BECAUSE THE FAILURE TO INCORPORATE THE ADDITIONAL SAFETY DEVICE URGED BY HOLLAND'S EXPERT DOES NOT RENDER THE CHIPPER DEFECTIVE AND UNREASONABLY DANGEROUS?

III. DID THE CIRCUIT COURT CORRECTLY GRANT MORBARK'S MOTION FOR SUMMARY JUDGMENT ON HOLLAND'S DESIGN DEFECT CLAIM BECAUSE HOLLAND UTTERLY FAILED TO SHOW THE REQUISITE ALTERNATIVE FEASIBLE DESIGN?

IV. DID THE CIRCUIT COURT CORRECTLY GRANT MORBARK'S MOTION FOR SUMMARY JUDGMENT ON HOLLAND'S FAILURE TO WARN CLAIM?

INTRODUCTION

On June 1, 2006, Appellant Andreal Holland neared the end of his work shift and began the process of changing the cutting knives on Respondent Morbark, Inc.'s stationary wood chipper. After locking the chipper, Holland failed to confirm the machine's drum had stopped before opening the hood which caused the hood to strike his head. Holland admits he violated both Morbark and his employer's operating procedures for the chipper, as well as a warning label and pictogram attached in three places on the hood. He knew not to open the hood before visually confirming the drum had stopped; indeed, his employer previously reprimanded Holland for opening the hood prematurely, and he understood he would be fired if he did it again.

Holland's liability theory to recover for his resulting injuries has been a moving target. Nevertheless, Holland was only prevented from offering one design theory in this case when the trial court denied Holland's belated attempt to add a Canadian OSHA-brake claim which would require the re-opening of discovery at significant cost to Morbark.

In the final analysis, Holland's eleventh hour OSHA-brake theory, just like all of his other liability theories, was not sufficient according to Holland's own expert – all roads led to one defect theory espoused by Holland's identified expert that Morbark should have incorporated an interlock to prevent opening of the hood before the drum stopped moving. This expert was so confident in his theory that he obviated any other liability theory Holland might assert by concluding that every chipper ever manufactured was defective unless it had an interlock. Yet, the expert also admitted the novelty of his theory in that no one else has ever advanced this theory and no manufacturer of stationary

wood chippers has ever analyzed the feasibility of an interlock, much less developed a prototype alternative, feasible design.

The trial judge properly ordered summary judgment based on this legal failure and well-settled South Carolina law that the absence of additional safety features does not render a product defective or unreasonably dangerous. The trial court also dismissed Holland's failure to warn claim because no duty to warn Holland existed based on his admissions that he knew not to attempt to open the hood before confirming the drum had stopped. This Court recognizes that the cases where a manufacturer will be liable for failing to do what no other manufacturer has ever done will be infrequent. Holland offers no reason to deviate from this pronouncement, and this Court should affirm.

STATEMENT OF THE CASE

Holland filed an Amended Summons and an Amended Complaint on March 3, 2009, seeking to recover unspecified damages allegedly related to personal injuries.[1] Holland originally sued Morbark, A & K Mulch, LLC, Precision Husky Corporation and Watford Industry, Inc. Holland first served Morbark on March 16, 2009. Morbark removed the case to federal court and filed its Answer generally denying Holland's allegations and asserting additional defenses. The case was remanded to state court on October 13, 2009. Thereafter, the parties consented to a scheduling order under which Holland was to identify his experts by August 1, 2010, and produce them for depositions by September 1, 2010; defendants were to identify experts by October 1, 2010, and produce them for depositions by October 29, 2010; discovery was to be completed by October 29, 2010; dispositive motions were to be filed by November 19, 2010; and trial could begin on or after February 1, 2011.

On July 28, 2010, Holland moved to amend and attached an amended Complaint that dismissed all defendants except Morbark and withdrew his negligence cause of action while still pleading products liability claims for strict liability and breach of implied warranty. Morbark consented to that motion, and Holland also filed Consent Stipulations of Dismissal of the other Defendants on August 23, 2010.

On January 14, 2011, Holland filed a second motion to amend, titled "Motion to Amend/Supplement Complaint." After hearing oral arguments, the circuit court denied

[1] These amended pleadings were the first received by or served on Morbark. If Holland filed an initial Summons and Complaint, Morbark has not received or been served with them. Holland's Designation of Matter only lists the March 2009 Amended Complaint, but no original Complaint or pleading filed before March 2009.

this motion in an order filed April 15, 2011.

On February 18, 2011, Morbark moved for summary judgment on all of Holland's claims. After reading the parties' memoranda and hearing oral arguments, the circuit court granted summary judgment to Morbark in an order filed June 2, 2011. Holland moved to reconsider both the order denying his motion to amend and the order granting summary judgment. On August 23, 2011, the trial court denied the motion to reconsider the entry of summary judgment. However, Holland filed his Notice of Appeal on September 21, 2011, and served it on Morbark on September 22, 2011, before the trial court ruled on Holland's motion to reconsider the order denying his motion to amend.

STATEMENT OF FACTS

Viewing the facts in the light most favorable to Holland as the non-moving party, the record reveals the following: this lawsuit concerns a model 58 stationary wood chipper that Morbark manufactured on February 9, 1996, and sold the next month to Johnson Sherman Company in Goldsboro, North Carolina. (Noch dep. p. 12, ll. 14-23). The next known detail of the chipper is that J. H. Chewning Lumber Company, Inc. of Spotsylvania, Virginia traded it to former Defendant Precision Husky in Alabama on August 24, 2005. Precision Husky, after adding a warning decal in three separate places on the hood of the chipper, sold the chipper on March 14, 2006, to Mr. J. C. Witherspoon, Jr., the principal owner of Holland's employer, A&K Mulch in Alcolu, South Carolina. (Precision Husky's November 23, 2009 answers to Holland's Interrogatory Nos. 7, 8 and 10; copy of warning decal affixed by Precision Husky; Smith dep. p. 29, l. 18 – p. 32, l. 6). Morbark had no involvement with the chipper following its original sale in 1996, and indeed was unaware that one of its machines was located at A&K Mulch. (Smith dep. p. 28, ll. 7-19; Witherspoon dep. p. 135, l. 17 – p. 136, l. 8).

Holland started working at A&K Mulch's sawmill on April 5, 2004. (Witherspoon dep. p. 105, ll. 11-19). His primary job was to operate a cut off saw. (Holland dep. p. 89, ll. 10-14). However, after a few months, he began changing the cutting knives on a smaller model Morbark chipper that A&K Mulch used until it purchased the subject chipper. (*Id.* p. 75, l. 24 - p. 76, l. 18).

Because the stationary chipper was fed by an automatic conveyer, the chipper does not require an operator to cut the wood or oversee its operation. (Davis dep. p. 54, l. 24 - p. 55, l. 19). Although Morbark provided an Operator's Manual to the original

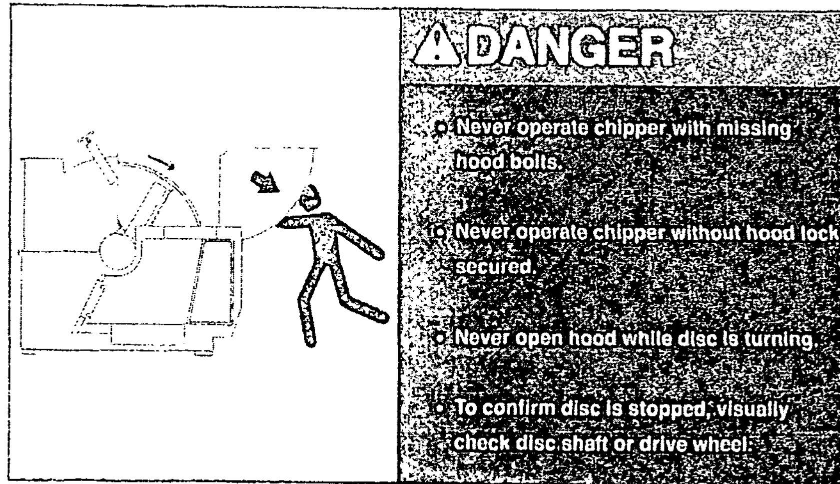
purchaser in 1996 that outlines the procedures for changing the chipper knives, A&K Mulch's employees who changed the knives, including Holland, had never seen the manual. (Holland dep. p. 89, ll. 22-23; Witherspoon dep. p. 64, l. 19 – p. 65, l. 17; p. 111, ll. 17-24). However, A&K Mulch did have a procedure to change the knives. The first step was to turn off the power and lock out and tag out the machine. Because of the momentum of its circular drum[2], the chipper can take as long as fifteen minutes to stop. The chipper was not to be opened until the drum stopped, and an employee could visually confirm in three separate places whether the drum was moving. The employee could also feel the vibrations and hear if the drum was still moving. (Holland dep. p. 104, l. 11 - p. 105, l. 19). According to Witherspoon, who has been around chippers his entire life, "there's no doubt when one of these things is turning." (Witherspoon dep. p. 53, l. 10 – p. 54, l. 11). Once the drum stopped, the employee would remove two pins, one on each side of the chipper hood, to open the hood and access the cutting knives. As originally designed and delivered, four horizontal bolts and two vertical bolts would also have to be removed to open the hood, but those bolts were missing by the time of Holland's accident. (Noch dep. p. 104, l. 7 – p. 105, l. 9; p. 108, l. 8 – p. 109, l. 8; Strong dep. p. 55, l. 4 – p. 56, l. 8; Davis dep. p. 62, l. 18 – p. 65, l. 23). Employees generally changed the knives during the lunch shift and when the cutting mill shut down at the end of the day. (Witherspoon dep. p. 43, ll. 7-9; p. 116, l. 7 – 118, l. 21).

Holland, because he changed these knives daily over a two year period, admits to knowing this procedure and particularly that he should never attempt to open the hood

[2] The drum also has been called a "wheel" and a "disc."

until the drum stopped turning. Indeed, he recalls a prior occasion where he was reprimanded for opening the hood prematurely. (Holland dep. p. 82, l. 8 - p. 84, l. 23; p. 100, l. 10 - p. 106, l. 6). On that occasion, one month before the accident, Witherspoon saw Holland standing by the chipper with the hood open and the drum turning. Witherspoon equated it to Holland "doing what injured himself" which moved Witherspoon to give Holland quite a "sermon" because of the danger to himself and others from prematurely opening the hood. (Witherspoon dep. p. 57, l. 13 – p. 58, l. 12; p. 90, l. 4 – p. 91, l. 20). Holland understood he would be fired if he ever did that again. (Holland dep. p. 107, ll. 10-22). Based on the training provided to employees and this specific encounter with Witherspoon, Holland knew not to open the hood before the chipper stopped moving. (Holland dep. p. 111, l. 20 - p. 112, l. 16; Witherspoon dep. p. 113, l. 1 – p. 116, l. 12).

Despite this knowledge, Holland alleges he was injured on June 1, 2006, when, after locking out and tagging out the chipper, he "mistakenly determined the wheel had stopped turning and attempted to remove the pins securing the two-piece hood assembly." (Amended and Supplemental Complaint dated July 23, 2010, ¶9). He further alleges that the hood contacted the rotating fan blades which caused the hood to kick back and strike him in the head. (*Id.* ¶10). The injury Holland alleges is exactly the type of injury the warning decals Precision Husky placed on the hood of the chipper caution against.



(Precision Husky's November 23, 2009 answers to Holland's Interrogatory Nos. 7, 8 and 10; copy of warning decal affixed by Precision Husky; Smith dep. p. 29, l. 18 – p. 32, l. 6). Because of this diagram and discussions Holland had with the person who trained him to operate the chipper and another co-employee, Holland understood the exact danger of being struck in the head by the hood. (Wright dep. p. 10, ll. 15-19; p. 45, l. 6 – p. 46, l. 3; p. 106, l. 25 – p. 107, l. 9; Brown dep. p. 30, l. 18 – p. 32, l. 4).

Based on these allegations, Holland asserts causes of action for statutory strict liability and breach of implied warranty. In support, Holland offers the opinions of Mr. Roger Davis and Dr. David Clement. Mr. Davis opines that the chipper is defective and unreasonably dangerous because the chipper hood is an unprotected hazard. He thus concludes the chipper is defectively designed because it does not have an interlock to prevent opening the hood until the drum stops moving. (Davis August 3, 2006 Report pp. 5-6). Similarly, Dr. Clement, a consultant in human factors psychology, offers two opinions. First, he opines the design of the chipper is defective from a human factors standpoint because the hood constitutes a hazard that the operator might inadvertently contact. (Clement dep. p. 11, ll. 4 – 10). This opinion is a design opinion that reiterates

Davis's conclusion. Secondly, Clement opines that there were no potentially effective warnings on the machine at the time of the accident. (*Id.* at p. 12, l. 13 – p. 13, l. 8). Specifically, he is critical of Precision Husky's warning decal and diagram above with which Morbark had no involvement. Clement also is critical of Morbark's original warnings and instructions in the Operator's Manual, but Holland never read those instructions, and most if not all of the decals originally affixed to the machine were not present on the day of the accident. (Holland dep. p. 89, l. 22 - p. 90, l. 5; Noch dep. p. 22, l. 15 – p. 23, l. 3).

In addition to the missing bolts that Morbark delivered to the original purchaser in 1996, the fan blades on the chipper at the time of Holland's accident were not original equipment or even manufactured by Morbark. The clearance between these blades and the hood was less than the clearance between Morbark's original blades and the hood as shown in Morbark's drawings, thus increasing the potential for the blades to contact the hood. No one measured the actual clearance at the time of the accident; the only measurement taken was of a replacement hood former defendant Watkins Industry fabricated and attached after Holland's accident. (Noch dep. p. 109, l. 9 – p. 110, l. 8; Strong dep. p. 31, l. 18 – p. 32, l. 17; p. 35, l. 17 – p. 36, l. 25; Davis dep. p. 65, l. 21 – p. 71, l. 5).

ARGUMENT

I. The Circuit Court Correctly Denied Holland's Motion To Amend Because The Untimely Addition Of New Defect Theories Previously Known To Holland Would Have Prejudiced Morbark.

By Order filed April 15, 2011, the circuit court appropriately exercised its discretion to deny Holland's untimely motion to add a new claim that the chipper violated Canadian OSHA standards due to the absence of an effective brake – a request made after the expiration of all scheduling order deadlines and the conclusion of all liability depositions. The circuit court's rejection of Holland's efforts to add this new design defect theory at the eleventh hour was not only proper, but it also was necessary to prevent Morbark from being prejudiced. "It is well established that a motion to amend is addressed to the sound discretion of the trial judge, and that the party opposing the motion has the burden of establishing prejudice." *Foggie v. CSX Transp., Inc.,* 313 S.C. 98, 22-23, 431 S.E.2d 587, 590 (S.C. 1993) (citing *Forrester v. Smith & Steele Builders, Inc.*, 295 S.C. 504, 369 S.E.2d 156 (Ct.App.1988)). As outlined below, Morbark met its burden, and the circuit court did not abuse its discretion.

A. Only One of Holland's Motions to Amend, the 2011 Request, Was Denied.

Although not entirely clear from Holland's Initial Brief which of the circuit court's two amendment decisions he challenges on appeal, there can be only one with which he disagrees: there were multiple shifts in Holland's theory of design defect throughout this litigation, but there was *only one denial* of amendment by the circuit court which occurred when Holland moved to add a new claim in 2011. It is quite surprising, then, that Holland now appears to challenge not only the circuit court's 2011

denial of his motion to amend, but also the circuit court's 2010 decision to *permit* his requested amendments, which he suggests was never granted.

Accordingly, before delving into why Holland's untimely request to amend was properly denied in April 2011, Morbark addresses Holland's revisionist history regarding his prior amendments in this case. As an initial matter, the very first Complaint with which Morbark was served on March 16, 2009 was an "Amended Complaint" (hereinafter referred to as the "2009 Amended Complaint"). (Amended Complaint). Thereafter, on July 28, 2010, Holland moved to amend his complaint to dismiss all defendants except Morbark and withdraw his negligence cause of action, leaving only claims against Morbark for strict liability and warranty (hereinafter referred to as the "2010 Amended Complaint"). (Amended and Supplemental Complaint). This motion, along with a motion to compel Holland filed, was placed on the circuit court's roster for a hearing on October 8, 2010, and it was granted after the parties advised the court that Morbark consented thereto. (October 8, 2010 Motions Roster).

Holland now appears to claim that his July 28, 2010 motion to amend was not granted because no written order was entered, and he argues that his "complaint (03/03/09) . . . has never been amended." (Initial Brief, 14-15). As outlined below, the record indicates otherwise. That the 2010 amendments were allowed by the circuit court is evidenced by: (1) Holland's own representations; (2) the circuit court's orders; (3) Morbark's litigation of the case; and (4) the dismissal of the other former defendants. First, Holland quoted from his 2010 Amended Complaint when outlining what he termed the "Current Allegations by Plaintiff against Morbark" in his March 2011 opposition to Morbark's summary judgment motion. (*Compare* March 10, 2011 Memorandum in

Support of Motion to Amend and in Opposition to Motion for Summary Judgment, 7, *with* ¶¶ 12-14 of 2010 Amended Complaint). He also specifically quoted from paragraph 14(d) of the 2010 Amended Complaint during the hearing on Morbark's summary judgment motion. (3/31/11 Tr. p. 48, ll. 4-22). Holland's presentation of his 2010 Amended Complaint allegations as the claims before the circuit court on summary judgment is at least a tacit admission that the 2010 request to amend was granted. Second, the circuit court's April 15, 2011 Order denying Holland's 2011 motion to amend specifically recounts that Holland's 2010 request to amend was "granted . . . at a hearing on October 8, 2010." (April 15, 2011 Order, 2). Third, the record clearly establishes that Morbark did not oppose the 2010 motion to amend, (April 15, 2011 Order, 2), and, in fact, consented to the 2010 Amended Complaint, (8/9/10 letter from Morbark's attorney to Holland's attorney; 8/9/10 executed consent of Morbark to Holland's Consent Order Allowing Amendment and Supplemental Complaint).[3] Finally, there can be no legitimate dispute that the case proceeded after October 2010 with Morbark as the sole remaining defendant and strict liability and warranty as the sole remaining claims. Holland never again sought to advance his negligence claim or his claims against any defendants other than Morbark. There can be no other conclusion but that the case proceeded with Holland's 2010 amendments.

As a practical matter, however, Holland's argument that he was denied the

[3] Holland references the consent order in his Initial Brief as having been "signed by some, but not all of the defendants." Whether or not the dismissed defendants signed the order is of no consequence; Morbark, the only remaining defendant, undisputedly signed its consent to the new allegations.

opportunity to advance "additional specifications" in his 2010 Amended Complaint is of no consequence in this appeal. All of the 2010 Amended Complaint allegations that Holland claims were disallowed as "further specifications that the Morbark chipper was defective" were, in fact, specifications already alleged in his 2009 Amended Complaint: (1) that the hood/guard could be opened while the machine was in operation, (Initial Brief, 14), was alleged in ¶ 19(a) of the 2009 Amended Complaint; (2) that the machine lacked a device to determine when the cutting action of the rotating wheel had stopped, (Initial Brief, 14), was alleged in ¶ 19(b) of the 2009 Amended Complaint; and (3) that the warnings and instructions failed to convey the specific and serious nature of death, (Initial Brief 14-15), was alleged in ¶ 19(d) of the 2009 Amended Complaint. The only allegations that Holland claims he was not allowed to assert in 2010 were already part of the case.

Thus, the only amendment decision that could be on appeal, and that is of any consequence in these proceedings, is the 2011 denial.

B. The Circuit Court Properly Denied Holland's Untimely 2011 Motion To Amend.

Holland claims that his 2011 motion to amend should have been granted. To the contrary, the circuit court properly denied Holland's request for an eleventh hour amendment that asserted new theories based upon facts previously known to Holland and that would require the re-opening of discovery at significant cost to Morbark after transfer to the trial roster.

Rule 15 of the South Carolina Rules of Civil Procedure and case law interpreting it govern this matter. This Rule provides that after thirty days following service of a

pleading, "a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party." Rule 15, SCRCP. While the circuit court has discretion to allow amendments, courts have warned that this power should not be used indiscriminately, or to prejudice or surprise another party. *Berry v. McLeod,* 328 S.C. 435, 492 S.E.2d 794 (Ct. App. 1997).

In this context, prejudice equates to an inexcusable delay in the proposal of a new claim that would require the opposing party "to introduce additional or different evidence to prevail in the amended action," particularly when the introduction of that new evidence would require a costly re-opening of discovery. *Ball v. Canadian American Exp. Co., Inc.,* 314 S.C. 272, 275, 442 S.E.2d 620, 622 (Ct. App. 1994) (citing *South Carolina State Highway Dep't v. Rural Land Co.*, 250 S.C. 12, 156 S.E.2d 333 (1967)); *see also Stanley v. Kirkpatrick*, 357 S.C. 169, 175, 592 S.E.2d 296, 298 (S.C. 2004); *Foggie v. CSX Transp., Inc.*, 313 S.C. 17, 22-23, 431 S.E.2d 587, 590 (1993). That is exactly the scenario that existed in this case.

1. The Addition Of A New OSHA/Brake Theory So Late In The Case Would Have Unfairly Prejudiced Morbark.

It is not insignificant that Holland's appeal fails to outline the particular amendment that he sought in 2011, characterizing it only as a claim "regarding violation of OSHA standards and related engineering principles," (Initial Brief 17), and "further specifications," (Initial Brief 21). That is par for the course for Holland's 2011 motion to amend. Indeed, it only generally requested "to amend and supplement the complaint to address various developments in the posture of the case since it was filed and to include

additional matters learned through discovery," (2011 Motion), and Holland never submitted a proposed amended complaint.

As observed by the circuit court, the first substantive revelation of Holland's proposed amendment occurred at the March 11, 2011 oral argument on his motion, when he presented a new design theory that the chipper violated OSHA standards, in particular a Canadian OSHA standard, due to the absence of an effective brake. (3/11/11 Tr. p. 12, l. 15-p. 13, l. 10; April 15, 2011 Order). Holland's appeal provides no further clarity regarding the contours of the 2011 proposed amendment, as his argument consists largely of a recitation of witness testimony related to various chipper designs and features without specifying which of those many theories were the subject of his proposed 2011 amendment. (Initial Brief, 17-21).

Holland's comprehensive review of the ever-evolving nature of his design defect theory does, however, strengthen the circuit court's finding that Morbark would be prejudiced by the amendment. Although Holland points out that three witnesses testified about numerous "alternative safety and warning designs and features," (Initial Brief, 18), that does not mean that those designs and features were, or ever would be, actual claims by Holland in this case. In other words, while some of Holland's witnesses may have mentioned OSHA in their depositions as far back as August 2010, Morbark could not have possibly predicted (and prospectively refuted) the Canadian OSHA/brake design defect theory which Holland himself only revealed in March 2011.[4]

[4] The substance of the testimony before Holland's 2011 attempt to amend actually gave Morbark ample reason to conclude that Holland *would not* assert an OSHA/brake claim as a design defect theory. Neither Davis, Clement, nor Smith opined that such a theory would be cognizable. Davis, when asked if he had an opinion that the chipper was defectively designed without a brake, responded he had no opinion. (Davis dep., p. 208,

As noted earlier, prejudice occurs when a proposed amendment states a new claim which would require the defendant "to introduce additional or different evidence to prevail in the amended action." *Ball,* 314 S.C. at 275, 442 S.E.2d at 622 (citing *South Carolina State Highway Dep't v. Rural Land Co.*, 250 S.C. 12, 156 S.E.2d 333 (1967)). Holland's proposed amendment to add a new theory of defect presented precisely the type of prejudice envisioned by the rule. To defend against an entirely new theory, Morbark would have been required to conduct additional discovery in a case that had already been transferred to the trial roster. Granting Holland's motion would have caused

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ll. 2-5) Clement, in turn, suggested that incorporating a brake in this size chipper was not reasonable because it would be "ungodly expensive." (Clement dep., p. 34, ll. 7-12) And Bob Smith's testimony, which Holland claims "created both confirmation and support of . . . further amendments," (Initial Brief, 20), ultimately rejected the application of such a theory in this case. Smith opined that the absence of such a brake option on the subject chipper did not change his opinion that the design of the Morbark chipper was neither defective nor unreasonably dangerous. (Smith dep. p. 99, l. 2 – p. 102, l. 2; p. 44, l. 15 – 46, l. 2). Thus, at the time the Holland requested his amendment, he had not even identified an expert to support his new theory that the chipper is defective or violative of Canadian OSHA without a brake.

In any event, the law is clear that private citizens cannot base an action for damages upon a violation of an OSHA standard. *See* 29 U.S.C. § 653. *See generally Helms v. Sporicidin Int'l*, 871 F.Supp. 837, 839 (E.D.N.C. 1994) (granting summary judgment to defendant on a failure to warn claim because it was premised upon an OSHA standard); *see e.g., Byrne v. Liquid Asphalt Systems, Inc.*, 238 F.Supp.2d 491, 492-93 (E.D.N.Y. 2002) (finding OSHA standards were established to create and maintain safe working conditions between employers and employees and are thus inadmissible against a manufacturer because such evidence is irrelevant and unduly prejudicial); *Johnson v. Koppers Co., Inc.,* 524 F.Supp. 1182, *app. dismissed,* (D.C. Ohio 1981) (stating OSHA does not provide a private right of action for an employee for violations of the employer); *Otto v. Specialties, Inc.*, 386 F.Supp. 1240 (D.C.Miss.1974) (stating OSHA does not permit a civil action for damages to remedy alleged violations of safety standards). Any such claim would have been legally insufficient as OSHA standards cannot be the basis for a private right of action against a manufacturer like Morbark. *Byrne*, 238 F.Supp.2d at 492-93; *Helms*, 871 F.Supp. at 839.

Nor would Holland's proposed claim under the British Columbia standards be actionable, as his own expert observed. (Davis dep., p.13 l. 22- 14 l.7).

a significant increase in costs, as discovery would need to be re-opened to allow Holland to identify an expert regarding the brake option (as noted in Footnote 4, *supra,* no prior witness testimony provided support) and to permit Morbark to retain a rebuttal expert. Moreover, many of the liability depositions would need to be re-taken to delve into the witness' testimony about, among other things, the sale of the chipper without an optional brake, the costs associated with an optional brake, the operation of the chipper with and without such a brake, and the industry custom or standard regarding a brake. *See Stanley,* 357 S.C. at 175, 592 S.E.2d at 298 (prejudice can be established by necessity of re-taking depositions). Morbark disagrees with Holland's assessment that any questioning of prior witnesses was sufficient to establish a defense to this new theory; surely Morbark was not expected to predict any and all new claims that Holland might assert and then attempt to refute those hypothetical claims. Any suggestion that a defendant must read a crystal ball when conducting discovery before it can demonstrate that a proposed amendment is prejudicial is fatally flawed.

2. Holland Unduly Delayed Proposing The 2011 Amendment.

Significantly, although Morbark did not have notice of these claims, Holland did. Holland confirmed that the information to be included in his 2011 amendment was previously known to him when he admitted that testimony *from August/September 2010* supported his theory. (Initial Brief, 17). The record confirms that Holland knew about the possible relevance of the OSHA standard and the defect theory based on the absence of a brake when his own experts, Davis and Clement, extensively discussed these two topics during their respective depositions on August 31, 2010 and September 13, 2010. (*See* Davis dep. p. 13, l. 22 – p. 14, l. 7; p. 194, 13 – p. 195, l. 14; Clement dep., p. 65, l.

20 – p. 66, l. 9). As Holland observes on appeal, "both of the Plaintiff's experts . . . were deposed and offered their opinions months before the deadline established in the Scheduling Order" – opinions that Holland now claims support his proposed amendment. (Initial Brief, 17). Nevertheless, Holland waited until after the expiration of all scheduling order deadlines and the conclusion of all liability depositions to assert his claim.[5]

The South Carolina Supreme Court has not hesitated to uphold circuit courts' decisions denying leave to amend where the moving party has unduly delayed in seeking amendment. This is particularly true where, as here, the information sought to be included by the proposed amendment consists of information previously known by the moving party. *See e.g.*, *Foggie*, 313 S.C. at 22-23, 431 S.E.2d at 590 (finding that circuit

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[5] Holland's admission that he possessed the information for his amendment even before expiration of the Scheduling Order deadlines undermines his attempt to place blame for his delay on "Defendant's failure to comply with the scheduling deadline established by the Court . . . [which Holland claims] literally created the very situation [Morbark] claims it was prejudiced by." (Initial Brief, 16). Morbark did not prevent Holland from seeking to amend his complaint.

In any event, the extension of discovery beyond the deadlines occurred because Holland continued to produce expert witnesses for their depositions long after his September 1, 2010 deadline. (Adams' 1st dep. (8/27/10), p. 26, l. 3 – p. 28, l. 4; p. 31, ll. 3-15; Adams' 2nd dep. (11/3/10), p. 4, l. 12 – p. 5, l. 5; cover page Deysach 11/8/10 dep.) Perhaps Morbark should not have accommodated Holland's violation of his deadlines, but Morbark waited until the conclusion of discovery before filing its motion for summary judgment. Similarly, Holland improperly suggests that Morbark failed to identify an expert by October 1, 2010 but "identified . . . Smith . . . as its expert witness as a deposition . . . on November 18, 2010." (Initial Brief, 16). To be clear, Morbark never retained an expert in this matter. Rather, Morbark videotaped Smith's evidence deposition because he was an out of state witness. After Holland's counsel conducted *voir dire* concerning Smith's qualifications, Holland stipulated that Smith, the Chairman/CEO of former defendant Precision Husky, qualified as an expert to offer design opinions. (Smith dep. p. 8, l. 2 – p. 9, l. 5; p. 24, l. 20 – p. 25, l. 3) Retaining an expert who must be disclosed to opposing counsel is entirely different from deposing a witness who demonstrates that he is qualified as an expert regarding a matter raised in the deposition. Regardless, any suggestion that the Scheduling Order played a role in Holland's delay is a red herring.

court did not abuse its discretion in denying motion to amend because the information on which the new answer would be based had been in the defendant's own files, the motion to amend was filed shortly before the date of trial, and an extensive delay would be required for investigative purposes); *Alamance Indus. v. Chesterfield Hosiery Mill*, 239 S.C. 287, 290-91, 122 S.E.2d 648, 649 (1961) (holding no abuse of discretion in denying request to amend answer five days before trial where defendant was aware of the factual matter that was the subject of the proposed amendment from the time the suit was commenced); *see also Dunbar v. Carlson*, 341 S.C. 261, 270-71, 533 S.E.2d 913, 918 (Ct. App. 2000) (circuit court did not abuse its discretion by denying motion to amend in part based on moving party's inexcusable delay in making motion). The assertion of new legal theories based upon the same facts previously known to Holland is nothing if not dilatory.

There was simply no basis for allowing Holland to amend at such a late date. In light of Holland's knowledge of the potential defect theory since at least August 2010, Holland's delay in filing the motion until after the conclusion of all liability depositions, the transfer of the case to the trial roster, and the additional expenses associated with re-taking many liability witness depositions and hiring new experts, Morbark sustained its burden of proof of prejudice and justice did not require the amendment.

II. The Circuit Court Properly Granted Summary Judgment On Holland's Design Defect Claim Because The Failure to Incorporate The Additional Safety Device Urged By Holland's Expert Does Not Render The Chipper Defective and Unreasonably Dangerous.

Setting aside the particular theory (or theories) of defect alleged by Holland in

this case, all of his products liability claims were fatally flawed from their inception.[6] Although each plaintiff's products liability claim may be premised on a different theory of defect, *all* products liability claims must satisfy the same three required elements: (1) the plaintiff was injured by the product; (2) the injury occurred because the product was in a defective condition, unreasonably dangerous to the user; and (3) the product, at the time of the incident, was in essentially the same condition as when it left the hands of the manufacturer. *Rife v. Hitachi Constr. Mach. Co.*, 363 S.C. 209, 215, 609 S.E.2d 565, 568-69 (citing *Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 462-63, 494 S.E.2d 835, 842 (Ct. App. 1997); *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 539, 462 S.E.2d 321, 326 (Ct. App. 1995)). A failure to prove any one of the elements which is common to all causes of action is fatal to *all related* claims. *Branham v. Ford Motor Co.*, 390 S.C. 203, 210, 701 S.E.2d 5, 8 (2010). In this case, the circuit court properly determined that Holland failed, as a matter of law, to establish that the chipper was in a defective condition and unreasonably dangerous to the user. *Rife*, 363 S.C. at 213, 609 S.E.2d at 568.

As outlined in more detail below, Holland's products liability claims all boil down to one legally insufficient theory: the chipper was defective and unreasonably dangerous simply because it could have been made safer. On appeal, Holland continues to advance his contention that the design was defective because it was not made safe enough, and he points to "evidence of publications and patents addressing . . . state of the

[6] A products liability action may allege any or all of the following defects: (1) a manufacturing defect, (2) a warning defect, and (3) a design defect. *Watson v. Ford Motor Co.*, 389 S.C. 434, 444, 699S.E.2d 169, 174 (2010). As evidenced by the issues on appeal, Holland's claims in this case were premised on the latter two theories: (1) he was not "adequately warned of dangers inherent to a product," and (2) the product was designed in a defective way thus causing an entire line of products to be unreasonably dangerous.

art at the time this machine was manufactured." (Initial Brief, 33). Holland has tried a plethora of design suggestions that he claims would have made the chipper safer, but the common denominator is that they all would have imposed a heavier burden on Morbark than the law requires.

A. The Summary Judgment Standard.

Summary judgment is appropriate where, as here, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(e), SCRCP; *Baughman v. American Telephone & Telegraph Co.*, 306 S.C. 101, 111, 410 S.E.2d 537, 545 (1991). In determining the appropriateness of granting summary judgment, the trial court is not "required to single out some one morsel of evidence . . . to create an issue of fact that is not genuine." *Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 302, 433 S.E.2d 871, 873 (Ct. App. 1993) (quoting *Main v. Corley*, 281 S.C. 525, 527, 316 S.E.2d 406, 407 (1984)). Moreover, "[a] party opposing summary judgment must do more than rely on mere allegations." *Walton v. Mazda of Rock Hill*, 376 S.C. 301, 307, 657 S.E.2d 67, 70 (Ct. App. 2008) (citing *Dyer v. Moss*, 208 S.C. 208, 211, 325 S.E.2d 69, 70 (Ct. App. 1985)). Where a defendant establishes entitlement to judgment as a matter of law, the court must grant summary judgment. *Humana Hospital-Bayside v. Lightle*, 305 S.C. 214, 216, 407 S.E.2d 637, 638 (1991); *Dyer,* 284 S.C. at 211, 325 S.E.2d at 70. "When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *Fleming v. Rose*, 350 S.C. 488, 493-494, 567 S.E.2d 857, 860 (2002) (citing *Peterson v. West Am. Ins. Co.*, 336 S.C.

89, 94, 518 S.E.2d 608, 610 (Ct. App. 1999)).

B. The South Carolina Supreme Court Has Defined What Establishes "Defective And Unreasonably Dangerous" In The Context Of Defective Design.

In cases involving equipment and machinery, like the case at hand, the determination of whether a product is defective and unreasonably dangerous is critical. "Academically, it may be argued that all products are defective because they can be made more safe. However, it does not automatically follow that the products are deemed 'unreasonably dangerous.'" *Claytor v. General Motors Corp.*, 277 S.C. 259, 265, 286 S.E.2d 129, 132 (1982).

By its very nature, a chipper potentially is dangerous. However, neither that fact nor the ability to make a chipper safer renders the chipper defective and unreasonably dangerous. As the South Carolina Supreme Court observed more than thirty years ago:

> Most any product can be made more safe. Automobiles would be more safe with disc brakes and steel-belted radial tires than with ordinary brakes and ordinary tires, but this does not mean that an automobile dealer would be held to have sold a defective product merely because the most safe equipment is not installed. By a like token, a bicycle is more safe if equipped with lights and a bell, but the fact that one is not so equipped does not create the inference that the bicycle is defective and unreasonably dangerous. . . . There is, of course, some danger incident to the use of any product.

Marchant v. Mitchell Distributing Co., 270 S.C. 29, 35-36, 240 S.E.2d 511, 513-14 (1977). This principle has the "longstanding approval" of the South Carolina Supreme Court as reiterated in *Branham v. Ford Motor Company*, 390 S.C. 203, 701 S.E.2d 5 (2010):

> In every design defect case the central recurring fact will be a product that failed causing damage to a person or his property. Consequently, the focus will be whether the product was made safe enough. This inquiry is

> the core of a risk-utility balancing test in design defect cases, **yet we do not suggest a jury question is created merely because a product can be made safer**.

Branham, 390 S.C. at 224, 701 S.E.2d at 16 (emphasis added).

Branham clarified the contours of what is required in a design defect case (like this one) to show that a product was "defective and unreasonably dangerous," and it held that the "the exclusive test in a products liability design case is the risk-utility test with its requirement of showing a feasible alternative design." *Id.* at 220, 701 S.E.2d at 14. In other words, Holland can only show that the chipper was defective and unreasonably dangerous because it contained a design flaw under the risk-utility test, which consists of an analysis to determine "if the danger associated with the use of the product outweighs the utility of the product." *Id.* at 218, 701 S.E.2d at 13 (quoting *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 543, 462 S.E.2d 321, 328 (Ct. App. 1995)). Consistent with its prior holdings that the ability to make a product safer does not alone make a product defective or unreasonably dangerous, the Court reiterated that "numerous factors must be considered [when determining whether a product is unreasonably dangerous], including the usefulness and desirability of the product, the cost for added safety, the likelihood and potential seriousness of injury, and the obviousness of danger." *Branham*, 390 S.C. at 218-19, 701 S.E.2d at 13 (quoting *Claytor*, 277 S.C. at 265, 286 S.E.2d at 132).

C. Holland's Efforts to Discredit *Branham* Should Be Disregarded.

Perhaps realizing that the risk-utility analysis does not yield a result in his favor, Holland asserts the risk-utility test does not apply in this case – a difficult argument in light of the clear precedent set by *Branham*. Holland accuses the South Carolina Supreme Court in *Branham* of "essentially rewrite[ing] the Defective Products Act," and

he contends that *Branham* should be given only "prospective" application. (Initial Brief, 34).

Holland's suggestion that *Branham* was improvidently decided is at least a tacit admission that *Branham* is the operative precedent.[7] In any event, even before *Branham*, South Carolina courts relied on the risk-utility test as one of two potentially applicable tests (the other being the consumer expectations test) to determine whether a design defect rendered a product unreasonably dangerous. *Id.* at 218, 701 S.E.2d at 13. No new or different obligation was imposed on Holland after *Branham* was decided, and he cannot claim that he was blindsided by the *Branham* holding.[8]

D. Failure To Incorporate The Additional Safety Device Urged By Davis Does Not Render The Wood Chipper Defective And Unreasonably Dangerous.

The circuit court's decision is due to be affirmed because Holland, instead of presenting evidence of a design flaw or analyzing the risk-utility factors, focused his summary judgment efforts on legally insufficient arguments, *to wit*: suggestions for how

[7] Holland even goes so far as to claim that the circuit court's reliance on *Branham*, clear precedent when the circuit court ruled on the summary judgment motion, was a "gotcha" decision by the circuit court to undermine Holland's claims "without allowing the amendment of the complaint." (Initial Brief, 30). It cannot reasonably be disputed that the circuit court was bound to follow *Branham*, and any suggestion that the circuit court had a nefarious motive in abiding by that precedent is inappropriate. Moreover, Holland's suggestion that his 2011 request to amend would have remedied the insufficiency of his claims under *Branham* is not accurate; his 2011 amendment asserting a different design defect theory did not address the risk-utility analysis.

[8] Indeed, after reviewing the legislative history, application of the risk-utility test in other jurisdictions and South Carolina precedent, the supreme court merely determined in *Branham* that the consumer expectations test was better suited for manufacturing defect cases and ill-suited for design defect cases, and the court pronounced the risk-utility test as the "exclusive test" for design defect cases. *Id.* at 220.

to make the chipper safer with additional features. Holland's expert Davis does not criticize the chipper's existing safety features; rather, he claims the chipper is defective because it could be made "more safe" with an interlock. *Marchant*, 270 S.C. at 35, 240 S.E.2d at 513. Even assuming that an interlock would make the chipper safer does not mean "a jury question is created" to defeat summary judgment. *Branham*, 390 S.C. at 224, 701 S.E.2d at 16; *see also Moore v. Barony House Restaurant, LLC*, 382 S.C. 35, 41, 674 S.E.2d 500, 503 (Ct. App. 2009) (". . . products are not defective simply because they do not have all the optional safety features that could be included.").

Two indistinguishable opinions from this Court, *Bragg* and *Holst v. KCI Konecranes International Corporation*, 390 S.C. 29, 699 S.E.2d 715 (Ct. App. 2010), demonstrate that Morbark's chipper is neither defective nor unreasonably dangerous under South Carolina law. As in this case, both plaintiffs alleged claims for design defect and failure to warn arising from an injury while operating heavy machinery: an aerial device (*Bragg*); and a crane (*Holst*). Both offered testimony from two experts that the product was defective and unreasonably dangerous because of the absence of an *additional* safety feature: a quick disconnect coupling (*Bragg*); and a video camera (*Holst*). In both cases, this Court nevertheless affirmed judgment as a matter of law for the manufacturers. *Bragg* analyzed the additional safety device proposed by the plaintiff's expert under the *Marchant* analysis and held that the aerial device was neither defective nor unreasonably dangerous to the intended user "considering the aerial device's characteristics, risks, dangers, and uses, together with the knowledge, training, and experience possessed by the intended user." *Bragg,* 319 S.C. at 546, 462 S.E.2d at 330. Similarly, *Holst* concluded that "the mere fact that a video camera and closed-

circuit television system could have been installed on the crane does not establish a design defect." *Holst*, 390 S.C. at 43, 699 S.E.2d at 723.

This conclusion is particularly appropriate in this case because no one has ever adopted the design Holland advances. Davis admits he is not aware of any manufacturer that incorporates his recommended design or even another human who shares his opinion:

> Q. Are you aware of any chipper manufacturer that utilized an interlock such as what you opine should have been used on the hood of a stationary wood chipper back in 1996?
>
> A. No, not aware of any.
>
> Q. Are you aware of any chipper manufacturer today that utilizes an interlock on the hood of a stationary wood chipper?
>
> A. I need to look at some of my research material. Just give me just a minute - - a few minutes. I've identified two manufacturers at least that provide a safety mechanism such that the hood will not be opened during operation, but that appears to be limited to brush chippers.
>
> Q. Okay. So real specific with my question. Are you aware of any chipper manufacturer that utilizes an interlock on the hood or access door of a stationary wood chipper?
>
> A. No, I'm not.
>
> Q. And you've researched that issue; correct?
>
> A. I have.
>
> Q. And you've tried to go out and find if anyone in the industry has ever adopted the design that you, Mr. Davis, opine should have been adopted?
>
> A. Correct.
>
> Q. And you've not been able to find anyone?

A. Correct.

(Davis dep. p. 89, l. 8 - p. 90, l. 14).

Q. So if I take your opinions in this case to their logical conclusion, Mr. Davis, every stationary wood chipper designed by every manufacturer of every wood chipper from the date the first chipper was ever manufactured to the present is defective?

A. I would agree.

Q. Are you aware of any other person in the history of the world who has come to such a conclusion besides you?

A. I don't know of anybody else who has examined the question, so I don't know the answer to that.

Q. Are you aware of - -

A. Well, as a matter of fact, I am aware of one other person.

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I have a coworker who had a case involving - - not a stationary chipper, but a brush chipper with a similar hazard with a similar injury who reached the same conclusions that I did in this case.

Q. Again, about mobile brush chippers which are different machines with different regulations. So as to stationary wood chippers, are you aware of any other person in the history of the world who has reached the same opinion as you?

A. No. I'm proud to be the first that I know of.

Q. And so to your knowledge, no one has ever designed a stationary wood chipper to have an interlock such as what you opine should have been used; correct?

A. I don't know of anybody who has done that.

(Davis dep. p. 93, l. 17 - p. 95, l. 6). Holland's other expert, Clement, concedes these same crucial points. (Clement dep. p. 19, ll. 11-18; p. 20, ll. 4-7; p. 23, ll. 8-23).

Similarly, Bob Smith, Chairman and CEO of Precision Husky, has never heard of

such a design:

> Q. Are you aware of any manufacturer in the stationary wood chipper industry who incorporated either a motion detector or an interlock on the hood of a stationary wood chipper back in 1996?
>
> A. No.
>
> Q. Has Precision Husky ever researched the feasibility or performed a feasibility analysis of incorporating an interlock or motion detector on the hood of its stationary chippers?
>
> A. No, sir.
>
> Q. Are you aware of any manufacturer in the industry who has done a feasibility analysis or researched the feasibility of incorporating an interlock or motion detector on the hood of a stationary wood chipper?
>
> A. No, sir.

(Smith dep. p. 42, l. 18 - p. 43, l. 12). Smith has worked with wood chippers for more than fifty years and has more experience in this industry than anyone he knows.[9] (*Id.* at p. 16, ll. 9-12; p. 17, ll. 1-10).

In *Bragg*, the plaintiff's expert too conceded no one in the industry had designed the additional safety device he proposed. The court reasoned that "[w]hile conformity with industry practice is not conclusive of the product's safety, the cases where a member of industry will be held liable for 'failing to do what no one in his position has ever done before' will be infrequent." 319 S.C. 531, 544, 462 S.E.2d 321, 329 (emphasis added).

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[9] Throughout his Initial Brief, Holland refers to Smith as Morbark's "expert." (*See, e.g.*, Initial Brief, 16, 17). As outlined in footnote 5, *supra*, Morbark never retained Smith or any other paid expert in this matter. Rather, during the videotaped evidentiary deposition of Smith, it became apparent that he was qualified to testify as an expert in chipper design and manufacture, and the *parties agreed* that he should be qualified as such. Smith opines that the subject chipper, manufactured by his competitor, is neither defective nor unreasonably dangerous to a reasonable degree of scientific certainty. (Smith dep. p. 11, ll. 1-5; p. 24, l. 20 – p. 25, l. 3; p. 43, l. 13 – p. 46, l. 2).

Likewise, *Holst* quoted with approval this excerpt from *Bragg* and noted no other manufacturer installed cameras on that type of crane. *Holst*, 390 S.C. at 36, 39, 699 S.E.2d at 719, 721.

Although not dispositive, *Bragg* and *Holst* further relied on the aerial device and crane's compliance with industry custom and applicable standards. *See Holst*, 390 S.C. at 39, 699 S.E.2d at 721 ("While the circuit court considered industry custom in determining Holst failed to produce competent evidence that the crane was defective and unreasonably dangerous, it was only one factor considered by the court. Because this court has given weight to conformity with industry custom, we find the circuit court did not err in considering industry custom as one factor in its analysis." (citing *Bragg*)).

Holland's claims are indistinguishable from *Bragg* and *Holst* considering the novelty of the expert opinion and that no manufacturer has ever incorporated the optional safety device that the expert opined was necessary to prevent the product from being defective and unreasonably dangerous. Davis similarly admits the chipper complied with industry custom even though there are no particular standards for stationary wood chippers. Indeed, Davis and Clement are not even aware of another injury where someone attempted to open the hood of a stationary wood chipper, regardless of the manufacturer, before the disc had stopped moving. (Davis dep. p. 13, l. 22 – p.14, l. 9; p. 39, ll. 19-22; p. 72, l. 12 – p. 74, l. 14; p. 82, ll. 7-17; p. 88, l. 3 – p. 89, l. 3; Clement dep. p. 39, ll. 7-18). The absence of any similar incidents is likely the reason no other manufacturer, person or expert has ever pursued this defect theory and demonstrates why Holland's claims fail. *See Bragg*, 319 S.C. at 546, 462 S.E.2d at 329 ("The fact that there had been no mishaps during this time is additional evidence that the aerial device was not

unreasonably dangerous.") (citation omitted).

E. Additional Theories Advanced by Holland At the Hearing Do Not Render The Wood Chipper Defective And Unreasonably Dangerous.

Once again demonstrating the malleability of his theories, Holland presented at the summary judgment hearing two new arguments regarding Morbark's chipper design. First, Holland argued that the chipper was unreasonably dangerous because it did not incorporate a design Precision Husky utilizes on some of its chippers. (3/31/11 Tr. p. 35, l. 8 – p. 37, l. 2). Just as with Holland's interlock theory this design, at best, would offer additional safety, and rather it seems just to provide different safety. More importantly, neither Davis nor Clement opined that Morbark's chipper was defective because it did not utilize this design. To the contrary, Davis testified Precision Husky's design, like all designs of every chipper manufacturer, is also defective because of the absence of an interlock or sensor.[10]

As the circuit court observed, Holland's theory of defect began to shift again at the hearing when Holland argued the chipper was defective because it may have malfunctioned at the time of his accident. (3/31/11 Tr. p. 37, l. 11 – p. 42, l. 7; summary judgment Order at 6-7). The law is clear, however, that "the mere fact that a product

[10] For this same reason, Holland's allegation that the chipper violated "OSHA guarding requirements," (Initial Brief 30, 32) has no merit. 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. Thus, he must conclude every chipper in the world is defective because the interlock design has never been used.

In any event, as Holland's expert observed, the OSHA requirements do not even apply to Morbark because Morbark's was not Holland's employer; accordingly, Morbark's design could not "violate" OSHA. (Davis dep. p. 22 l. 19 – p. 23 l. 4). Davis further noted that there were no "engineering standards or any standards at all that were applicable to the chipper at the time of manufacture and distribution in 1996[.]" (Davis dep. p. 82 ll. 8-11).

malfunctions does not . . . establish the product was defective." *Bragg*, 319 S.C. at 544, 462 S.E.2d at 328. In foreclosing a defect theory based upon malfunction of the product, this Court observed in *Bragg* that "[s]trict liability is not equivalent either to absolute liability or to insurance of the safety of the product's users." *Bragg*, 319 S.C. at 544, 462 S.E.2d at 328.

In a case where the theory is premised on a design defect in a strict liability cause of action, "the plaintiff must prove the product, as designed, was in an unreasonably dangerous or defective condition," focusing solely on the condition of the product—*not* the actions of the manufacturer. *Bragg*, 319 S.C. at 539-40, 462 S.E.2d at 326 (citing *Reed v. Tiffin Motor Homes, Inc.*, 697 F.2d 1192 (4th Cir.1982)).

Neither of these arguments salvages Holland's claims.

III. The Circuit Court Properly Granted Summary Judgment On Holland's Design Defect Claim Because Holland Utterly Failed To Show The Requisite Alternative Feasible Design.

The circuit court's summary judgment decision was also appropriate because, just as in *Bragg* and *Holst*, Holland failed "to introduce evidence of a feasible design alternative." *Bragg*, 319 S.C. 546, 462 S.E.2d at 330. *Branham* leaves no doubt about this requirement:

> In sum, in a product liability design defect action, the plaintiff **must** present evidence of a reasonable alternative design. The plaintiff will be **required** to point to a design flaw in the product and show how his alternative design would have prevented the product from being unreasonably dangerous. This presentation of an alternative design **must** include consideration of the costs, safety and functionality associated with the alternative design. 390 S.C. at 225, 701 S.E.2d at 16 (emphasis added).

In *Bragg*, the court instructed that the requisite proof of an alternative design cannot be

merely conceptual. 319 S.C. at 546, 462 S.E.2d at 330. *Holst* expounded on the proof required and noted that the plaintiff's experts had not "conducted a risk-utility analysis regarding their proposed design alternative" and "failed to weigh the benefits of installing cameras against the costs and potentially adverse consequences." 390 S.C. at 37, 699 S.E.2d at 719. Thus, this Court held: "Because Holst failed to produce evidence of a feasible design alternative or that a risk-utility analysis was conducted, she cannot establish the crane was defective and unreasonably dangerous as a matter of law." *Id.*, 699 S.E.2d at 719-20.

A. No One Has Performed A Feasibility Analysis.

Holland's claims fail for the same reasons as in *Holst*. "Conceptual" is the exact adjective Davis used to characterize his theory about an interlock:

> Q. Stay with me now. I'm real narrow. Are you aware of any person or company that has performed a feasibility analysis to incorporate an interlock into a stationary wood chipper?
>
> A. I have not seen such a study.
>
> Q. You yourself have not done such a study?
>
> A. Correct.
>
> Q. You have not prepared a design for an interlock into a stationary wood chipper, have you?
>
> A. Not a detailed design; more of a **conceptual** design.

(Davis dep. p. 208, l. 20 - p. 209, l. 7 (emphasis added)).

Davis has not performed a risk-utility analysis. He has not evaluated the cost of his proposed interlock or even designed how it would be attached to a chipper. He has not evaluated the feasibility of such a device on a production model chipper. Indeed, he

has not tested the interlock in the field to be able to consider the safety and functionality issues. In fact, neither he nor Smith is aware of anyone ever performing a risk-utility analysis for a proposed interlock. (Smith dep. p. 43, ll. 1-12). As in *Bragg*, *Holst*, and *Branham*, this theoretical, conceptual alternative design without scientific risk-utility analysis does not meet Holland's burden, and summary judgment should be affirmed.

B. The Circuit Court Properly Based Its Dismissal Of Holland's Design Defect Claims On Material Facts That Were Not Genuinely In Dispute.

As a final matter, Morbark would be remiss not to address Holland's accusation that the circuit court did not rely on undisputed facts when granting summary judgment on Holland's design defect claim. (Initial Brief, 21-27). It is axiomatic that the summary judgment standard does not generally require the absence of *any* disputed fact, but rather the absence of *material* disputed facts. Although Holland accuses the circuit court of overlooking disputed facts in its analysis, the record reveals that undisputed, material facts supported the circuit court's decision to grant summary judgment on Holland's design defect claim. Holland points to what he terms five "fundamental factual conclusions cited by the Court" which he claims "demonstrate [the circuit court's] misunderstanding of the record." (Initial Brief, 22).

Quite tellingly, Holland's discussion of these "factual conclusions" is devoid of any discussion of their materiality; indeed, the fundamental criterion that all disputes must be material and genuine to have any effect on the summary judgment analysis is mentioned only summarily at the conclusion of Holland's recitation. As outlined below, these purported "disputes" are nothing more than distinctions without a difference – not only was there was no true dispute regarding these matters, but also to the extent any

dispute existed, it was not material to the circuit court's design defect analysis.

Holland first disputes any suggestion that he "was attempting to open the moveable section of the hood/guard to change the chipper knives when the accident happened" and seeks clarification that he was injured when he discovered that one pin was already missing from the hood, removed the remaining pin, and the hood sprang up on him. (Initial Brief, 22). According to Holland, the terminology he uses shows that "there was no warning or indication that removing the remaining pin would cause the hood/guard to open without pulling it open." (Initial Brief, 22). This semantic dispute is not material to his defective design claim; whether Holland opened the hood directly or pulled a pin out that caused the hood to open is of no consequence to his claims in this case.[11] What is material are these undisputed facts: (1) Holland understood that he was never to attempt adjustments or repairs of any kind while the chipper is turning; (2) Holland violated that warning and prohibition; and (3) the hood would not have spontaneously flown open without some prohibited action from Holland. (Holland dep. p. 109, ll. 8-15; p. 111, l. 20 - p. 112, l. 16; Davis dep. p. 16, l. 14 - p. 17, l. 1; Clement dep. p. 41, l. 11 – p. 42, l. 2).

Holland next takes issue with any suggestion that "the employee could feel the vibrations and hear the disc if the disc were still moving," and he cites to testimony from Woods, the mill foreman, that it was not possible to see the disc and testimony from Holland that he was wearing ear plugs. (Initial Brief, 23). What Holland fails to cite,

[11] That this is a distinction without a difference is illustrated by the account of the accident provided by Holland's expert: "He removed one or more pins securing the hood to the machine, began to try to open the hood, and the rotating member struck the hood violently knocking it in the open position striking Mr. Holland in the face." (Davis dep. p. 52, ll. 17-21).

however, is his *own* testimony that: (1) he could see whether the disc had stopped by using either one of two available methods -- looking "inside the hole" and looking "at the belts;" (2) he could put his hands on the chipper and feel if the wheel was still moving; and (3) he could hear the wheel if it was still moving. (Holland dep. p. 104, l.11 – p. 105, l. 15). Any suggestion that an employee lacked the ability to see, feel, or hear the disc moving is contrary to Holland's testimony.

Third, Holland disagrees with the circuit court's use of the word "reprimand" when describing a prior incident in which he was caught by owner Witherspoon prematurely opening the hood. Holland points to testimony from Woods that a written disciplinary notice was never issued in an apparent effort to suggest that this incident never occurred. (Initial Brief, 23-24). Holland's own testimony once again undermines his position on appeal. Indeed, Holland's version of this incident sounds far worse than a written disciplinary slip: "And Mr. Jim Witherspoon caught me and . . . . told me the next time I do that he was going to discharge me or fire me from doing that." (Holland dep. p. 105, l. 20 - p. 106, l. 2). Whether it was an official "reprimand" or not is inconsequential – Witherspoon was moved to give Holland quite a "sermon" because of the danger to himself and others from prematurely opening the hood. (Witherspoon dep. p. 57, l. 13 – p. 58, l. 12; p. 90, l. 4 – p. 91, l. 20).

The fourth and fifth "factual conclusions" with which Holland takes issue relate to the missing/replaced bolts and fan blades that altered the chipper in the ten years between Morbark's manufacture and the accident. Holland apparently does not disagree that these items in fact were modified during that time period; he seems only to dispute that those modifications were not causative. (Initial Brief, 24-27). In the final analysis, missing or

replaced bolts and fan blades have nothing to do with an analysis of Morbark's original design – as even admitted by Holland's attorney, these items undisputedly were removed by unknown individuals after the chipper left Morbark's hands. (3/31/11 Tr. p. 58, l. 15 – p. 59, l. 7).

Finally, Holland questions the circuit court's recitation of facts regarding the Morbark-provided warnings that were present on the chipper in 1996 but had been removed by the time of the accident in 2006, which he claims were not adequate to prevent an accident. Although this matter was not specifically enumerated in Holland's "fundamental factual conclusions," it is clear that he takes issue with the circuit court's discussion thereof. (Initial Brief, 27-28).

Ironically, the "dispute" to which Holland refers is nothing more than an inconsistency in the testimony provided by *his own experts.* Holland supports his argument with one hypothesis from his expert (Clement) that those now removed warnings were inadequate, (Initial Brief, 27-28 (citing generally to Clement's testimony without specific page reference)) while neglecting to mention contravening testimony from his other expert (Davis) that Holland's injury would have been impossible had he heeded the Morbark-provided procedures and warnings. (Davis dep. p. 60, l. 1 - p. 61, l. 9; *see also* Witherspoon dep. p. 94, l. 8 - p. 95, l. 1, p. 127, l. 19 – p. 128, l. 3). Davis's testimony undermines Holland's claims in two critical ways. First, Davis's "impossible to be injured" theory makes clear his belief that the warnings and decals Morbark originally delivered with the chipper could have prevented the injury in this case, dispelling Holland's current theory that he has established the "essentially the same condition" requirement because removal of those warnings did not contribute to the

injury. Second, Davis's opinion proves Morbark's defense to Holland's failure to warn claim; Davis does not dispute that the chipper as manufactured by Morbark *did* adequately warn that the type of injury suffered by Holland could occur. Indeed, when the chipper left Morbark's hands it contained numerous warnings communicated through the use of decals and instructions – warnings which were not only sufficient according to Holland's expert, but would have made it impossible for Holland to injure himself as he did.

As outlined above, all of the "disputed evidence" to which Holland cites was either not genuinely disputed, or to the extent any dispute could be interpreted, it was not material to the circuit court's analysis. Reversal is not warranted by nuanced disputes about immaterial facts that did not impact the circuit court's conclusions.

IV. The Circuit Court Properly Granted Summary Judgment On Holland's Failure to Warn Claim.

Bragg and *Holst* also affirmed dismissal of the failure to warn claims. Under South Carolina law, "[a] product may be deemed defective, although faultlessly made, if it is unreasonably dangerous to place the product in the hands of the user without a suitable warning." *Moore*, 382 S.C. at 41, 674 S.E.2d at 503-04 (quoting *Anderson v. Green Bull, Inc.*, 322 S.C. 268, 273, 471 S.E.2d 708, 712 (Ct. App. 1996)). Nevertheless, "a seller is not required to warn of dangers or potential dangers that are generally known and recognized. It follows, then, that a product cannot be deemed either defective or unreasonably dangerous if a danger associated with the product is one that the product's users generally recognize." *Anderson*, 322 S.C. at 270-71, 471 S.E.2d at 710 (citations omitted).

Additionally, "[a] product bearing a warning that the product is safe for use if the user follows the warning is neither defective nor unreasonably dangerous." *Id.* Where a manufacturer gives a warning, the manufacturer "may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous." *Restatement* (Second) *of Torts* § 402A *cmt. j* (1965) (incorporated into South Carolina law by *S.C. Code Ann.* § 15-73-30 (2005)). "[T]he seller is not liable for any injuries caused by the use of the product if the user ignores the warning." *Anderson*, 322 S.C. at 270-71, 471 S.E.2d at 710 (citations omitted).

A. Holland Was Aware Of The Inherent Dangers Of Using The Chipper.

Dismissal of Holland's failure to warn claim was warranted because Morbark was "not required to warn of dangers or potential dangers that are generally known and recognized," as were the dangers in this case. *Anderson*, 322 S.C. at 270-71, 471 S.E.2d at 710. Although the warnings and instructions that Morbark delivered with the chipper at the time of sale were not with the chipper when Holland injured himself, Precision Husky, the company that sold the chipper to A&K Mulch, had affixed a warning decal showing by words and pictogram exactly what would happen to a user that operated the hood before the chipper had stopped turning. (Precision Husky warning decal 3; Witherspoon dep. p. 126, l. 7 – p. 127, l. 18; Holland dep. p. 111, ll. 8-9). Holland admitted that the specific manner of injury would be getting hit in the head just as he alleges happened in this accident. (Holland dep. p. 109, ll. 8-15). Furthermore, A&K Mulch had established procedures for changing the knives that included making certain through visual confirmation that the chipper had stopped moving before opening the hood

to access the knives.

Indeed, every A&K Mulch employee who changed knives on the chipper, including Holland, had seen and understood Precision Husky's decal and also understood A&K Mulch's protocol for changing the knives. While Clement criticizes the wording and picture of this decal, the employees understood the words and diagram. (*See* Woods, p. 61, l. 19 – p. 63, l. 6). More importantly, Morbark cannot be held liable for the content of this decal for the simple reason that Morbark did not design that warning. It was not present on the chipper at the time it left Morbark's hands, and obviously a manufacturer cannot be held liable for another's product.

Regardless, the evidence establishes that Holland knew and appreciated the exact danger of opening the hood before the chipper had stopped turning:

Q. Had you read this warning before your accident?

A. Yes, sir.

(Holland dep. p. 111, ll. 8-9).

Q. Did you know never to open the hood while the disk is turning?

A. Yes, sir.

Q. And that's what it says there in the third bullet point; right?

A. Yes, sir.

Q. And the next one, did you know to confirm the disk had stopped by visually checking the disk shaft or drive wheel?

A. That's what I did, I thought I did that day.

Q. And this diagram shows somebody getting hit in the head when they tried to open the hood before the disk had stopped turning; right?

A. You just open it, you open it walking back.

Q. Doesn't it show the hood coming down and hitting somebody in the head—

A. Yeah.

Q. --because the wheel is still moving?

A. Yes, sir.

Q. And that's what happened to you on the day of this accident, isn't it?

A. Yes, sir.

(Holland dep. p. 111, l. 20 - p. 112, l. 16).[12] Moreover, a fellow employee confirmed Holland's knowledge of the specific danger of being struck in the head by the hood if he opened it prematurely. (Brown, dep. p. 30, l. 18 – p. 32, l. 4).

Therefore, under *Anderson*, the chipper is not defective and unreasonably dangerous. *Anderson*, 322 S.C. at 270-71, 471 S.E.2d at 710; *see also S.C. Code Ann.* § 15-73-20 ("If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery."). Holland attempts to avoid this conclusion by arguing the sufficiency of the warning is a jury question based on Clement's criticisms. *See Allen v. Long Mfg. NC, Inc.*, 332 S.C. 422, 505 S.E.2d 354 (Ct. App. 1998). However, this argument puts the cart before the horse. The circuit court did not need to reach the

[12] Holland mischaracterizes Morbark's position as an "attempt to use the warning claims to create a misuse argument." (Initial Brief, 28). Morbark did not argue that Holland's appreciation of the danger illustrated his misuse of the machine; Morbark argued that Holland's appreciation of the danger defeats his warning claim because Morbark was "not required to warn of dangers or potential dangers that are generally known and recognized," as were the dangers in this case. *Anderson*, 322 S.C. at 270-71, 471 S.E.2d at 710.

question of the sufficiency of the warning because Morbark had no duty to warn Holland in the first place based on Holland's admissions. For this reason, the circuit court's decision is due to be affirmed.

B. Holland's Accident Would Have Been Impossible If Morbark's Warnings Had Been Heeded.

As outlined earlier, at the time the chipper left Morbark's hands in 1996, it contained numerous decals and warnings and was accompanied by the Operator's Manual. (Morbark 24, 40-42, 62, 65, 70, 71, 73, 74, 76, 87-91). Although the warnings and decals were removed by others during the ten years prior to Holland's accident, they were not removed or altered by *Morbark.* Thus, the salient question is whether the chipper, at the time it left Morbark's hands, included warnings that made "the product . . . safe for use if the user follows the warning[s]." *Anderson*, 322 S.C. at 270-71, 471 S.E.2d at 710.

Collectively, the warnings and decals Morbark originally delivered with the chipper instruct the operator never to work on the chipper alone, never to operate the chipper without having read and understood the Operator's Manual, to wait for the chipper to coast completely to a stop which could take several minutes, to check the chipper sheave to verify the chipper had stopped before opening the hood, never to attempt adjustments or repairs while the chipper is turning and never to open the chipper while it is turning. Holland ignored or violated every one of these warnings and prohibitions. (Davis dep. p. 16, l. 14 - p. 17, l. 1; Clement dep. p. 41, l. 11 – p. 42, l. 2).[13]

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[13] There is no merit to Holland's semantic argument that he should have been specifically told not to remove a pin from the hood. (Initial Brief 29). It is axiomatic that Morbark's instruction not to make any adjustments or repairs while the chipper is turning was sufficient to caution users not to remove a pin, which would certainly constitute an

Holland's expert admitted that if Holland had heeded the procedures described above, it was **impossible** for him to injure himself as he did. (Davis dep. p. 60, l. 1 - p. 61, l. 9; *see also* Witherspoon dep. p. 94, l. 8 - p. 95, l. 1, p. 127, l. 19 – p. 128, l. 3). Thus, for this additional reason, there was no liability for failure to warn, and the circuit court's decision should be affirmed.

C. The Circuit Court Properly Determined That The Chipper Was Not In Essentially The Same Condition As When It Left Morbark's Hands.

As noted earlier, Holland's failure to warn claim, like his design defect claim, also required satisfaction of the three required elements: (1) the plaintiff was injured by the product; (2) the injury occurred because the product was in a defective condition, unreasonably dangerous to the user; and (3) **the product, at the time of the incident, was in essentially the same condition as when it left the hands of the manufacturer**. *Rife.*, 363 S.C. at 215, 609 S.E.2d at 568-69 (emphasis added). Holland's failure to establish the final required element – that the chipper was in essentially the same condition as when it left Morbark's hands – was fatal to his failure to warn claim.

The record supports the circuit court's finding that the chipper involved in Holland's accident was not the same chipper that Morbark originally built and sold ten years earlier. As Holland's arguments on appeal confirm, it was undisputed that by the time of Holland's accident, parts were missing or had been replaced and modifications had been made to the original design. As relevant to this claim, the Operator's Manual

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"adjustment" or "repair." Likewise, Precision Husky's decal depicted exactly what would happen to a user that opened the hood before the chipper had stopped turning. (Precision Husky warning decal 3; Witherspoon dep. p. 126, l. 7 – p. 127, l. 18; Holland dep. p. 111, ll. 8-9).

that originally accompanied the chipper and multiple warning decals affixed to the chipper when it left Morbark's hands in 1996 (including the decal instructing that the decals not be removed) were missing by the time of Holland's accident ten years later.

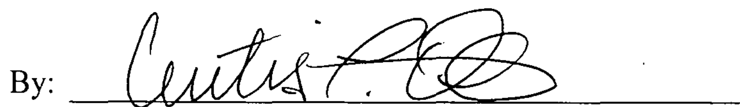
As previously noted, Holland apparently does not dispute on appeal that the chipper involved in his accident had been modified in this manner. (Initial Brief, 31-32). This substantial modification of the chipper demonstrates that it was not in essentially the same condition at the time of the accident as it was when it left Morbark's hands and warrants affirmance of the circuit court's decision to grant summary judgment on Holland's warning claim.

CONCLUSION

On June 1, 2006, Holland did something he had been instructed against, warned about by writing and pictogram, previously reprimanded for, and which he specifically knew not to do: he tried to open the hood of the chipper before it stopped rotating. He now seeks recovery based on a theory that, besides Davis, no person in the history of the world has theorized and no manufacturer has ever researched or considered, much less designed and implemented. By Davis's account, every stationary chipper in the world is defectively designed because none of them would have prevented Holland's injury. South Carolina law does not follow *Star Trek*: it does not require Morbark to go where no man has gone before. Morbark respectfully requests this Court to affirm.

Signature page to follow

August 23, 2012

By: 

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