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,

Plaintiff/Appellant,

vs.

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

RECORD ON APPEAL-VOLUME I

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INDEX TO RECORD ON APPEAL

INDEX	PAGE
Index-Volume 1	I
Index-Volume II	iii
Index-Volume III	iv
INDEX TO RECORD VOLUME I	
ORDERS	
Order Hon W. Jeffrey Young, granting Defendants' Motion For Summary Judgment, 05/27/11	1
Order Hon W. Jeffrey Young, denying Plaintiff's Motion To Alter Or Amend Judgment, 08/23/11	14
Order, Hon. George James, Denying Motion To Amend and Supplement Complaint, **04/15/11**	15
Order, Hon George James, Granting Plaintiff's Motion To Compel Answers To Interrogatory #1 and Supplemental Interrogatory # 32, 10/8/10	20
Order, Hon. George James, Consent Scheduling Order, 07/09/10	21
Order appointing Peggy Knox as Guardian Ad Litem For Plaintiff, 09/03/08	25
PLEADINGS	
Amended Complaint, 03/03/09	27
Answer To Amended Complaint, 04/10/09	39
TRANSCRIPTS	
Transcript of hearing of Defendant's Motion For Summary Judgment held before Hon. W. Jeffrey Young on 03/31/11	54
Transcript of hearing of Plaintiff's Motion to Amend and Supplement Complaint held before Hon. George James on 03/31/11	135
Transcript of hearing of Plaintiff's Motion to Compel held before Hon. George James on 10/08/10	163

MOTIONS

Plaintiff's Motion to Alter or Amend Order Denying Plaintiff's Motion To Amend and Supplement Complaint, 06/20/11 184

Plaintiff's Motion For Reconsideration of Order Granting Defendant's Motion For Summary Judgment, 06/16/11 185

Defendant's Motion For Summary Judgment, 02/23/11 186

Plaintiff's Motion For Protective Order, 01/12/11 188

Plaintiff's Motion To Amend And Supplement Complaint, 01/13/11 190

Plaintiff's Second Motion To Compel Defendant to fully respond to Plaintiff's Interrogatory # 32 and Request To Produce #15, 09/07/10 191

Plaintiff's Motion To Compel Defendant to fully respond to Plaintiff's Interrogatory # 1, 5, 14, 18, 19 and Request To Produce # 6, #7, 08/14/10 192

Plaintiff's Motion To Amend And Supplement Complaint with proposed amended and supplemental complaint, 07/30/10 193

EXHIBITS

Plaintiff's Memorandum In Support Of Motion For Reconsideration and To Amend and Alter Order Denying Plaintiff's Motion To Amend And Supplement Complaint, 07/07/11 199

Plaintiff's Memorandum In Support Of Motion For Reconsideration and To Amend and Alter Order Granting Defendant's Motion For Summary Judgment, 06/16/11 209

Memorandum In Support Of Motion For Summary Judgment by Defendant with Exhibits, 03/29/11 223

Def. Exhibit A Deposition transcript of Morbark representative Larry Knoch, excerpts 243
Def. Exhibit B Precision Husky Corp. Responses To Plaintiff's Interrogatories (#4-11) 249
Def. Exhibit C Sticker affixed by Precision Husky 252
Def. Exhibit D Deposition transcript of Precision Husky representative Bobby Ray Smith, excerpts 253
Def. Exhibit E Deposition transcript of A&K Mulch representative James C. Witherspoon, Jr., excerpts 267
Def. Exhibit F Deposition transcript of Andreal Holland, excerpts 292
Def. Exhibit G Deposition transcript of Roger E. Davis, P.E., excerpts 311
Def. Exhibit H Deposition transcript of Morbark representative James Strong, excerpts 340

Def. Exhibit I Report of Roger Davis, P.E., excerpts 346
Def. Exhibit J Deposition transcript of David E. Clement, PhD., excerpts 349
Def. Exhibit K Morbark documents:
Portion of Morbark Model 48"and 58" Stationary R.H. Chipper
Safety, Operators Manual (Morbark #024, 040-042) 359
Morbark warning decals (Morbark # 062-076) 363
Photos of Morbark 58" chipper serial # 914 (Morbark #086-091) 378

Memorandum In Support of Plaintiff's Motion To Amend And Supplement Complaint and In Opposition To Motion For Summary Judgment, and Supplemental Memorandum In Opposition To Summary Judgment 383

Plaintiff's Documents and Materials Filed In Opposition to Defendant's Motion For Summary Judgment including:

A. Depositions of A&K Mulch, LLC and employees:
Deposition transcript of James Witherspoon, appearing as Morbark witnesses pursuant to SCRCP 30(b)(6), excerpts and exhibits 407

Def. Exhibit #1-Precision Husky label (PH003) 448
Pl. Exhibits 9A-9F-Photos of chipper machine at A&K Mulch 449
Pl. Exhibit #13-Invoice (07/24/06) by Morbark, Inc. for warning labels sent to A&K Mulch (AK056) 455
Pl. Exhibit #14-chipper warning labels from Morbark Parts Manual Same warning decals (Morbark # 062-076) at Record pp. 363-377 456
Pl. Exhibit #15-Purchase order, chipper inspection sheet, chipper check sheet (Morbark # 01, 06, 08-010) 457

Deposition transcript of A& K Mulch foreman Woodrow Woods, excerpts 466

INDEX TO RECORD VOLUME II

Continuation of deposition transcript of A& K Mulch foreman Woodrow Woods, excerpts and exhibits 493

Pl. Exhibit #1-Photo W. Woods with chipper 519
Pl. Exhibit #2-Photo 48" chipper at small mill 520
Pl. Exhibit #3-Photo A&K Mulch logs to process 521
Pl. Exhibit #6-Photo 58" chipper-two piece hood open 522
Pl. Exhibit #7-Photo 58" chipper-two piece hood open 523
Pl. Exhibit #8-Photo 58" chipper fed by vibrating feeder 524

Deposition transcript of A& K Mulch foreman Robert Roseboom, excerpts 525

B Depositions of Defendant Morbark, Inc.
Deposition of James Strong appearing as Morbark witnesses pursuant

to SCRCP 30(b)(6), excerpts 550
Pl. Exhibit #2: Morbark Parts Manual (Morbark # 012, 019-022) 596
Morbark machine drawings including:
-Infeed Hood-RH-top discharge part #40045-580 601
-Infeed Hood-RH-top discharge part #40046-580 602
-Hood pin- part #30107-480 603
-Fan blade- part #40293-580 604
-Chipper Hood-part # 5" disc (6 knife) disc #30299-580 605
Pl. Exhibit #14-Patent # 3,524,485 "Log Chipping Apparatus" Morbark Indust. 606
Pl. Exhibit #15-Patent #6,016,855 "Hood Assembly For A Wood Chipper" 611
Pl. Exhibit #19-Patent # 4,043,514 "Comminution Device" 622
Pl. Exhibit #20-Engineering Change Notice 1999- stationary chippers comply with Safety Standards , Part 52 "Sawmills 630
Pl. Exhibit #23-Photo of Morbark chipper with the hood open 631

C. Deposition transcript of Precision Husky President Bobby Ray Smith, excerpts and exhibits 632

Pl. Exhibit #1-Precision Husky chipper specifications. (PH0028-PH0030) 742
Pl. Exhibit #2-Precision Husky machine invoice, 04/05/06 (AK 053) 744
Precision Husky machine quotation, 03/14/06 (AK054) 745
Pl. Exhibit #3-Chipper shipping documents, 04/13/06 746
Pl. Exhibit #4-Morbark chipper machine photo 747
Pl. Exhibit #5-Morbark chipper machine photo 748
Pl. Exhibit #6-Morbark chipper machine photo label 749
Pl. Exhibit #7-Precision Husky "Waste Wood Chipper Operations & Maintenance Manual" 750
Pl. Exhibit #11-Morbark chipper specifications 775
Pl. Exhibit #12-British Columbia OSHA Regulation Part 27-Wood Prod. Mfg 776
Pl. Exhibit #13-Morbark "Model 48" and 58" Stationary R.H. Chipper Safety, Operators Manual" (Morbark 024-058) 777
Pl. Exhibit #14-Morbark "Model 48" and 58" Stationary R.H. Chipper Parts Manual" (Morbark # 012, 019-022) Same as Record pp. #596-600

D. Deposition transcript of David Clement, PhD., Plaintiff's human factors expert, excerpts and exhibits 815

Def. Exhibit #3-Published articles regarding wood chippers
Chippers: Can Safety Be Engineered? 877
Chipping Away At Chipper Safety 882
Equipment Spotlight-Wood Chippers 888
Morbark Safety Information 891
Fatal and Non-Fatal Occupational Injuries Involving Wood Chippers, Dept. Of Health and Human Centers For Disease Control and Prevention 892
Wood Chippers Get Sophisticated 897
Def. Exhibit #5-Patent 6,016,855 Hood Assembly For Wood Chipper

Same Patent as Record pp. 611-621
Pl. Exhibit #1-Photo damaged hood assembly. 900
Pl. Exhibit #2-Photo Morbark chipper 901
Pl. Exhibit #3-Photo Morbark chipper 902
Pl. Exhibit #4-Photo Morbark chipper 903
Pl. Exhibit #5-Photo Precision Husky chipper hood lock bar device 904
Pl. Exhibit #6-Photo 1989 Precision Husky chipper with hood lock device 905
Pl. Exhibit #7-Morbark machine labels (Morbark # 062-076)
Same warning labels as Record pp. 363-377
Pl. Exhibit #8-Photo of 48" Morbark chipper at A&K Mulch 907

E. Deposition of Roger E. Davis, P.E., Plaintiff's engineering expert witness 908

INDEX TO RECORD VOLUME III

Continuation of deposition of Roger E. Davis, P.E., excerpts and exhibits 985

Exhibit #2- Report of Roger Davis, P.E. with photos figures 1-13 1037

Morbark "Model 48" and 58" Stationary R.H. Chipper Safety, Operators Manual" (Morbark #024-058) Same as Record pp. 777-814

Morbark "Model 48" and 58" Stationary R.H. Chipper Parts Manual" (Morbark # 012, 019-022) Same as Record pp. 596-600

Morbark Drawing "Fan Blade" part # 30160-58 (Morbark # 0180) 1058

Neuropsychologiocal Report of Andreal Holland, 04/09/2009 1059

"Warren A"-Photo of Precision Husky horizontal feed, top discharge chipper machine with two piece hood and hood lockbar 1064

"Warren E-F"- Copy of advertisement for used 1986 Precision Husky horizontal feed, top discharge chipper machine with two piece hood and hood lockbar 1065

"Warren K-M"- Copy of advertisement for Precision Husky horizontal feed, top discharge chipper machine with one piece hood 1067

Precision Husky "Chipper Specifications" delivery on 04/06/06. (PH 028-029) Same as Record pp. 742-743

Precision Husky "Quotation" on 03/014/06. (PH 030) (AK053) Same as Record p. 744

Exhibit #3- portion of "Precision Husky Waste Wood Chipper Operation & Maintenance Manual" Same as Record pp. 750-774

Published articles regarding wood chippers Same as Record pp. 877-899

Morbark Bark Bulletin #8 (Morbark #098) 1070
Morbark Bark Bulletin #31 (Morbark #0100) 1071
Morbark Bark Blletin #201 (Morbark # 01060-0107) 1072

Purchase Order for Morbark Model 58", Chipper Final Inspection, Equipment Load Completion Report, Chipper Check Sheet (Morbark #001-006, 008-010) Same as Record pp. 457-465

British Columbia OSHA Regulation-Part 27 "Wood Manufacturing" Same as Record p. 776

Morbark machine drawings Same as Record pp. 601-604

Exhibit #6-Morbark drawings fan blade #30160-580 (Morbark #0180) 1058

Exhibit #7-Patent #6,036,125 "Wood Chipper" 1074

Exhibit #8-Patent #6,016,855 "Hood Assembly For A Wood Chipper" Same as Record pp. 611-622

Exhibit #9-"Morbidity and Mortality Weekly Report" Same as Record pp. 892-896

Exhibit # 10-"Warren A" Photo of Precision Husky two piece hood chipper machine design Same as Record p. 064

Deposition transcript of Andreal Holland, excerpts 1079
Def. Exhibit #1-Precision Husky warning label 1165

Deposition transcript of Peggy Knox, GAL, excerpts 1166

Defendant Morbark's Answers To Interrogatories

Defendant's Answers To Plaintiff's Interrogatories, #1-20, 05/26/09 1180
Defendant's Answers To Plaintiff's Interrogatories, #21-32. (08/26/10) 1191
Defendant's Supplemental Answers To Plaintiff's Interrogatories #32, 10/15/10 1194

Defendant Morbark's Response To Request For Production

Defendant's Response To Request For Production, #1-11, 05/26/09 1197
Defendant's Response To Request For Production, # 17-28, 10/11/10 1204
Defendant's Response To Request For Production, #29-36, 12/17/10 1211

Defendant Morbark's Request To Admit
Defendant's Answers To Request To Admit # 7, 11, 8/26/10 1216
Defendant's Answers To Request To Admit #17, 10/11/10 1218
Defendant's Answer To Request To Admit #20, (Morbark # 077) 12/17/10 1219

Plaintiff's Attachments to Plaintiff's Request To Admit #17 (Morbark patents referred to in Morbark #077-permanent sticker attached to chipper machine)
4,736,781-Stump Disintegrator 1221
4,771,953-Retractable Anvil Chipper 1222
4,787,431-Flail Apparatus 1223
5,000,620-Drum-type Wood Chipper 1224
5,054,703-Stump Chipper Knife Assembly 1236
5,070,920-Debarker Knife Assembly 1237
5,137,219-Wood Chipper And Infeed System 1238
5,138,957-Hot Gas Generation System For Producing Combustible Gasses For A Burner From Particular Solid Organic Biomass Material 1251
5,148,844-Flail Drum System 1252
5,191,754-Self Propelled Compost Windrow Turning And Aerating Machine And Methods Of Operating The Machine 1259
5,261,306-Circular Saw Blade For Tree Cutting And Bunching Vehicles 1260
5,322,104-Flail Drum Machines And Methods 1261
5,419,502-Tub Grinder Systems And Methods For Comminuting Waste Wood 1263
5,713,525-Horizontal Comminuting Machine Particularly For Recyclable Heavy Wood Randomly Carrying Non-Shatterable Foreign Pieces 1264
5,820,042-Wood Chipper Rotor Head Knife Holder And Knife Assembly 1266

A&K Mulch, LLC, Responses To Request To Admit #15, #16, 08/13/10 1268

Affidavit Of Bob Smith, President Precision Husky Corp, 08/16/10 1269

OTHER MATERIALS

Deposition transcript(s) of Glenn Adams
1st deposition, 08/27/10 (pp. 26-28, 31-32) 1272
2nd deposition, 11/03/10 (pp. 4-6) 1277

Deposition transcript of Levain Brown (pp. 30-33) 1281

Deposition transcript of David Wright, (pp. 10, 45, 106, 107) 1286

Deposition transcript cover page for Robert Deysachs, PhD. 1291

Additional transcript pages of deposition of David Clement (p. 24) 1292

Additional transcript pages of deposition for Roger Davis, P.E. (pp. 13, 39, 52) 1294

Additional transcript pages of deposition of Woodrow Woods, (pp. 61-63) 1298

Precision Husky's Answers to Plaintiff's Interrogatories #7, 8, 10 1301

Consent Stipulation of Dismissal of Defendants Watford Industry, Inc., A&K Mulch, Precision Husky Corp. 1303

Correspondence, proposed Consent Order Allowing Amended and Supplemental Complaint 1322

Clarendon County motion roster10/08/2010 1326

Certification of Record On Appeal 1329

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CLARENDON	)	Civil Action No.: 2008-CP-14-0461
Andreal Holland by his Guardian Ad Litem Peggy Knox,	)	
Plaintiff,	)	**ORDER GRANTING SUMMARY JUDGMENT**
vs.	)	
Morbark, Inc.,	)	
Defendant.	)	

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Plaintiff Andreal Holland, through his mother and guardian *ad litem*, Peggy Knox, filed this product liability lawsuit to recover damages for injuries Plaintiff allegedly sustained from a wood chipper manufactured by Defendant Morbark, Inc. The Court scheduled a hearing on March 31, 2011, in Kingstree, South Carolina, to hear Morbark's Motion for Summary Judgment.[1] Both parties submitted memoranda that the Court reviewed, and the Court heard lengthy arguments from Morbark's attorney, Curtis L. Ott, and Plaintiff's attorney, Donald E. Jonas. After considering the parties' positions, the Court hereby grants Morbark's motion.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if 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 . . .

[1] The parties consented to the hearing outside Clarendon County.

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 v. Moss*, 284 S.C.208, 211, 325 S.E.2d 69, 70 (Ct.App. 1985).

RELEVANT FACTS

The subject machine is a model 58 stationary wood chipper that Morbark manufactured on February 9, 1996, and sold the next month to a North Carolina company. In 1995, a Virginia company traded the chipper into former Defendant Precision Husky Corporation in Alabama on August 24, 2005.[2] Precision Husky, after adding a warning decal to the hood of the chipper, sold the chipper on March 14, 2006, to Mr. J. C. Witherspoon, Jr., the principal owner of Plaintiff's employer, A&K Mulch, LLC in Alcolu, South Carolina.

Plaintiff started working at A&K Mulch's sawmill on April 5, 2004. His primary job was to operate a cut-off saw. 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.

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. Only for maintenance or changing the knives is someone needed to approach the machine. Although Morbark provided an

[2] Plaintiff originally sued Precision Husky, Corporation, A&K Mulch, LLC, and Watford Industry, Inc. in addition to Morbark. Plaintiff subsequently dismissed all defendants except Morbark.

Operator's Manual in 1996 to the original purchaser that outlines the procedures for changing the chipper knives, A&K Mulch's employees who changed the knives, including Plaintiff, had never seen the manual. However, A&K Mulch did follow a procedure to change 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 disc, the chipper can take as long as fifteen minutes to stop. The chipper was not to be opened until the disc stopped, and an employee could visually confirm in three separate places whether the disc was moving. The employee also could feel the vibrations and hear if the disc was still moving. Once the disc 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 these bolts were missing by the time of Plaintiff's accident. Furthermore, the fan blades on the chipper at the time of Plaintiff's accident were not the ones Morbark originally installed and were not 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.

Plaintiff, because he changed these knives daily over a two year period, admits to knowing A&K Mulch's procedure and particularly that he should never attempt to open the hood until the disc stopped turning. Indeed, he recalls a prior occasion when Witherspoon reprimanded Plaintiff for opening the hood prematurely, and he understood he would be fired if he ever did that again.

Despite this knowledge, Plaintiff 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 Complaint ¶9] He further alleges the hood contacted the rotating fan blades which caused the hood to kick back and strike him in the head. [*Id.* ¶10]

Based on these allegations, Plaintiff asserts causes of action for statutory strict liability and breach of implied warranty. In support, Plaintiff 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 concludes the chipper is defectively designed because it does not have an interlock or sensor to prevent opening the hood until the disc stops moving. 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. This opinion simply reiterates Davis' conclusion. Secondly, Clement opines that there were no potentially effective warnings on the machine at the time of the accident. Specifically, he is critical of Precision Husky's warning decal and diagram as well as Morbark's original warnings and instructions in the Operator's Manual.

LEGAL ANALYSIS

Morbark argues Plaintiff cannot prove the chipper was defectively designed and unreasonably dangerous at the time it left Morbark's hands, and that Plaintiff does not have the required evidence of a feasible alternative design available in 1996 when Morbark manufactured and sold the chipper. Morbark also asserts there is no duty to warn because Plaintiff admitted that he was aware of the dangers associated with opening the hood prematurely.

I. Plaintiff's design defect claims fail as a matter of law.

In any products liability action, regardless of the theory of recovery pursued, the plaintiff bears the burden of proving: (1) he was injured by the product; (2) that 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)). In cases involving equipment and machinery, determining whether a product is defective and unreasonably dangerous is critical because "[a]cademically, 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). "Strict liability is not equivalent either to absolute liability or to insurance of the safety of the product's users. Likewise, the mere fact that a product malfunctions does not . . . establish the product was defective." *Bragg*, 319 S.C. at 544, 462 S.E.2d at 328.

Recently, in *Branham v. Ford Motor Company*, 390 S.C. 203, 701 S.E.2d 5 (2010), the South Carolina Supreme Court reviewed the proof elements in a design defect case, which is Plaintiff's theory. The court held "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. Under the risk-utility test, "a product is unreasonably dangerous and defective 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)). "[N]umerous 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). Furthermore, "by its very nature, the risk-utility test requires a showing of a reasonable alternative design." *Id.* at 219, 701 S.E.2d at 13.

A. The chipper was not in essentially the same condition at the time of the accident as when it left Morbark's hands.

The chipper that Plaintiff alleges injured him was not the chipper Morbark originally built and sold. By the time of Plaintiff's accident, the original fan blades were replaced with fan blades manufactured by an unknown company. These substitute fan blades had less clearance from the hood than that shown in Morbark's drawings, thus increasing the possibility of the blades striking the hood. Furthermore, the extra safety provided by the original horizontal and vertical bolts that secured the hood and had to be removed before accessing the blades was eliminated by the simple fact that they were lost by the time A&K Mulch purchased and used the chipper. The same is true for warning decals affixed to the chipper when it left Morbark's hands in 1996; warnings that, if followed, would have made Plaintiff's accident impossible. Accordingly, these substantial modifications and omissions render Plaintiff unable to prove the common product liability element of substantially similar condition.

B. The failure to incorporate the additional safety device urged by Plaintiff's expert does not render the wood chipper defective and unreasonably dangerous.

Furthermore, Plaintiff's evidence fails to establish the chipper was defective and unreasonably dangerous. At the hearing, Plaintiff argued the chipper was defective because it may have malfunctioned at the time of his accident. However, *Bragg* forecloses this argument.

319 S.C. at 544, 462 S.E.2d at 328 ("Likewise, the mere fact that a product malfunctions does not . . . establish the product was defective."). Thus, the Court next analyzes the design defect theory Plaintiff advances.

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).

Branham quoted this excerpt and reaffirmed South Carolina's "longstanding approval" of this principle. The court further noted:

> 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).

Applying this principle to Plaintiff's design defect theory requires dismissal. Plaintiff argued at the hearing that Morbark's design was defective because it did not incorporate a design Precision Husky utilizes on some of its chippers. However, at best this design 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 the designs of every chipper manufacturer, is also defective because of the absence of an interlock or sensor.

Davis' actual defect opinion does not criticize the 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. However, even assuming an interlock would make the chipper safer does not mean "a jury question is created" to overcome Morbark's motion. *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."). The Court finds three design defect cases, *Bragg*, *Moore* and *Holst v. KCI Konecranes International Corporation*, are persuasive as the appellate courts affirmed judgment as a matter of law for the manufacturers despite evidence, including expert testimony, of ways to make a safer aerial device, industrial crane and golf cart.

Additionally, the Court's conclusion is strengthened because no one has ever adopted the design Plaintiff advances. Davis admits he is not aware of any manufacturer that incorporates his recommended design or even of another human who shares his defect opinion. Plaintiff's other expert, Clement, concedes these same crucial points. Similarly, Bob Smith, Chairman and CEO of Precision Husky, has never heard of such a design.

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). 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*)).

Plaintiff'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. 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 Plaintiff'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).

C. **Plaintiff cannot prove the requisite alternative feasible design.**

A second basis on which *Bragg* and *Holst* affirmed judgment was the failure "to introduce evidence of a feasible design alternative." *Bragg*, 319 S.C. 546, 462 S.E.2d at 330. As stated above, *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, the 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.

Plaintiff's claims fail for the same reasons. "Conceptual" is the exact adjective Davis used to characterize his theory about an interlock. 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. As in *Bragg* and *Holst*, and recently reaffirmed by *Branham*, this theoretical, conceptual alternative design without scientific risk-utility analysis does not meet Plaintiff's burden, and summary judgment is appropriate.

II. Plaintiff's failure to warn claims fail as a matter of law.

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)). 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; therefore, the seller is not liable for any injuries caused by the use of the product if the user ignores the warning. Further, 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).

Moreover, 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)).

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. However, by the time of Plaintiff's accident ten years later, many of those decals, including the one instructing that the decals not be removed, were gone. 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. Plaintiff ignored or violated every one of these warnings and prohibitions. Furthermore, it is undisputed that if he had heeded these warnings and obeyed these instructions, it was impossible for him to injure himself as he did. Thus, under these undisputed facts, there can be no liability for failure to warn.

Although these warnings and instructions that Morbark delivered with the chipper at the time of sale were not with the chipper when Plaintiff injured himself, Precision Husky had affixed a detailed warning showing by words and pictogram exactly what would happen to a user that opened the hood before the chipper had stopped turning. Plaintiff admitted that the specific manner of injury would be getting hit in the head just as he alleges happened in this accident. 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 Plaintiff, had seen and understood Precision Husky's decal and also understood A&K Mulch's protocol for changing the knives. The Court also finds that 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 Plaintiff knew and recognized the exact danger of opening the hood before the chipper had stopped turning. 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.").

Plaintiff 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 Court does not reach the question of the sufficiency of the warning because Morbark had no duty to

warn Plaintiff in the first place based on Plaintiff's admissions.

For the foregoing reasons, the Court rules that Morbark is entitled to summary judgment and therefore its motion is hereby granted.

AND IT IS SO ORDERED.

The Honorable W. Jeffrey Young

27 May, 2011

Sumter, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF CLARENDON	)	IN THE COURT OF COMMON PLEAS THIRD JUDICIAL CIRCUIT Case No. 08-CP-14-0461
Andreal Holland by his Guardian Ad Litem Peggy Knox, Plaintiff, vs. Morbark, Inc., Precision Husky Corporation, A & K Mulch, LLC, Watford Industry, Inc.	)	**ORDER**

This matter is before the Court pursuant to plaintiff's timely filed motion for reconsideration. Plaintiff seeks to have this Court reconsider its order granting summary judgment to the defendant. No hearing was held on the instant motion. After carefully considering the arguments made in the memoranda submitted by the plaintiff and defendant, the motion is denied.

W. Jeffrey Young, Circuit Court Judge
Third Judicial Circuit

Date: August 23, 2011
Manning, SC

BEULAH G. ROBERTS
CLERK OF COURT
CLARENDON COUNTY, SC
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00014

Sep. 16. 2011 2:45PM No. 4661 P. 3

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CLARENDON	)	Civil Action No.: 2008-CP-14-0461
Andreal Holland by his Guardian Ad Litem Peggy Knox,	)	
Plaintiff,	)	
vs.	)	**ORDER**
Morbark, Inc.,	)	
Defendant.	)	

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OF ORIGINAL FILED IN THIS OFFICE
DATE 6/24
Beulah B. Roberts
CLERK OF COURT
CLARENDON COUNTY, SC

BEULAH B. ROBERTS
CLERK OF COURT
CLARENDON COUNTY, SC
2011 APR 15 PM 3:53

This matter came before me for a hearing on March 11, 2011, on Plaintiff's "Motion to Amend/Supplement Complaint" filed January 14, 2011. Present before the Court were Donald E. Jonas, attorney for Plaintiff, and Curtis L. Ott, attorney for Defendant.

Plaintiff filed this products liability action to recover damages allegedly related to personal injuries he received in an accident on June 1, 2006, when he attempted to change the cutting knives of a Morbark model 58" stationary wood chipper at his employer's, A & K Mulch, LLC, saw mill. A & K Mulch's owner purchased the chipper from Precision Husky Corporation, and Watford Industry, Inc. installed the chipper at the mill. Plaintiff originally sued Morbark, A & K Mulch, Precision Husky and Watford, and Plaintiff first served Morbark on March 16, 2009. Morbark initially removed the case to federal court, but it was remanded on October 13, 2009. Thereafter, the parties consented to a scheduling order under which Plaintiff was to identify his experts by August 1, 2010; discovery was to be completed by October 29, 2010; and trial could begin on or after February 1, 2011.

The present motion is not Plaintiff's first motion to amend. On July 28, 2010, Plaintiff moved to amend and attached an amended Complaint that dismissed all Defendants except

Morbark, and withdrew his negligence cause of action while still pleading claims for strict liability and breach of implied warranty. Morbark did not oppose that motion, and the Court granted it at a hearing on October 8, 2010. This pleading alleges Plaintiff was injured 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 Complaint ¶9] He further asserts that the hood contacted the rotating fan blades which caused the hood to kick back and strike him in the head. [Id. ¶10]

To support his case, Plaintiff identified two liability experts, Mr. Roger Davis in mechanical engineering, and Dr. David Clement in human factors engineering. In his deposition on August 31, 2010, and his report dated August 3, 2006, Davis opines the chipper hood is an unprotected hazard. He concludes the chipper is defectively designed because it does not have an interlock to prevent opening the hood until the drum stops moving. [Davis Report pp. 5-6] Similarly, Clement offers two opinions. First, he opines the chipper is defectively designed from a human factors standpoint because the hood constitutes a hazard that the operator might inadvertently contact. Secondly, Clement opines that there were no potentially effective warnings on the machine when Plaintiff was injured. [Clement, p. 11, ll. 4 -10, p. 12, l. 13 – p. 13, l. 8] Thus, Plaintiff's only defect theory to this point concerns the absence of an interlock.

Plaintiff's present motion did not attach a proposed amended pleading, and the motion is unclear regarding the relief sought. *See* Plaintiff's motion (Plaintiff moves "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."). However, Plaintiff's counsel explained at the hearing that he wants to amend to allege that the chipper violates OSHA standards, and in particular a Canadian OSHA standard, and to assert a new theory that the

chipper is defective because of the absence of an effective brake that would decrease the time between shutting off the electrical power to the chipper and it completely stopping. Defendant opposes this motion.

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. The trial court is vested with discretion to rule on motions to amend, and the rule generally favors amendments. In this context, prejudice equates to a lack of notice to the other party that the new issue would be tried and a lack of opportunity to refute it. Morbark, as the party opposing the motion, bears the burden of proving prejudice. *Stanley v. Kirkpatrick*, 357 SC 169, 592 S.E.2d 296 (2004).

Applying this law to the present case leads the Court to conclude that Morbark has established the requisite prejudice and justice does not require the amendment. Plaintiff filed this motion following the expiration of all scheduling order deadlines, the conclusion of all liability depositions and the transfer of the case to the trial roster. Furthermore, Plaintiff has long known about the possible relevance of the OSHA standard and the defect theory based on the absence of a brake because 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, p. 194, l3 – p. 195, l. 14; Clement, p. 65, l. 20 – p. 66, l. 9] *See Foggie v. CSX Transportation, Inc.*,. 313 S.C. 98, 431 S.E.2d 587, 590 (1993) (trial court did not abuse its discretion by denying motion to amend in part because moving party had evidence in its possession all along and trial was imminent); *Dunbar v. Carlson*, 341 S.C. 261, 270-71, 533

S.E.2d 913, 918 (Ct.App. 2000) (trial court did not abuse its discretion by denying motion to amend in part based on moving party's inexcusable delay in making motion). When asked if he had an opinion that the chipper was defectively designed without a brake, Davis responded he had no opinion. [Davis, p. 208, ll. 2-5] Clement, in turn, stated that incorporating a brake in this size chipper would be "ungodly expensive." [Clement, p. 34, ll. 7-12] However, the impetus for Plaintiff's motion apparently is testimony from the Chairman and CEO of Precision Husky, Bob Smith, who stated that his company sells chippers with an optional brake for an additional $4,000 to $5,000.[1] However, the absence of such a brake option on the subject chipper did not change Smith's opinion that the design of the Morbark chipper is neither defective nor unreasonably dangerous. [Smith p. 99, l. 2 – p. 102, l. 2; p. 44, l. 15 – 46, l. 2] Thus, Plaintiff has not identified an expert to support his new theory that the chipper is defective without a brake.

Granting Plaintiff's motion would cause significant increases in discovery costs, at least some of which could have been avoided if Plaintiff had timely moved. At this point, discovery would need to be re-opened to allow Plaintiff to identify an expert regarding the brake option and 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).

Based on Plaintiff's knowledge of the potential defect theory concerning the absence of a brake since at least August 2010, Plaintiff's delay in filing the present motion until January 2011

[1] Precision Husky sold this chipper to the owner of A & K Mulch for $25,977. [PH 30 – 3/14/06 Sales Quotation]

after the conclusion of all liability depositions and the expiration of the Scheduling Order deadlines, and the additional expenses associated with re-taking many liability witness depositions and hiring new experts, the Court finds Morbark has sustained its burden of proof of prejudice and justice does not require the amendment. Accordingly, the Court denies Plaintiff's motion.

AND IT IS SO ORDERED.

4/13, 2011

Florence, SC

By: _____
The Honorable George C. James, Jr.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Clarendon
IN THE COURT OF COMMON PLEAS

Peggy Knox, GAL

PLAINTIFF(S)

JUDGMENT IN A CIVIL CASE

CASE NO. 08 -CP- 14 0461

Norbark Industries

DEFENDANT(S)

CHECK ONE:

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____.

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____.

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____
NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order. (Formal order to follow)
☐ Statement of Judgment by the Court:

Defendant is to identify potential witnesses and respond to Interrogatory #1 w/in 10 days. Defendant is to answer Supp. Int. #3R w/in 10 days.

Dated at Manning, South Carolina, this 8 day of Oct., 2010.

PRESIDING JUDGE

~~This judgment was entered on the _____ day of _____, 20____;~~ and a copy mailed first class this 8 day of October, 20 10 to attorneys of record or to parties (when appearing pro se) as follows:

Darrell Wayne Carter, et al — Quets Lyman Ott, et al

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CERTIFIED TRUE COPY
OF ORIGINAL FILED IN THIS OFFICE
DATE 10/8/10
CLERK OF COURT
CLARENDON COUNTY, SC

CLERK OF COURT / Deputy

SCCA SCRCP Form 4 Revised 06/2008

00020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CLARENDON	)	Civil Action No.: 2008-CP-14-0461
Andreal Holland by his Guardian Ad Litem Peggy Knox,	)	
Plaintiff,	)	
vs.	)	**CONSENT SCHEDULING ORDER**
Morbark, Inc., Precision Husky Corporation, A & K Mulch, LLC, and Watford Industry, Inc.,	)	
Defendants.	)	

The parties jointly propose the following scheduling order deadlines:

1. Plaintiff shall identify by full name, address, and telephone number each person whom Plaintiff expects to call as an expert at trial by **August 1, 2010**. Plaintiff shall make each expert identified available for his/her deposition by **September 1, 2010**.

2. Defendants shall identify by full name, address, and telephone number each person whom Defendants expect to call as an expert at trial by **October 1, 2010**. Defendants shall make each expert identified available for his/her deposition by **October 29, 2010**.

3. Discovery in this matter shall be completed no later than **October 29, 2010**. All discovery requests shall be served in time for the responses thereto to be served by this date.

4. Dispositive motions shall be filed by **November 19, 2010**.

5. This case is subject to being called for trial on or after **February 1, 2011**, and after the Court rules on any dispositive motions.

AND IT IS SO ORDERED.

The Honorable George C. James Jr.
Chief Administrative Judge

7/9, 2010

Florence, South Carolina

WE CONSENT:

7/8, 2010

By: Curtis L. Ott

Curtis L. Ott
David C. Marshall
Turner, Padget, Graham & Laney, P.A.
Post Office Box 1473
Columbia, SC 29202
Phone: (803) 254-2200
Fax: (803) 799-3957

ATTORNEYS FOR DEFENDANT MORBARK, INC.

WE CONSENT:

June 22, 2010

By: _____

Donald E. Jonas
Cotty and Jonas
1328 Blanding Street
Columbia, SC 29201
Phone: (803) 309-2535
Fax: (803) 254-7522

ATTORNEYS FOR PLAINTIFF

00024

STATE OF SOUTH CAROLINA)) COUNTY OF CLARENDON)	IN THE COURT OF COMMON PLEAS THIRD JUDICIAL CIRCUIT
Ex Parte:)) Peggy Holland Knox on behalf of Andreal Holland,)) Petitioner,) In Re:)) Andreal Holland by his as Guardian Ad Litem Peggy Knox)) Plaintiff,) vs.)) Mobark Industries, Inc, A & K Mulch, LLC, And John Doe,)) Defendants,)	PETITION AND ORDER FOR APPOINTMENT OF GUARDIAN AD LITEM

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DATE 9/5/08
Beulah S. Roberts
CLERK OF COURT
CLARENDON COUNTY, SC

2008 SEP -5 PM 1:48

Your Petitioner would respectfully show;

1. Petitioner, Peggy Holland Knox, is the natural mother and was duly appointed as Conservator of the Plaintiff Andreal Holland, d.o.b. 2/10/75, by the Clarendon County Probate Court.

2. Petitioner and her son, Andreal Holland, are citizens and residents of Clarendon County, South Carolina..

3. Your Petitioner is prepared to institute a civil action against Defendants Mobark Industries, Inc, A & K Mulch, LLC and "John Doe", on behalf of her son, resulting from a severe and permanent head injury he received on June 1, 2006 while operating a Model 58 chipper machine, Serial no. 914, manufactured by Defendant Mobark Industries in Clarendon County, State of South Carolina.

4. That Petitioner is informed and believes that because of the serious and permanent head and brain injury of her son, that he is handicapped from prosecuting the civil action on his own behalf, that she is a fit and suitable person to be appointed to prosecute such action and that her son has consented to her appointment as guardian ad litem to prosecute such action.

00025

Wherefore, Petitioner requests that she be appointed guardian ad litem of Andreal Holland who is legally incapacitated and/or incapable of prosecuting this action solely on his own behalf.

September 3, 2008

Peggy Holland Knox

Peggy Holland Knox

CONSENT OF GUARDIAN

I, the undersigned Peggy Holland Knox, consent to my appointment as guardian ad litem for Andreal Holland in the above action and agree to serve in that capacity.

September 3, 2008

Peggy Holland Knox

Peggy Holland Knox

CONSENT OF ANDREAL HOLLAND

I, the undersigned Andreal Holland consent to have my mother, Peggy Holland Knox, appointed to serve as mu guardian ad litem in the above action and to serve in that capacity.

September 3, 2008

Andreal Holland

~~Peggy Holland Knox~~

Andreal Holland

ORDER APPOINTING GUARDIAN AD LITEM

On consideration of the above petition, it is hereby ordered that Peggy Holland Knox be appointed as guardian ad litem on behalf of Andreal Holland, the legally incapacitated person in this action.

September 3, 2008

Beulah S. Roberts

Honorable Beulah Roberts
Clerk Of Court, Clarendon County

00026

STATE OF SOUTH CAROLINA)
)
COUNTY OF CLARENDON)

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT

2008 CP 14-0461

CERTIFIED TRUE COPY
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DATE 3/3/09
CLERK OF COURT
CLARENDON COUNTY, SC

Andreal Holland by his Guardian Ad Litem Peggy Knox

Plaintiff,

vs.

Morbark Inc, Precision Husky Corporation, A & K Mulch, LLC, Watford Industry, Inc.

Defendants,

~~AMENDED COMPLAINT~~

(Jury Trial Requested)

2009 MAR -3 AM 11:03
BEULAH G. ROBERTS
CLERK OF COURT
CLARENDON COUNTY, SC

The Plaintiff Andreal Holland by his duly appointed Guardian Ad Litem would respectfully show:

JURISDICTION AND VENUE

1. Plaintiff Andreal Holland is a citizen and resident of Clarendon County, State of South Carolina and, on June 1, 2006, was employed as a machine operator in Clarendon County, South Carolina where he suffered a severe and permanent head injury while operating a Morbark, Model 58, 150 h.p. wood chipper machine, serial # 914.

2. Peggy Holland is the mother of Andreal Holland and was appointed his conservator by the Clarendon County Probate Court and was duly appointed as his guardian ad litem for the purpose of prosecuting this action.

3. Upon information and belief, the Defendant Morbark Inc., hereafter Defendant Morbark, is a corporation duly organized under the laws of the State of Michigan and is a successor corporation to various Morbark entities that designed, manufactured, marketed, sold and distributed the Morbark Model 58, 150 h.p. wood chipper machine, serial # 914, that was operated by Plaintiff on June 1, 2006.

4. Upon information and belief the Defendant Morbark produced, manufactured, distributed, promoted the sale of its products and services, including the Morbark wood chipper model here involved, and placed into the stream of commerce Morbark equipment through nationally circulated trade publications, internet advertising and various means intended to reach customers in South Carolina with the reasonable expectation that those goods and products, support and parts services would be purchased, used and consumed in South Carolina.

5. That the acts and omissions hereafter alleged against Defendant Morbark caused injury to the Plaintiff.

6. Upon information and belief Defendant Precision Husky Corporation is a corporation duly organized under the laws of the State of Alabama and, on or about February 2006, was a reseller and distributor of the Morbark Model 58 wood chipper machine here involved.

7. Upon information and belief the Defendant Precision Husky Corporation promoted the sale of its products, equipment and services, including the Morbark wood chipper machine here involved, through nationally circulated trade publications, internet advertising and various means intended to reach customers in South Carolina with the reasonable expectation that those goods and products would be purchased, used and consumed in South Carolina.

8. Upon information and belief Defendant Precision Husky Corporation offered for sale and actually sold the Morbark Model 58 wood chipper machine here involved, including support and parts services for equipment it sold and/or distributed, for use in Clarendon County, South Carolina.

9. That the acts and omissions hereafter alleged against Defendant Precision Husky Corporation caused injury to the Plaintiff.

10. Upon information and belief the Defendant Watford Industry, Inc., is a South Carolina Domestic Corporation doing business throughout South Carolina and including the installation and rigging of the Morbark Model 58 wood chipper machine here involved in Clarendon County, South Carolina.

11. The Defendant A&K Mulch, LLC is a South Carolina limited liability corporation with its principal place of business located in Clarendon County, South Carolina and, upon information and belief, was the purchaser and owner of the Morbark Model 58 wood chipper machine here involved.

12. The Court has jurisdiction of Defendant Morbark and Defendant Precision Husky Corporation pursuant to S.C. Code Ann. § 36-2-803 (1976).

13. The Court has jurisdiction of the remaining Defendants A & K Mulch, LLC, Watford Industry, Inc. and John Doe pursuant to S.C. Code Ann. § 36-2-802 (1976).

14. The venue of this action is properly placed in Clarendon County, South Carolina.

FOR A FIRST CAUSE OF ACTION
(Negligence-All Defendants)

15. On June 1, 2006, at approximately the end of his shift, the Plaintiff powered off and locked out the Morbark Model 58 chipper machine he was operating in preparation for cleaning and changing the cutting knives. As the machine slowed Plaintiff heard a noise from the turning wheel cutting area of the machine and went to consult his supervisor. When he returned to the machine he mistakenly determined the wheel had stopped turning and attempted to open the hood access door to the wheel.

16. As the Plaintiff attempted to move the hood it came in contact with the rotating fan blades which caused the hood to suddenly kick back and strike the Plaintiff in the head causing severe and permanent injuries to the Plaintiff.

17. The Defendant Morbark is engaged in the business of forest products processing equipment machine design, manufacture and sale and specifically including the manufacture and sale of the wood chipper machine here involved.

18. At all times mentioned, the Defendant Morbark undertook a duty to design, manufacture, inspect, sell and distribute the wood chipper machine here involved with operational and maintenance features complying with industry standards and practices adequate to assure the machine was safe to use and suitable for the expected and intended use and including the duty to design and manufacture a machine with prominently displayed and understandable instructions advising the user/operator of the cleaning and maintenance procedures and adequate warnings of the foreseeable dangers to the operator of the serious hazard created by the heavy rotating cutting wheel that continues to turn after the electrical power is shut off.

19. That the above set forth incident and Plaintiff's resulting injuries and damages were proximately caused by the negligence, gross negligence, reckless, willful and wanton acts of the Defendant Morbark, in one or more of the following particulars:

a. In designing and manufacturing the wood chipper machine without an interlock to prevent the hood from opening until the rotating wheel had stopped turning;

b. In designing and manufacturing the wood chipper machine without a motion detector to determine when the rotating wheel had stopped turning;

c. In designing and manufacturing the wood chipper machine without a securely fitted hood/cutter access door with positively secured and fitted pins upon which to rotate;

d. In designing and manufacturing the wood chipper machine without prominently displayed cleaning, maintenance and operating instructions and warnings conveying the serious nature of injury or death that would result from opening the hood/cutter access door while the rotating wheel was turning;

e. In promoting, selling and distributing the wood chipper machine without an interlock to prevent the hood/cutter access door from opening until the rotating wheel had stopped turning;

f. In promoting, selling and distributing the wood chipper machine without a motion detector to determine when the rotating wheel had stopped turning;

g. In failing to inspect and thereafter promoting, selling and distributing the wood chipper machine without a securely fitted hood/cutter access door with positively secured and fitted pins upon which to rotate;

h. In failing to inspect and thereafter promoting, selling and distributing the chipper machine without prominently displayed cleaning, maintenance and operating instructions and warnings conveying the serious nature of injury or death that would result from opening the hood/cutter access door while the rotating cutting wheel was turning.

20. The Defendant Precision Husky Corporation is engaged in the business of machine design, manufacture and sale of forest products processing equipment and specifically including wood chipper machines.

21. At all times mentioned, the Defendant Precision Husky Corporation undertook a duty to inspect, advertise, sell and distribute the chipper machine here involved to assure its operating and maintenance features were in accord with industry standards and practices adequate to assure the machine was safe to use and suitable for the expected and intended use and including the duty to advertise, sell and distribute the machine with prominently displayed and understandable instructions advising the user/operator of the cleaning and maintenance procedures and adequate warnings of the foreseeable dangers adequate to alert the operator of the serious hazard created by the heavy rotating cutting wheel that continues to turn after the electrical power is shut off.

22. The Defendant Precision Husky Corporation failed to exercise due care and was negligent, grossly negligent, willful and wanton in the following particulars:

a. In failing to adequately inspect and thereafter promoting, selling and distributing the wood chipper machine here involved without an interlock to prevent the hood/cutter access door from opening until the rotating cutting wheel had stopped turning;

b. In failing to adequately inspect and thereafter promoting, selling and distributing the wood chipper machine without a motion detector to determine when the rotating cutting wheel had stopped turning;

c. In failing to adequately inspect and thereafter promoting, selling and distributing the wood chipper machine without a securely fitted hood/cutter access door with positively secured pins and fitted pins upon which to rotate;

d. In failing to inspect and thereafter promoting, selling and distributing the wood chipper machine without prominently displayed cleaning, maintenance and operating instructions and warnings conveying the serious nature of injury or death that would result from opening the hood/cutter access door while the rotating cutting wheel was turning.

23. The Defendant Watford Industry is engaged in the business of machine rigging and installation and including the installation of forest products processing equipment and including wood chipper machines.

24. At all times mentioned, the Defendant Watford Industry undertook a duty to install, inspect and make ready for use the wood chipper machine here involved to assure its operating and maintenance features were in accord with industry standards and practices adequate to assure the machine was safe to use and suitable for the expected and intended use and including the duty to equip and install the machine with prominently displayed and understandable instructions advising the user of the cleaning, maintenance and operating procedures and adequate warnings of the foreseeable dangers adequate to alert the operator of the machine of the serious hazard created by the heavy rotating cutting wheel that continues to turn after the electrical power is shut off.

25. The Defendant Watford Industry failed to exercise due care and was negligent, grossly negligent, willful and wanton in the following particulars:

a. In rigging and installing the wood chipper machine here involved without an interlock to prevent the hood from opening until the rotating cutting wheel had stopped turning;

b. In rigging and installing the wood chipper machine here involved without a motion detector to determine when the rotating cutting wheel had stopped turning;

c. In rigging and installing the wood chipper machine here involved without a securely fitted hood/cutter access door with positively secured and fitted pins upon which to rotate;

d. In rigging and installing the wood chipper machine without prominently displayed cleaning, maintenance and operating instructions and warnings conveying the serious nature of injury or death that would result from opening the hood/cutter access door while the rotating cutting wheel was turning;

e. In failing to inspect the installation and operation of the machine to assure its operating and maintenance features were in accord with industry standards and practices adequate to assure the machine was safe to use and including the duty to equip the machine with instructions and warnings adequate to warn the user/operator of the machine of the serious hazard created by the heavy rotating cutting wheel that continued to turn after the electrical power had been shut off.

26. Upon information and belief, the Defendant A & K Mulch is engaged in the business of processing forest products and owns, operates and maintains various processing machines including the wood chipper machine here involved.

27. Upon information and belief, the Defendant A & K Mulch undertook a duty to install and maintain the wood chipper machine here involved to assure its operating and maintenance features were in accord with industry standards and practices adequate to assure the machine was safe to use and suitable for the expected and intended use and including the duty to

equip and install the machine with prominently displayed and understandable instructions advising the user of the cleaning, maintenance and operating procedures and adequate warnings of the foreseeable dangers adequate to alert the user/operator of the machine of the serious hazard created by the heavy rotating cutting wheel that continues to turn after the electrical power is shut off.

28. The Defendant A & K Mulch failed to exercise due care and was negligent, grossly negligent, willful and wanton in the following particulars:

a. In purchasing, erecting, installing and maintaining the wood chipper machine here involved without operating and maintenance features complying with industry standards and practices adequate to assure the machine was safe to use;

b. In installing and operating the wood chipper machine here involved without an interlock to prevent the hood from opening until the rotating cutting wheel had stopped turning;

c. In installing and operating the wood chipper machine here involved without a motion detector to determine when the rotating cutting wheel had stopped turning;

d. In installing and operating the wood chipper machine here involved without a securely fitted hood access door with positively secured fitted pins upon which to rotate;

e. In rigging and installing the wood chipper machine without prominently displayed cleaning, maintenance and operating instructions and warnings conveying the serious nature of injury or death that would result from opening the hood/cutter access door while the rotating cutting wheel was turning;

f. In failing to inspect the installation and operation of the machine to assure its operating and maintenance features were in accord with industry standards and practices adequate to assure the machine was safe to use and including the duty to equip the machine with instructions and warnings adequate to warn the user/operator of the machine of the serious hazard created by the heavy rotating cutting wheel that continued to turn after the electrical power had been shut off.

29. That as a direct and proximate result of the joint and several acts and omissions of the defendants, Plaintiff has been seriously injured and damaged in the following particulars::

a. Was struck in the head and as a result sustained serious and permanent injuries and damage;

b. Suffered severe, serious and painful injuries from which the Plaintiff is informed and believes he will have permanent adverse effect and disability; that the expected duration of his permanent disability is governed by §19-1-150, *Code of Laws of South Carolina, 1976*, as amended;

c. Has and will experience extreme pain, mental anguish, suffering and discomfort over a long period of time;

d. Has been temporarily and permanently prevented from attending to his usual and ordinary household duties;

e. Has incurred expenses for medical treatment as a result of his injuries;

f. Is informed and believes that he will incur expenses for medical treatment in the future as a result of this accident;

g. Has lost the ability to fully engage in certain activities that he previously enjoyed;

h. Has experienced a loss of wages and income earning capacity.

30. That as a direct and proximate result of the joint and several acts, delicts and omissions Plaintiff is entitled to an award of actual and punitive damages in such amount as may be awarded by a jury.

FOR A SECOND CAUSE OF ACTION
(Strict Liability-Defendants Morbark, Precision Husky Corporation)

31. The pertinent allegations of the preceding paragraphs are realleged as fully as if repeated verbatim.

32. The Morbark wood chipper machine here involved was defective at the time that it was manufactured, sold, resold and ultimately purchased and installed in Calhoun County, South Carolina.

33. Upon information and belief, at no time was the Morbark wood chipper machine altered or changed in any material manner and, at the time of the accident on June 1, 2006, Plaintiff was using the machine in a manner in which it was intended.

34. The Defendant Morbark and Defendant Precision Husky Corporation sold the Morbark wood chipper here involved in a defective condition unreasonably dangerous to the Plaintiff and similarly situated consumers and users.

35. As a direct and proximate result of the Defendants acts, omissions and delicts, Plaintiff was seriously injured and said Defendants are strictly liable for Plaintiff's injuries and damages pursuant to §15-73-30 et seq. of the Code of Laws of the State of South Carolina, 1976, as amended, in manufacturing, distributing and/or selling a defective chipper wood machine and Plaintiff is entitled to an award of actual and consequential damages in such amount as may be awarded by a jury.

FOR A THIRD CAUSE OF ACTION
(Implied Warranty-Defendants Morbark, Precision Husky Corporation)

36. The pertinent allegations of the preceding paragraphs are realleged as fully as if repeated verbatim.

37. Defendant Morbark had a duty to the Plaintiff/machine operator and undertook an implied warranty of merchantability that the wood chipper machine was fit for the particular purpose for which it was intended, as heretofore alleged.

38. Defendant Morbark impliedly represented that it had the skill, knowledge and expertise to properly design, manufacture and distribute the Morbark chipper machine free of

defects and further warranted its operating and maintenance features and characteristics were in accord with industry standards and practices adequate to assure the machine was safe to use and suitable for the expected and intended use and including the duty to equip and install the machine with prominently displayed and understandable instructions advising the user of the cleaning, maintenance and operating procedures and adequate warnings of the foreseeable dangers adequate to alert the operator of the machine of the serious hazard created by the heavy rotating cutting wheel that continues to turn after the electrical power is shut off.

39. Defendant Precision Husky Corporation had a duty to the Plaintiff/machine operator and undertook an implied warranty of merchantability that the wood chipper machine was fit for the particular purpose for which it was intended, as heretofore alleged.

40. Defendant Precision Husky impliedly represented that it had the skill, knowledge and expertise to properly inspect, advertise, sell and distribute the Morbark chipper machine free of defects and further warranted its operating and maintenance features and characteristics were in accord with industry standards and practices adequate to assure the machine was safe to use and suitable for the expected and intended use and including the duty to equip and install the machine with prominently displayed and understandable instructions advising the user of the cleaning, maintenance and operating procedures and adequate warnings of the foreseeable dangers adequate to alert the operator of the machine of the serious hazard created by the heavy rotating cutting wheel that continues to turn after the electrical power is shut off.

41. The Morbark wood chipper machine here involved was in fact defective and was not fit for the purpose for which it was intended due to the defects heretofore alleged.

42. The Defendant Morbark and Defendant Precision Husky Corporation breached their duty and implied warranty of merchantability by distributing and/or selling a Morbark

wood chipper machine that was defective in design, testing and manufacture that did not contain operating and maintenance features and characteristics that complied with industry standards and practices adequate to assure the machine was safe to use and suitable for the expected and intended use and without prominently displayed and understandable instructions advising the user of the cleaning and maintenance procedures and adequate warnings to the operator of the foreseeable dangers created by the heavy rotating wheel that continued to turn after the electrical power had been shut off.

WHEREFORE, Plaintiff prays for judgment against the Defendants as follows:

First Cause Of Action-Negligence

Plaintiff prays for judgment against all the Defendants, jointly and severally, for an award of actual and punitive damages in such amount as a jury may award, together with costs of this action, and for such further relief as this Court may deem fit, just and proper;

Second Cause Of Action-Strict Liability and Third Cause Of Action- Implied Warrannty

Plaintiff prays for judgment against the Defendants Morbark and Precision Husky Corporation, jointly and severally, for an award of actual and consequential damages in such amount as may be awarded in amount in such amount as a jury may award, together with costs of this action, and for such further relief as this Court may deem fit, just and proper.

Columbia, S.C.

February 29, 2009

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

CIVIL ACTION NO.: 2:09-cv-00898-PMD

Andreal Holland by his Guardian Ad Litem Peggy Knox, Plaintiff, vs. Morbark, Inc., Precision Husky Corporation, A & K Mulch, LLC, and Watford Industry, Inc., Defendants.	**DEFENDANT MORBARK, INC.'S ANSWER TO PLAINTIFF'S AMENDED COMPLAINT** **(Jury Trial Requested)**

Defendant Morbark, Inc. ("Morbark") hereby answers Plaintiff's Amended Complaint as follows. Each and every allegation not hereinafter specifically admitted, qualified, or explained is expressly denied.

1. Morbark lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 1 of the Amended Complaint, and, therefore, denies the same.

2. Morbark lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 2 of the Amended Complaint, and, therefore, denies the same.

3. Answering Paragraph 3 of the Amended Complaint, Morbark admits only that it is a corporation organized and existing under the laws of the State of Michigan, with its principal place of business in the State of Michigan. Morbark also admits that it designs and manufactures, in part, and finally assembles and sells certain heavy equipment, including, but not limited to forestry and sawmill equipment such as wood chippers and grinders. Because this

lawsuit is Morbark's first notice of Plaintiff's alleged incident, Morbark lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 3 regarding the machine Plaintiff identifies, and, therefore, denies the remaining allegations of Paragraph 3.

4. Answering Paragraph 4 of the Amended Complaint, Morbark admits only that it designs and manufactures, in part, and finally assembles and sells certain heavy equipment, including, but not limited to forestry and sawmill equipment such as wood chippers and grinders. Because this lawsuit is Morbark's first notice of Plaintiff's alleged incident, Morbark lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 4 regarding the machine Plaintiff identifies, and, therefore, denies the remaining allegations of Paragraph 4.

5. Morbark denies the allegations of Paragraph 5 of the Amended Complaint.

6. Answering Paragraph 6 of the Amended Complaint, Morbark responds that these allegations are directed toward a defendant other than Morbark, and, therefore, no response is required. To the extent the Court may deem a response is required, Morbark denies these allegations.

7. Answering Paragraph 7 of the Amended Complaint, Morbark responds that these allegations are directed toward a defendant other than Morbark, and, therefore, no response is required. To the extent the Court may deem a response is required, Morbark denies these allegations.

8. Answering Paragraph 8 of the Amended Complaint, Morbark responds that these allegations are directed toward a defendant other than Morbark, and, therefore, no response is required. To the extent the Court may deem a response is required, Morbark denies these allegations.

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9. Answering Paragraph 9 of the Amended Complaint, Morbark responds that these allegations are directed toward a defendant other than Morbark, and, therefore, no response is required. To the extent the Court may deem a response is required, Morbark denies these allegations.

10. Answering Paragraph 10 of the Amended Complaint, Morbark responds that these allegations are directed toward a defendant other than Morbark, and, therefore, no response is required. To the extent the Court may deem a response is required, Morbark denies these allegations.

11. Answering Paragraph 11 of the Amended Complaint, Morbark responds that these allegations are directed toward a defendant other than Morbark, and, therefore, no response is required. To the extent the Court may deem a response is required, Morbark denies these allegations.

12. The allegations of Paragraph 12 of the Amended Complaint are legal conclusions requiring no response from Morbark. To the extent the Court deems a response is required of Morbark, Morbark denies these allegations.

13. The allegations of Paragraph 13 of the Amended Complaint are legal conclusions requiring no response from Morbark. To the extent the Court deems a response is required of Morbark, Morbark denies these allegations.

14. Morbark lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 14 of the Amended Complaint, and, therefore, denies these allegations.

FOR A FIRST DEFENSE TO THE FIRST CAUSE OF ACTION
(Negligence-All Defendants)

15. Morbark lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 15 of the Amended Complaint, and, therefore, denies the same.

16. Morbark lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 16 of the Amended Complaint, and, therefore, denies the same.

17. Answering Paragraph 17 of Plaintiff's Amended Complaint, Morbark admits only that it designs and manufactures, in part, and finally assembles and sells certain heavy equipment, including, but not limited to forestry and sawmill equipment such as wood chippers and grinders. Because this lawsuit is Morbark's first notice of Plaintiff's alleged incident, Morbark lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 17 regarding the machine Plaintiff identifies, and, therefore, denies the remaining allegations of Paragraph 17.

18. The allegations of Paragraph 18 of the Amended Complaint are legal conclusions requiring no response from Morbark. To the extent the Court deems a response is required of Morbark, Morbark denies these allegations.

19. Morbark denies the allegations of Paragraph 19 of the Amended Complaint, including all subparagraphs.

20. Answering Paragraph 20 of the Amended Complaint, Morbark responds that these allegations are directed toward a defendant other than Morbark, and, therefore, no response is required. To the extent the Court may deem a response is required, Morbark denies these allegations.

21. Answering Paragraph 21 of the Amended Complaint, Morbark responds that these allegations are directed toward a defendant other than Morbark, and, therefore, no response is required. To the extent the Court may deem a response is required, Morbark denies these allegations.

22. Answering Paragraph 22 of the Amended Complaint, including all subparagraphs, Morbark responds that these allegations are directed toward a defendant other than Morbark, and, therefore, no response is required. To the extent the Court may deem a response is required, Morbark denies these allegations.

23. Answering Paragraph 23 of the Amended Complaint, Morbark responds that these allegations are directed toward a defendant other than Morbark, and, therefore, no response is required. To the extent the Court may deem a response is required, Morbark denies these allegations.

24. Answering Paragraph 24 of the Amended Complaint, Morbark responds that these allegations are directed toward a defendant other than Morbark, and, therefore, no response is required. To the extent the Court may deem a response is required, Morbark denies these allegations.

25. Answering Paragraph 25 of the Amended Complaint, including all subparagraphs, Morbark responds that these allegations are directed toward a defendant other than Morbark, and, therefore, no response is required. To the extent the Court may deem a response is required, Morbark denies these allegations.

26. Answering Paragraph 26 of the Amended Complaint, Morbark responds that these allegations are directed toward a defendant other than Morbark, and, therefore, no response is required. To the extent the Court may deem a response is required, Morbark denies these

allegations.

27. Answering Paragraph 27 of the Amended Complaint, Morbark responds that these allegations are directed toward a defendant other than Morbark, and, therefore, no response is required. To the extent the Court may deem a response is required, Morbark denies these allegations.

28. Answering Paragraph 28 of the Amended Complaint, including all subparagraphs, Morbark responds that these allegations are directed toward a defendant other than Morbark, and, therefore, no response is required. To the extent the Court may deem a response is required, Morbark denies these allegations.

29. Morbark denies the allegations directed against it in Paragraph 29 of the Amended Complaint, including all subparagraphs.

30. Morbark denies the allegations directed against it in Paragraph 30 of the Amended Complaint.

FOR A FIRST DEFENSE TO THE SECOND CAUSE OF ACTION
(Strict Liability-Defendants Morbark, Precision Husky Corporation)

31. Answering Paragraph 31 of the Amended Complaint, Morbark incorporates by reference its responses to Paragraphs 1 through 30 of Plaintiff's Amended Complaint as fully and effectively as if set forth verbatim herein.

32. Morbark denies the allegations of Paragraph 32 of the Amended Complaint.

33. Morbark lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 33 of the Amended Complaint, and, therefore, denies the same.

34. Morbark denies the allegations directed against Morbark in Paragraph 34 of the Amended Complaint. The remaining allegations of Paragraph 34 are directed toward other

defendants, and, therefore, no response is required of Morbark. To the extent the Court may deem a response is required, Morbark denies the allegations of Paragraph 34 directed toward other defendants.

35. Morbark denies the allegations directed against Morbark in Paragraph 35 of the Amended Complaint. The remaining allegations of Paragraph 35 are directed toward other defendants, and, therefore, no response is required of Morbark. To the extent the Court may deem a response is required, Morbark denies the allegations of Paragraph 35 directed toward other defendants.

FOR A FIRST DEFENSE TO THE THIRD CAUSE OF ACTION
(Implied Warranty-Defendants Morbark, Precision Husky Corporation)

36. Answering Paragraph 36 of the Amended Complaint, Morbark incorporates by reference its responses to Paragraphs 1 through 35 of Plaintiff's Amended Complaint as fully and effectively as if set forth verbatim herein.

37. The allegations of Paragraph 37 of the Amended Complaint are legal conclusions requiring no response from Morbark. To the extent the Court deems a response is required of Morbark, Morbark denies these allegations.

38. The allegations of Paragraph 38 of the Amended Complaint are legal conclusions requiring no response from Morbark. To the extent the Court deems a response is required of Morbark, Morbark denies these allegations.

39. Answering Paragraph 39 of the Amended Complaint, Morbark responds that these allegations are directed toward a defendant other than Morbark, and, therefore, no response is required. To the extent the Court may deem a response is required, Morbark denies these allegations.

40. Answering Paragraph 40 of the Amended Complaint, Morbark responds that these allegations are directed toward a defendant other than Morbark, and, therefore, no response is required. To the extent the Court may deem a response is required, Morbark denies these allegations.

41. Morbark denies the allegations of Paragraph 41 of the Amended Complaint.

42. Morbark denies the allegations directed against Morbark in Paragraph 42 of the Amended Complaint. The remaining allegations of Paragraph 42 are directed toward other defendants, and, therefore, no response is required of Morbark. To the extent the Court may deem a response is required, Morbark denies the allegations of Paragraph 42 directed toward other defendants.

43. Morbark denies the "WHEREFORE" paragraphs of the Amended Complaint, including the prayers for relief that follow.

FOR A SECOND DEFENSE

44. Morbark alleges that Plaintiff's Amended Complaint fails to state a claim upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

FOR A THIRD DEFENSE

45. Morbark alleges that Plaintiff's Amended Complaint is or may be barred by the applicable statutes of limitation or repose.

FOR A FOURTH DEFENSE

46. Morbark pleads Plaintiff's contributory negligence as a bar to Plaintiff's recovery in this case. Alternatively, if the doctrine of comparative negligence applies, Morbark alleges that the negligence and/or fault of Plaintiff was greater than any negligence or fault, if any, which may be established against Morbark and, therefore, Plaintiff is barred from recovery.

Morbark further alleges that any injury or damage sustained by Plaintiff was due to and caused by the negligence and/or fault of Plaintiff, combining, concurring, and contributing with the negligence and/or fault, if any, on the part of Morbark, and that any amount of recovery awarded to Plaintiff for the alleged injuries and damage should be reduced by the Court based on the percentage of negligence and/or fault attributed to Plaintiff. Morbark reserves the right to define the particulars of Plaintiff's contributory or comparative negligence at the conclusion of discovery.

FOR A FIFTH DEFENSE

47. Morbark submits that the injuries and damages for which Plaintiff seeks recovery were due to, and proximately caused by, the negligence, recklessness, willfulness, wantonness, and criminal acts of a party or parties other than Morbark in the operation, maintenance, or use of the product at issue. Plaintiff's claims against Morbark, therefore, should be barred or reduced by the amount of such negligence, recklessness, willfulness, or wantonness.

FOR A SIXTH DEFENSE

48. Morbark submits that the injuries and damages for which Plaintiff seeks recovery were due to, and proximately caused by, the intervening negligence, recklessness, willfulness, wantonness, criminal acts, and fault of a party or parties other than Morbark. Such intervening negligence, recklessness, willfulness, wantonness, criminal acts, and fault are the sole cause of the injuries and damages for which Plaintiff seeks recovery, and, therefore, Plaintiff may not recover against Morbark.

FOR A SEVENTH DEFENSE

49. Morbark would show that the injuries and damages for which Plaintiff seeks recovery were due to, and proximately caused by, the sole negligence, recklessness, willfulness,

wantonness, criminal acts, and fault of third parties for whom Morbark is not liable. Therefore, the acts or fault of third parties are the real, efficient, direct, and proximate cause of the injuries for which Plaintiff seeks recovery, and, therefore, Plaintiff cannot recover against Morbark.

FOR AN EIGHTH DEFENSE

50. Morbark would show that the damages for which Plaintiff seeks recovery were due to and proximately caused by voluntary actions taken by Plaintiff in full knowledge of any associated risk, of which one, in the exercise of due care, should have known or appreciated, and, therefore, this voluntary assumption of risk is a complete bar to this action; or, in the alternative, a facet of comparative negligence.

FOR A NINTH DEFENSE

51. Morbark alleges that any damages sustained by Plaintiff were due to and caused by the misuse or misapplication of the product described in the Amended Complaint, and therefore, Plaintiff may not recover against Morbark.

FOR A TENTH DEFENSE

52. Morbark submits that the damages for which Plaintiff seeks recovery may have been due to and proximately caused by the modification or alteration of the product described in the Amended Complaint, and, therefore, Plaintiff may not recover against Morbark.

FOR AN ELEVENTH DEFENSE

53. Morbark alleges that the conditions that Plaintiff alleges caused Plaintiff's damages were open and obvious as a matter of law, and thus Morbark is not liable to Plaintiff in any sum or amount.

FOR A TWELFTH DEFENSE

54. Morbark affirmatively pleads the content of S.C. Code Ann. § 15-73-20 (Supp. 2005) as a complete defense to the allegations of Plaintiff's Amended Complaint.

FOR A THIRTEENTH DEFENSE

55. Morbark affirmatively pleads all defenses which are or may become available to it under *Restatement (Second) of Torts* § 402A and the comments thereto, as codified by S.C. Code Ann. § 15-73-30 (Supp. 2005).

FOR A FOURTEENTH DEFENSE

56. Morbark submits that at all times its product was designed, manufactured and assembled in compliance with all applicable industry and governmental standards and regulations, and in conformance with the prevailing industry customs and practices, and, therefore, Plaintiff cannot recover against Morbark.

FOR A FIFTEENTH DEFENSE

57. Morbark submits that the product at issue was state-of-the-art when originally designed, manufactured and sold by Morbark to the original purchaser, and did not present an unreasonable risk of harm to Plaintiff or other users, and, therefore, Plaintiff cannot recover against Morbark.

FOR A SIXTEENTH DEFENSE

58. Morbark alleges Plaintiff failed to notify Morbark in a timely manner of any alleged breach of warranty as required by the South Carolina Uniform Commercial Code.

FOR A SEVENTEENTH DEFENSE

59. Morbark refers to and incorporates herein by reference the terms, limitations, disclaimers and exclusions of any warranties issued with the sale of the product at issue.

FOR AN EIGHTEENTH DEFENSE

60. Morbark denies Plaintiff's claim for punitive damages. An award of punitive damages under South Carolina law violates the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution, and Article I, Section 3 of the South Carolina Constitution in that:

(a) The judiciary's ability to correct a punitive damage award only upon a finding of passion, prejudice or caprice is inconsistent with due process guarantees;

(b) Any award of punitive damages serving a compensatory function is inconsistent with due process guarantees;

(c) Any award of punitive damages based upon the wealth of the Defendant violates due process guarantees;

(d) The juror's unfettered power to award punitive damages in any amount it chooses is wholly devoid of meaningful standards and is inconsistent with due process guarantees;

(e) Even if it could be argued that the standard governing the imposition of punitive damages exists, the standard is void for vagueness;

(f) Plaintiff's claims for punitive damages violates the equal protection clause of the Fourteenth Amendment of the United States Constitution, and Article I, Section 3 of the South Carolina Constitution in that the amount of punitive damages is based upon the wealth of the Defendant; and

(g) Any award of punitive damages for conduct or activity of the Defendant outside the State of South Carolina is inconsistent with the interest of federalism, and violates the governing authority of *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) and *Phillip Morris USA v. Williams*, 2007 WL 505781 (U.S. Sup. Ct. Feb. 20, 2007).

Plaintiff's claim for punitive damages violates the federal doctrine of separation of powers and Article I, Section 3 of the South Carolina Constitution for the reason that punitive damages are a creation of the judicial branch of government, which invades the province of the legislative branch of government. Morbark submits that like provisions of governing foreign

state law may likewise violate constitutional guarantees, including those established under the Constitution of the one of the various States and the United States Constitution.

FOR A NINETEENTH DEFENSE

61. Morbark pleads applicability of The Economic Development, Citizens and Small Business Protection Act of 2005, effective July 1, 2005, which amended S.C. Code Ann. §§ 15-38-15 [joint and several liability], 15-7-30 [venue], 15-7-100 [venue], 36-2-803(B) [jurisdiction], and other pertinent statutory sections, and invokes the remedies and procedures provided therein.

FOR A TWENTIETH DEFENSE

62. Morbark submits that it is entitled to a set off or credit for any amount paid to Plaintiff by any third party as compensation for the injuries and damages for which Plaintiff seeks recovery herein.

FOR A TWENTY-FIRST DEFENSE

63. Morbark alleges that the original and/or subsequent purchaser(s) of the product at issue is/are a "sophisticated user" or "learned intermediary" which knew or should have known any dangers associated with the design of the product at issue, if any, and should have accordingly warned Plaintiff of said risks and dangers. As such, Morbark raises the "sophisticated user" or "learned intermediary" defense as a complete bar to this action.

FOR A TWENTY-SECOND DEFENSE

64. Morbark submits that foreign state law may govern the causes of action alleged in Plaintiff's Amended Complaint, and hereby claims all applicable and available defenses, not otherwise stated herein, recognized under such law.

FOR A TWENTY-THIRD DEFENSE

65. Morbark submits that Plaintiff's Amended Complaint may fail for improper venue pursuant to Rule 12(b)(3) of the Federal Rules of Civil Procedure.

FOR A TWENTY-FOURTH DEFENSE

66. Morbark submits that Plaintiff's Amended Complaint fails for lack of personal jurisdiction pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure.

FOR A TWENTY-FIFTH DEFENSE

67. Morbark submits that it has not had an opportunity to conduct a sufficient investigation or to engage in adequate discovery regarding the circumstances of Plaintiff's allegations. Morbark intends to act as best it can to inform itself of the pertinent facts and prevailing circumstances surrounding any reported damage as alleged in Plaintiff's Amended Complaint, and gives notice of its intent to assert any further defenses that its information gathering process may indicate are supported by fact and law. These defenses may include, but are not limited to, a defense that the action is barred in whole or in part by any applicable statute, contract, release, covenant, and/or the doctrine of laches. Morbark thus reserves the right to amend this Answer and assert additional defenses.

WHEREFORE, having fully answered Plaintiff's Amended Complaint, Defendant Morbark, Inc. prays that the Amended Complaint be dismissed, with prejudice, and for such other and further relief as the Court may deem just and proper.

(Signature page to follow.)

TURNER, PADGET, GRAHAM & LANEY, P.A.

April 10, 2009

By: s/ David C. Marshall

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00053

STATE OF SOUTH CAROLINA)
)
COUNTY OF WILLIAMSBURG)

COURT OF COMMON PLEAS
2008-CP-14-00461

ANDREAL HOLLAND as guardian ad litem for PEGGY KNOX,

PLAINTIFF

vs.

MOBARK, INCORPORATED, PRECISION HUSKY CORPORATION, A&K MULCH, LLC, and WATFORD INDUSTRIES, INCORPORATED,

DEFENDANTS

TRANSCRIPT OF RECORD

March 31, 2011
Kingstree, South Carolina

B E F O R E:

THE HONORABLE WILLIAM JEFFREY YOUNG, JUDGE.

A P P E A R A N C E S:

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Attorney for the Defendants

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Official Court Reporter

Transcribed by:
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I N D E X

(There were no witnesses produced.)

EXHIBITS

(There were no exhibits marked.)

THE COURT: This is the case of Andreal Holland as guardian ad litem for Peggy Knox versus Mobark, Incorporated, Precision Husky Corporation and A&K Mulch, LLC, and Watford Industries, Incorporated, under Docket No. 2008-CP-14-461.

This is a motion for summary judgment from a Clarendon County case that we are hearing here in Williamsburg County.

Mr. Ott, I believe you are the moving party; is that correct?

MR. OTT: That is, Your Honor.

THE COURT: And Mister -- you are Mister?

MR. JONAS: Don Jonas, Your Honor.

THE COURT: All right. You may proceed.

MR. OTT: Thank you, Your Honor. Good morning. May it please the Court.

THE COURT: Yes, sir.

MR. OTT: First of all, Your Honor, let me thank you for working us into your schedule. I know that can be difficult, and we appreciate the time that you've given us this morning.

Your Honor, this lawsuit concerns a Mobark Model 58-inch stationary wood chipper. Mobark built this particular machine back in February of 1996. The next month it sold it to a company in North Carolina.

Fast forward nine years, Your Honor, because during that time we don't know what happened to that machine.

But what we do know is that in 2005, a company out of Virginia traded that machine in to an Alabama corporation called Precision Husky, which is a former defendant in this case.

Precision Husky cleaned it up, added three warning decals that we'll get to in just a little bit, and sold it to a Mr. Witherspoon in Alcolu.

And Mr. Witherspoon owns a company called A&K Mulch, and that was Mr. Holland, the plaintiff's, employer.

Mr. Holland started working for A&K Mulch in April 2004. His job, main job, was to operate what's called a cutoff saw at the A&K Mulch sawmill.

However, about three months into his job, so roughly June of 2004, he started changing cutting knives on a smaller Mobark machine, it was a 48-inch machine, but the procedure and the operation of the machine were exactly the same as the subject machine today.

Once he started that task of changing the blades, no one at A&K Mulch changed the blades more frequently than Mr. Holland. Indeed, he did it every day, and most times two times a day, on a lunch break and

then at the end of the shift.

Now, to talk about this machine, Your Honor, it's important to clarify exactly what type of machine it is. It is a stationary mobile -- or stationary chipper. That means that it stays in place.

It can be contrasted to a mobile chipper that you often see with local governments taking out after a storm, they take it out there. Those type of machines, Your Honor, require an operator to set up the machine, hand feed the brush into it, operate the machine and take care of whatever is ground up.

Those machines, because of the proximity of the operator to the machine during its operation, have very strict standards and requirements from an engineering standpoint.

However, there -- as admitted by all the experts in this case, there are no applicable standards to stationary wood chippers, for the main reason, Your Honor, as I'll explain in a moment, that there is no reason for an operator or employee ever to get near one of these machines while they're in operation. They are automatically fed.

There is a conveyor that brings the materials, the debris, from the sawmill out to the chipper. It's automatically fed into the chipper.

The chipper itself is self-operational. It spins at a high RPM and the high RPM with the combination of the cutting knives grounds the material. The material is automatically discharged through a chute. And so there is no reason whatsoever for an operator to be near it. In fact, you don't have an operator with a stationary wood chipper.

The only time someone would be required to go near the machine, Your Honor, is to change the cutting knives. And that, again, was Mr. Holland's responsibility.

Now, with the machine that Mobark originally sold and built in 1996, an operator's manual was provided. However, A&K Mulch, if they had the operator's manual, never showed it to the employees; and, indeed, Mr. Holland admits that he never saw it and never read it.

Nevertheless, A&K did have procedures -- Mr. Jonas might take issue with "procedure"-- but plans, steps, whatever you want to say, but a set plan to follow to change the cutting knives on this machine. And that first step was to lock out and tag out the machine.

Now, the machine's electrical power is located some distance away from the machine itself. So the first step is to lock it out and tag it out.

Then the employees were trained and knew that the machine takes, because of the high RPM and the size of this machine -- it's roughly my height, a 58-inch wheel -- it takes some time for that to coast to a stop, and so that time could be anywhere from up to 15 minutes depending on how much debris was in the machine itself.

The operators knew, then, not to go near the machine during that time, lock out and tag out, and Mr. Holland's procedure was to go back to his particular machine, the cutoff saw, and clean up around there and then return to the machine after that elapsed time.

When he would return to the machine, Your Honor, the next step was to visually confirm, to make sure that that disc inside the chipper had come to a complete stop.

There are specific warnings about it, the training was very clear: All employees were instructed never, ever, ever put your hands on this machine until it has come to a complete stop.

Well, how do you determine that? In three different areas you could visualize whether the machine was moving, either by seeing the drum itself or the belts moving that would power the machine. If the belts are moving, the motor's still moving. If the belts are stopped, the drum would stop turning.

Additionally, Your Honor, as explained by the employees who operated this and the owner, Mr. Witherspoon, you can hear it if it's still moving. You can hear it. And if you put your hands on the machine, or on the safety guard area, you can feel it vibrating to know whether it's still moving or not.

Once -- and in Mr. Witherspoon -- to give a quote, Your Honor -- "there's no doubt when one of these things is turning." That's the quote from Mr. Witherspoon.

Now, once it stopped, to access the cutting knives you needed to remove two pins on either side of the hood of the chipper. Once you removed those pins -- you remove one from one side, go to the other side and remove that one -- then once those pins are removed, you can pull back the hood on a bolt and it has a resting place on which it sits. Once that hood is opened, you can access the cutting knives and go about the process of changing them.

The procedure to change the knives on the 48-inch machine, that smaller one that he used for two years daily before his accident, was the same as the one on the 58-inch machine.

That 58-inch machine was installed by Watford, another former co-defendant, in April of 2006, so roughly

six weeks to two months before Mr. Holland's injury on June 1st.

Now, from his daily operation of the 48-inch machine, Mr. Holland, as he admits in his deposition, was abundantly familiar with the process to follow to go about changing the knives, and particularly as relevant to this lawsuit, he was well aware that he should never, ever touch that machine until it had come to a complete stop, and he knew exactly where to go to look, to verify that it had indeed come --

THE COURT: He stated that in his deposition?

MR. OTT: Absolutely, Your Honor. And I can read the quote, if necessary.

Now, in fact, Your Honor, to go a step further, Mr. Holland, on at least one occasion that he admits, was severely reprimanded by his employer, Mr. Witherspoon, for doing exactly what he did on the day of the accident; mainly, trying to access those cutting blades before the machine had come to a complete stop.

On this particular occasion, Mr. Witherspoon walked through his business area, was not there for any particular reason but noticed the hood of the machine open, Mr. Holland standing there, and the drum rotating. In his words, he went over and gave Mr. Holland quite a sermon. He said they had a prayer session. He stressed

to Mr. Holland the danger to himself and to other employees that's potentially arisen when he tried to do what he was doing on that day and, indeed, was doing on the day of this accident.

Mr. Holland understood from Mr. Witherspoon that if he ever did that again, open that hood before the drum had stopped moving, that he would be fired. So there is no doubt by the genuine -- or by the undisputed facts in this case that Mr. Holland knew not to do exactly what he did on the day of this accident.

Looking at the most recent amended complaint, Your Honor, this is how the plaintiff describes what happened on June 1, 2006.

Paragraph 9: Plaintiff mistakenly determined the wheel, meaning the drum inside the chipper, had stopped turning and attempted to remove the pins securing the hood.

Next paragraph: He further alleges that the hood hit the rotating blades which caused the hood to kick back and hit Mr. Holland in the head.

That's their description of how this accident happened according to their latest version of the complaint.

Based on these facts, Your Honor, which again are completely undisputed, he pleads causes of action for

statutory strict liability and breach of implied warranty.

Your Honor listed all the other defendants that were on the original caption, but the last amended complaint dismissed everybody except Mobark. And it also withdrew another products liability claim of negligence that they had previously pled.

In support of their case, Your Honor, they have identified two expert witnesses: A Mr. Davis, who is a mechanical engineer. Mr. Davis opines that the hood is an unprotected hazard and that the chipper is defective because it does not have an interlock to prevent opening the hood while that drum is still moving during the coast-down time.

They also offer the expert testimony of a Dr. Clement, who is a human factors engineer. He shares the same opinion as Mr. Davis about the hood, but he adds another element in terms of warnings to the effect that he says on the machine at the time of the accident, there were no effective warnings warning of the danger to which Mr. Holland alleges he was exposed.

THE COURT: Let me ask you, would warning be a real issue here since he had been specifically told not to do that?

MR. OTT: No, Your Honor.

THE COURT: Does the warning make any difference -- I mean going one step further -- having been face-to-face told not to do something, would a warning have made any difference?

MR. OTT: No, Your Honor. Anderson versus Greenville, which I extensively cite in our supporting memorandum, goes into exactly that situation. There is no duty to warn of open and obvious dangers, if qualified, or more importantly, there's no duty to warn where the employee recognizes the danger and understood the danger.

I asked those questions and can again read exact quotes from Mr. Holland, but he knew not to do what he did on this day. So there was no duty to warn.

And more importantly, he was warned. Attached to -- as one of the exhibits, Your Honor, to our memorandum is a warning decal that I referenced that Precision Husky had added to the machine. That was by pictogram and words showing exactly what happened to Mr. Holland on this particular day. And it was on three separate places on the hood: On the front and on both sides.

Mr. Holland admits he had seen it, admits the picture shows that if the drum is moving, the hood can contact and shows the operator in the pictogram getting hit exactly in the head and then it gives bullet point

words showing exactly what Mr. Holland did on this day and warning him not to do that; namely, make sure the drum has stopped moving before you open this and --

THE COURT: Don't they allege in their memorandum in opposition that he was dyslexic or something like that? Would that have made a difference in this case?

MR. OTT: Your Honor, I don't think it does. Mobark, as the manufacturer, does not have any control over who goes and operates this machine.

But more importantly, if he was dyslexic, fine, maybe he has a problem reading it, but he read it fine during the deposition. When I read it to him, he said he understood that and knew that beforehand.

Plus, dyslexia won't affect a picture, which he said yes, that shows someone trying to open this hood before the drum had stopped moving, the hood kicking back and hitting you in the head.

That's what it shows, Mr. Holland, doesn't it?

THE COURT: Dyslexic wouldn't affect the fact that his employer told him he'd be fired if he opened it again.

MR. OTT: You just took my next bullet out of my mouth, Your Honor. That's exactly the point.

So that's Dr. Clement's testimony.

Now, the only defect theory in this case is the absence of this interlock and the sufficiency of the warnings, if there was indeed a duty to warn.

Recently, Your Honor, the plaintiff had filed a motion to amend his complaint to add additional violations about violations of OSHA, which again, OSHA, I think as we know, only applies to employers, doesn't apply to manufacturers, as admitted by their experts. Then also to allege a new defect theory based on the absence of a brake to slow that coast-down period time from 15 minutes to something less.

Judge James heard that motion, Your Honor, on March 11th and last week sent an email to Mr. Jonas and me advising that he was denying that motion to amend.

I can hand up Judge James' email if necessary.

So the motion to amend was denied, so that the only defect theory remains this absence of an interlock to slow down that coast-down time.

Now, Your Honor, I don't know if I need to go over the general product liability law in South Carolina, but there's three common elements. One is that the plaintiff was injured by the product.

For purposes of this motion today, that is not in play. We don't raise that issue.

The other two common elements, whether you're

talking about strict liability, negligence or breach of warranty, are that, number one, that the machine was in essentially the same condition on the day of the accident as when it left Mobark's hands, and number two, that the machine must be defective and unreasonably dangerous to the user. Those two required elements are definitely part of our motion today.

And, Your Honor, recently the South Carolina Supreme Court addressed the requirements of a plaintiff in a product liability case based on a design defect in the case of Branham versus Ford Motor Company, and the Court went through a lengthy history of the case law on products liability and specifically came to the conclusion, Your Honor, that although originally there were two methods of proving design defect, the consumer expectations test and the risk utility analysis, that the consumer expectations test is ill-suited for design defect cases and more appropriately simply applied to what are manufacturing defect cases. -

Manufacturing defect cases are when a particular product comes off the assembly line and doesn't meet the manufacturer's specifications. A design defect case says, well, every one of your products is defective.

And in those latter cases, the Court has held

that the risk utility analysis is the only proper test to apply. So that is the one that is at issue today.

And, Your Honor, the Court specified that numerous factors must be considered when determining whether a product is unreasonably dangerous, including usefulness and desirability of the product, the cost for additional safety, the likelihood of potential seriousness of injury, and the obviousness of danger.

And importantly for today's motion also, Your Honor, the Court made it very clear that by its very nature, the risk utility test requires a showing of reasonable alternative design.

Now, Your Honor, our first argument is that there is no design defect under these undisputed facts. There are essentially four arguments that I'm going to make.

Number one is, this machine is not the machine that we originally sold. It had been substantially modified in very important aspects.

Number two is, the case law is very clear that the failure to make the safest machine possible does not mean it's defective and does not mean it's unreasonably dangerous.

Going even further into number three, Your Honor, which I call the Star Trek argument, that you

boldly go where no man has gone before, says under Bragg that if no one has ever done in the industry what your expert says needs to be done to make this machine not defective and not unreasonably dangerous, then those cases are going to be so rare as essentially not to exist. And we do have this here in this particular case.

And lastly, under the design defect argument, Your Honor, is the failure as admitted by their experts to come up with a feasible alternative design, which there is no doubt following Branham is an absolute requirement under South Carolina law.

So if I may just briefly, Your Honor, address each of those as they're outlined in our argument.

The chipper again that was sold in 1996 contained six bolts on the hood that an operator would additionally need to remove, three on each side -- two vertical, one horizontal on each side -- that an operator would need to remove in addition to the pins that we already talked about. Those bolts were gone, missing and nobody knows where they are or how long they had been gone, why they've been gone.

THE COURT: Would that have taken additional time to --

MR. OTT: Exactly, Your Honor. That would -- and more importantly, you would be on the machine and you

would feel here, and again already should have seen, whether that drum in there was still moving or not. So that's a substantial modification and shows that it was not in substantially similar condition on the day of the accident as when it left Mobark's hands.

Additionally, we learned at Mr. Holland's deposition that one of those two pins that additionally secured the hood was missing. When he went to look there and to open it up, he said that one of those pins was missing. Well, the warnings that Mobark originally delivered said never, ever go near the machine or operate the machine when one of those hood pins is missing. That's another substantial modification.

Additionally, Your Honor, as we put color versions of our exhibits to the memoranda, Mobark delivered many decals on the machine as originally sold. And if you skip to the very end, the very back, you can see exit photographs that Mobark takes of the machines that it sells.

In the exit photographs from 1996 that are attached in there, they show the machine with all the decals. The decals themselves are just in front of those exit photographs. Most of those decals, including the one that says never remove the decals, were missing on the day of the accident. That's another substantial

modification.

And finally, Your Honor, and perhaps most importantly to their theory, is that the original fan blades on the drum were not Mobark equipment by the time of Mr. Holland's accident in June of 2006. They were larger and a different style, but they were not the ones that Mobark originally put on this machine.

And the importance of this, Your Honor, aside from the fact that their expert didn't even realize that fact, is that the larger size of these fan blades decreases the clearance between the fan blades and the hood, making a potential for the fan blade to actually strike the hood greater.

Mr. Davis, their expert, does not know exactly what the clearance was. Other than by looking at Mobark's original specifications, he's never done any testing to see if, as originally designed, the fan blade could come into contact with that hood. But he has to admit, just from simple science and physics, that because of the larger size fan blades -- which again were not Mobark equipment, were not manufactured by Mobark or any of its vendors -- increased the likelihood that the hood could be struck by these fan blades.

Your Honor, the next argument is that the failure to incorporate additional safety on machine does

not render the machine defective nor unreasonably dangerous.

As we said in our memoranda, by its very nature -- like a lawnmower, like a car, like many other products -- a chipper is dangerous, it's got moving parts, but it's an important machine for those in that industry to grind up material and be able to sell it.

As the Supreme Court observed more than 30 years ago in the Marchant case, 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 this bicycle is defective and unreasonably dangerous. There is, of course, some danger incident to the use of any product.

In Branham just last year -- we've already talked about that being the seminal design case -- the Court reaffirmed this long-standing principle under South Carolina law and said in every design defect case, the

center recurring fact would be a product that failed and caused damage to a person or his property. Consequently, the focus would be that 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.

Now, applying that principle, longstanding since Marchant right up through last year, requires dismissal of this case.

Davis's defect opinion is not critical of the existing safety features on this machine, rather he says it can be made more safe by adding an interlock that would prevent opening the hood until it had come to a stop.

But as Branham just said, just because a product can be made safer doesn't mean that a jury question is created by that testimony sufficient to overcome this motion.

Your Honor, I cited in our brief and went through analysis of two Court of Appeals cases, Bragg versus Hi-Ranger and the case called Holst versus KCI, and those cases are factually and legally indistinguishable from this case.

Indeed, you could add another case, Moore

versus Barony, which is a 2009 Court of Appeals case that's also cited in there, but Moore involved a golf cart accident where the allegation was you should have put lights on it, manufacturer, because it might be used on public highways, and that's what happened in that case when someone was hit while driving it on the highway.

Bragg involved an aerial device that is used to go up and change wires and the like. And the argument there was that the operator was electrocuted because they didn't have a special quick disconnect switch that would have stopped hydraulic fluid coming up, then the operator in the crane or bucket aspect went to use these hydraulic tools.

And also in the Holst case, Your Honor, that was a crane down in the loading docks in Charleston where they're taking those big boxes, containers, and one was dropped down on an employee.

And additionally, the safety device that the plaintiff's urged in that case was a video camera to be installed on the crane that could have been focused on that area to show the operator someone was beneath him.

In all those cases, Your Honor, they alleged design defect cases, or design defect theories for failure to include these additional safety features.

In all of them, the Court dismissed the claims

as a matter of law -- two of them at summary judgment, one at directed verdict -- and in all cases, Your Honor, like the present, they offered two experts to come in and say that the product at issue was defective for failure to incorporate these additional safety features.

But the Court in each of those cases went back to that Marchant analysis and said that they were not defective simply because they didn't have all these additional safety features.

Your Honor, that conclusion is further buttressed when the Star Trek situation comes up, as we say happens in this case, Star Trek meaning you boldly go where no man has gone before, and that's exactly where Mr. Davis, the plaintiff's expert, is going in this case.

Your Honor, to give you the quote from Bragg, "While conformity with industry practice is not conclusive of the product 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."

Now, let's take a look at what Mr. Davis had to say about the novelty of his opinions.

"Mr. Davis, are you aware" -- and this is on page 10 of my memorandum, Your Honor -- "Are you aware of any chipper manufacturer that utilized an interlock such

as what you opine should have been used on the hood of the stationary wood chipper back in 1996?

No, not aware of it.

Are you aware of any chipper manufacturer today that utilizes an interlock on the hood of a stationary wood chipper?

I need to look at some of my research material. Just give me a minute, a few minutes.

I've identified two manufacturers at least that provide a safety mechanism such that the hood will not be up during operation, but that appears to be limited to brush chippers, again, going back to the distinction we already made.

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?

No, I'm not.

You've researched that issue, correct?

I have.

And you've tried to go out and find if anyone in the industry has ever adopted the design that you, Mr. Davis, opined should have been adopted, correct, and you've not been able to find anyone?

Correct."

Here's how you take that admission from their expert to its ridiculous conclusion.

"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?

I would agree.

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

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

Are you aware of -- " and he interrupted.

"Well, as a matter of fact, I am aware of one other person. I have a co-worker who had a case involving not a stationary chipper but again a brush chipper with a similar hazard with a similar injury who reached the same conclusion that I did in this case, again, about mobile brush chippers, which are different machines with different regulations.

So as to stationary wood chippers, are you aware of any person in the history of the world who has reached the same opinion as you?

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

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?

I don't know of anyone else who has done that."

We also, in this case, Your Honor, had Precision Husky as a defendant before they were dismissed back in July of last year, and Precision Husky, of course, is a competitor of Mobark.

I went and took Mr. Bob Smith, who is their chairman and CEO's deposition over in Alabama, and I asked him, "Have you ever heard of such a thing?" and, first of all, I clarified that he was an expert as stipulated by Mr. Jonas, and that he is not aware of anyone in his industry who has more knowledge and experience than he. It's a bold statement, I made him say it, he's not a proud man, but I was just making my point.

So I asked this person who is the most knowledgeable in the chipper industry: "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?

No."

So, Your Honor, no one has done this. No one, as you'll see in just a moment, has even researched or

conducted a risk utility or feasibility analysis in the process of doing it, and one of the simple reasons to explain that is there have been no other similar incidents. I asked Mr. Davis and Dr. Clement if they were aware of anyone who had ever been injured while operating a stationary wood chipper when they attempted to open the hood before the drum had stopped moving and neither one of them were aware of such a similar incident.

To quote from Bragg, Your Honor, when that happens and there's no other similar incidents, the fact that there had been no mishaps during this time is additional evidence that the aerial device was not unreasonably dangerous. So, again, the absence of any similar accidents with stationary wood chippers is further evidence, as Your Honor has already heard plenty of other evidence that there was no unreasonably dangerous or defective condition in this product.

Lastly, Your Honor, our fourth argument on the design defect aspect concerns the requirement of an alternative feasible design. And, Your Honor, it's been made clear that that's an absolute requirement. But what's also been made clear is that the plaintiff's experts do not have one.

The first basis of dismissal in both Bragg and

Holst was the novelty of the opinions of a failure of anyone else to incorporate such a design. But the second basis of dismissal in both Bragg, Holst, and Moore was the failure of experts to produce that alternative feasible design.

It can't be conceptual, Your Honor. It has to have been a real-life application that requires a prototype to be made, that requires a feasibility study and a risk utility analysis actually be done in hopes -- the expert said, Well, you can put a camera on the crane. And I guess the analogy to this case would be with Mr. Davis, Well, you can put an interlock on a chipper.

I don't know if you can or not because you've got to design exactly where it needs to go. It can't be in the inside portion of it or else it would be damaged during the chipping operation.

So I don't know if that's a fair analogy or not, but even in Holst they said that wasn't sufficient for you to go through it. You actually have to do the scientific feasibility analysis. You have to weigh the benefits against the costs, the potentially adverse consequences, you have to actually do the scientific study. It can't be conceptual. However, conceptual is the exact adjective that came out of Mr. Davis's mouth when I asked him to discuss whether there was a

reasonable feasible alternative design.

"Are you aware "-- this is to Mr. Davis -- "of any person or company that has performed a feasibility analysis to incorporate an interlock into a stationary wood chipper?

I have not seen such a study.

You yourself have not done such a study, correct? You have not prepared a design for an interlock into a stationary wood chipper, have you?

Not a detailed design, more of a conceptual design," right out of Mr. Davis's mouth.

Similarly, I asked Mr. Smith, Precision's CEO, whether he had ever heard of such a thing.

"Has Precision Husky ever researched the feasibility or performed a feasibility analysis of incorporating an interlock motion detector on the hood of its stationary chippers?

No, sir.

Are you aware of any manufacturer in the industry who has done a feasibility analysis or researched the feasibility of incorporation of an interlock or motion detector on the hood of a stationary wood chipper?

No, sir."

So not only did their expert not do the work,

no one, no one in the industry has ever done the required feasibility risk utility analysis of this proposed alternative design.

Your Honor, those are our arguments as pertains to the design defect, that aspect. We've already touched upon a little bit the warnings aspect of it. I can go into that, Your Honor, further, but I don't think it's necessary.

Again, I do want to probably read the quote from Mr. Holland just to bring home the fact that he understood the warnings and the procedures for the day of this accident.

And it may be helpful, Your Honor, if you take a look at Tab C.

Tab C shows -- should be a color photograph or color copy of the warning decal that I mentioned that Precision Husky placed on the machine in three separate places.

It shows the pictogram of a hood coming and striking the operator -- or actually not an operator -- a person in the head.

Obviously the movement of the hood is depicted, the movement of the drum is depicted, and it shows the impact with the person's head, and then it has the four bullet points to the right under the word "danger."

Do you see it, Your Honor?

THE COURT: Yes, sir.

MR. OTT: All right. That is what I'm asking Mr. Holland about in the following portion of his deposition at the bottom of 17 of my memo.

"Had you read this warning before your accident?

Yes, sir."

Well, that goes to the dyslexic aspect. I don't think he was dyslexic, but regardless, he read it.

"Did you know never to open the hood while the disc is turning?

Yes, sir.

And that's what it says there in the third bullet point, right?

Yes, sir."

And the next one: "Did you know to confirm the disc had stopped by visually checking the disc shaft or drive wheel?

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

And this diagram shows somebody getting hit in the head when they tried to open the hood before the disc had stopped turning, right?

You just open it, you open it walking back.

Doesn't it show the hood coming down and

hitting someone in the head because the wheel is still moving?

Yes, sir.

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

Yes, sir."

So, Your Honor, we never get to the point of whether our warnings were sufficient or not because there was never a duty to warn. Anderson versus Greenville makes clear there's no duty to warn, even if there was a danger, when the person or user is fully aware of the danger, as Mr. Holland was both from his training, both from being severely disciplined with the threat of being discharged by his employer on a prior occasion and from looking at the pictogram and reading those four bullet points.

And so, Your Honor, we are entitled, I think, under the law and undisputed facts to summary judgment in this case.

Thank you.

THE COURT: Thank you, Mr. Ott.

Mr. Jonas, I imagine you have a different view of the conclusion of this.

MR. JONAS: I begin, Your Honor, by saying I appreciate a good argument. And we've heard a good

argument. And if those were the facts, I'd be probably sitting back down.

Your Honor, a variety of exhibits have been introduced in this case that help us understand what the engineering problems and principles are involved in this. And I appreciate that there are lots of things to talk about here, but I want to begin by making certain that we have a good understanding of the machine and who was involved in this case. We've used a lot of names.

The actual machine that we're dealing with -- there's a Mobark 58-inch horizontal feed vertical or top discharge machine, chipper machine.

When it came out of the factory, Your Honor, I think Counsel's already handed you up a photo by exhibits. This is just a blow-up of one of the shots of it as it left the factory, this red machine.

This one pictures the back of the hood. And if you just look at the outline there, you can see a handle. And if you look a little further, if the photograph revealed it, you'd see where these pins go that we've referred to.

A better photograph was introduced into the case showing the arrangement of this machine when this fellow, Mr. Davis, the only fellow that ever inspected or investigated this case, about three weeks after it

happened went to A&K Mulch and at the outset of this, this fellow here that's pictured here with a hammer in his hand knocking that pin out is Mr. Woodrow Woods. He's the foreman and he's an important witness in the case who was deposed.

Counsel has referred to the automatic feed of this machine, and at the lower left-hand corner of this photo barely revealed here is something that was marked as a vibrating belt that goes up through the plant and trash that's going to be turned into mulch is put on that belt and is fed into this chute which goes through into the machine where the cutter's guarded by this half hood and, of course, it shoots out the top through this screen up here in this arrangement to make sure the chip size is consistent.

These chips are, of course, valuable and the ones that don't make it through the screen because they're too large go back out onto this belt and go back down to this feed chute and back down and get reprocessed.

The belt guard for the motor of the machine is over on the right as we're looking at the photograph, and, of course, the pins are on both sides equally.

Now, Counsel referred to a 48-inch machine that had been around the A&K Mulch plant and was still in use.

This is a photo of the 48-inch machine that was relocated.

It's got a lot of information on the side there. Those are apparently Mobark decals that stayed on the machine over the course of time. It's kind of in rough condition, but I think it's still in operational use.

The other fellow that we've been talking about that Mobark has qualified as their expert witness is this fellow over here on the left side of this green machine. That's Mr. Bob Smith at Precision Husky in Leeds, Alabama. Mr. Smith has been in business 50 years. He's a competitor of Mobark. He is demonstrating here a 58-inch horizontal feed vertical discharge wood chipper, a mill chipper as I think Counsel refers to it.

The significant difference, if you want to quickly arrange or compare these is, of course, this bar across the top that Mr. Smith later on testified would have prevented this accident, or at least if it had -- even if this hood had been open while the disc was rotating, it would have caught the edge of that hood on that safety bar, and that machine design's been around since the early 80s.

THE COURT: Would that have stopped the thing from turning?

MR. JONAS: Not from turning, but it would have kept the hood from coming back any further than that bar.

THE COURT: But there were already pins in there that kept the hood from coming back. As long as the wheel wasn't turning the pins kept it from coming back; is that right?

MR. JONAS: Well, the hood stays in place with those pins.

THE COURT: And is that an interlocking device?

MR. JONAS: Those are just mechanical locks of a hood. We've got --

THE COURT: Why do you need that if you've already got pins that keep it straight or standing up rather than remove the pins?

MR. JONAS: You know, of course it's a design that he would claim is superior to the Mobark design.

The important thing for my argument is that, of course, it's been around for a long time on an identically purposed machine that would have -- I think I ordered one, I've got it in my office. It cost me about $125 in shipping.

If that had been installed and an operator mistakenly removed the pins, according to Mr. Smith, it would have prevented the hood from coming back --

THE COURT: Then you've got one more thing. I

mean there already was supposed to have been some bolts on this thing, too; is that correct?

MR. JONAS: Well, we'll get to the bolts.

One of the things Mobark and Counsel had referred to is a manual that came with the 48-inch and 58-inch Mobark machines. That manual's got a lot of information in it. I think it's probably 35 pages. There isn't one word about bolts.

There's no indication on the illustrated parts manual --

THE COURT: See, all this is well and good, but didn't you agree that your client knew he wasn't supposed to open that hood while the thing was moving?

MR. JONAS: Your Honor, he testified and the procedures he was trained for at Mobark -- or at A&K Mulch rather -- were no formal procedures.

THE COURT: Did he -- that takes away the fact from that. Did he know? I mean, if he knew it, then he doesn't need to be warned about it, he knew it.

MR. JONAS: Your Honor, if this case was about him opening the hood to change the knife blades, that might be relevant. That's not what the facts are in this case.

Mr. Ott has not discussed the facts of this case. He's avoided talking about the fact that Mr.

Holland came to the machine that apparently was in a broken condition on the day of this incident.

The testimony, the only testimony from any witness -- not argument but testimony -- is that someone called Mr. Holland from a place in the mill closer to where that machine was at and said they heard some sort of a noise coming from the machine. Mr. Holland says he went back to eventually -- Judge, it's six to seven minutes, he went back to investigate. He put a stick down that chute to see if the thing was turning. He heard nothing, he felt nothing, and the stick didn't move.

He went from there to find that Mr. Woods, the foreman, "What do I do?" Mr. Woods said, "You go get the guy that helps you, Leroy Frierson."

Mr. Leroy, unfortunately, was busy selling candy out of his canteen to other people. He didn't have time to come down and look at it.

Mr. Frierson, the testimony is, had 20 or 30 years experience in the wood processing business. Mr. Holland had far less experience. He had whatever he learned on the job at this mill, and the testimony is, he got taught a lot of things, most of which were only partially true. Depending on which person, he judged wrong.

This training information that comes in this manual has one page, one paragraph that addresses what Counsel claims is a procedure that Mobark wanted him to follow.

This is a manual, of course, that was never kept with the machine. Now there's no way that --

THE COURT: But it was delivered with the machine, wasn't it?

MR. JONAS: I don't think there's any reason to doubt that.

THE COURT: So, I mean, what more can they do? Are they supposed to weld it to the side of the machine so that it doesn't get lost when they resell it and everything like that?

MR. JONAS: Well, even assuming that, Judge, the one paragraph out of 37 pages is "after power's disengaged, chipper will coast -- rotate in brackets -- for several minutes until it completely stops. Check the chipper sheave to verify the stop before opening the hood."

I don't know what that means.

THE COURT: You don't understand that?

MR. JONAS: I don't know what it means.

THE COURT: Do you think an ordinary person would understand what that means?

MR. JONAS: I think if I had never seen another machine in my life, I couldn't know what a chipper sheave was. I couldn't look up in this manual and find it.

THE COURT: But the facts are this man worked on a machine similar to this; is that correct? It's not like he's off of Main Street, Williamsburg County walking into this building.

MR. JONAS: He says that he knew to look at the machine and put the stick down it, that was one test he had, and he looked at the belts to see if they were turning.

Nowhere on this machine says "look here" or "look here." There is one paragraph in a 37-page manual that's not in the machine that says "look at the chipper sheave."

If I look at this original photograph of Mobark, nothing on here says "look here, look there," and nothing says chipper sheave. It doesn't say it takes 15 minutes for this thing to run down. None of this has anything to do with what Mobark should have reasonably anticipated and was foreseeable, that people all over the industry know that the coast-down time is significant in these machines.

But that's not this case. That would be a good case for Mr. Ott to argue. This case is all about a book

and machine.

Now he goes back --

THE COURT: Let me ask you this. If the machine is broken, that means there's not a design defect, but if it was working and now it's broken, how could the manufacturer know to protect somebody from a broken machine if we all know the machine's broke?

MR. JONAS: Machines break for a lot of reasons.

This one had -- after we finished trying to find Mr. Frierson who didn't show up, Mr. Holland went looking for him a second time. He still couldn't find him. By now he thinks he's at the office. He goes back to the machine and discovers there's a pin missing. It was the pin that --

THE COURT: It was designed --

MR. JONAS: -- Mr. Woods is knocking out. These have got little clips in them -- sir clips they call them -- to keep it from coming out.

Now, Mr. Holland hadn't worked on this machine in 24 hours. He says it was the end of the day prior when he last changed the chipper knives on this machine.

This pin was not in the machine. The machine, to the best he could determine, was not turning.

Mr. Holland goes to the other side and works out the pin. As the pin is working out, with his hand

he's turning it -- there's a little L-shape at the top -- it pops open and slams him in the head. The sole evidence in this case is that the machine was not turning when Mr. Holland got there.

Nobody else knows anything about this case. There is no reason to turn this into a case about trying to change chipper blades.

The business about -- you know, I listened patiently while Mr. Ott tried to tell us about the other occasions when Mr. Witherspoon gave him a warning about turning the -- or opening the hood with the wheel turning. The testimony is totally disputed about that.

Mr. Holland says on the occasion Mr. Witherspoon came to him, he had opened the hood after the machine had stopped, was turning the wheel to clean it and that that was dangerous in itself. The machine was stopped, but to get to the full access of the wheel -- he was cleaning it and he shouldn't have been doing it, and he didn't do it again. That has nothing to do with this case. Nothing.

At the time that we looked at the -- Mr. Woods, the only other person in this case that has -- other than Mr. Holland and Roger Davis, who examined the machine three weeks later, Mr. Woods did his own investigation. He went and discovered that there was no damage to the

pin, but there was some damage to the fan blade.

Now the fan blade -- there's been a lot of discussion about fan blades, but I'm a little confused about why we're bringing it up, but this fan blade business is in the -- it's in the manual itself. And I actually ordered a couple of these things with Mr. Ott's help so I can measure them up.

I'm a little confused by some of the testimony I heard when I went to Wynn, Michigan to discover what the problems were.

You know, he says that this thing had the wrong parts on it, I think he said that.

When I went back and looked at his answers to interrogatories, number eight I think, he told everyone that read those that the illustrated parts manual reference to fan blades was 30160-580.

Now the reason this is important is because I think Mr. Ott is correct, that when this triple went out, originally sent to these folks in North Carolina, there's some dispute about how it was equipped.

This 58-inch chipper comes with two -- three types of blades. One is a paddle type, a 401157-480. The other is this box type, 30160-580. And then there's a third type that was referred to in the chipper check sheet in 1996 when it left the Mobark factory, there they

said it was a 40239-580.

Your Honor, I was in Wynn, Michigan, and I asked this fellow, I said, "What's the difference?" I mean, we're all getting back to this question about the argument that there wasn't enough clearance between the chipper disc with the fan blades and the hood. I think Mr. Ott argued that there's some problem there, you know, it made it more hazardous. Actually, Mr. Davis said it didn't. He's the only expert that testified --

THE COURT: Again, if the blade's not turning, it doesn't make any difference what blade it is.

MR. JONAS: That's absolutely so. But, of course, the question in this case is how did this happen.

Mr. Smith, you know, the fellow at Precision Husky, talks about a problem with plugging. And in his deposition I asked him the question, "What do you mean "-- because his manual, which goes on for about 90 pages, warns of every specific hazard and in comparison the Mobark manual looks like the Encyclopedia Britannica.

But Mr. Smith, who also designed those labels that Mr. Ott says that Mobark now wants to take credit for, those pictograms, yet Mr. Smith says plugging happens when that screen on the top of the machine essentially is clogged and it slows down the operation of the motor and it can clog the machine.

Now, how does that happen? One of the issues in this case is this vibrating conveyor. The testimony is that when this machine was powered off -- and there's no doubt that it was -- Mr. Holland went back and he turned off the power but he left the vibrating feeder going. Now, that's how he was told to do it.

The reason somebody might want to do that is --

THE COURT: Is that what the manufacturer told him to do or is that what the people --

MR. JONAS: The manufacturer has no reference to this.

THE COURT: Don't you have to show that the manufacturer gave a design that was defective and that that would be your burden of proving?

MR. JONAS: I have proven it. And I think we need to get back to the facts and I'll try to drag this back together. I just want to correct the record as I thought I heard it recited here. And we'll get to two things that I think would make this inappropriate for summary judgment.

But I just want to make sure that everybody knows, there's no testimony in this case to suggest that the blades that were on this machine, the fan blades, were not correctly installed or that there was some problem with them. So I think we need to get away from

that.

You know, this fellow, the 30(B)(6) witness in Wynn, Michigan, that was supposed to answer all those questions said he didn't think it was the correct blade and that's when we got into this business about what do you mean? We've got three different types of blades and so we're going to start measuring them up and do the calculations. Roger Davis ends all that by simply saying, "I measured it three weeks after this accident. It was half an inch or less of clearance between the edge of the fan blade and the edge of the new hood that was put on the machine."

THE COURT: When was the new hood put on the machine?

MR. JONAS: Within days. Mr. Witherspoon went out and --

THE COURT: After the accident?

MR. JONAS: After the accident. He went out and had one constructed by this Watford Company.

He didn't wait to get one from Michigan, they manufactured one. They're apparently very skillful. But there was adequate clearance between that fan blade.

And there is no doubt in my mind that the business about the blades is a big red herring in this case.

The real question goes back to what were the conditions at the time and what was -- if you want to look at it just as a warning case, how would you look at it? Was any of this anticipated or foreseeable is the question.

It was maybe foreseeable. Mr. Smith says during the course of his 50 years, he had a couple of observations that he recalled was, you know, that -- he says if there was some malfunction of the machine -- just to go over the order I've got it in -- and that the hood kicked back, some force against the hood, that hood lock, that bar over the top of that green machine would have kept this thing from opening. No accident.

He also said although he was qualified as an expert, he had no idea how the accident here happened. So his observations about most of this are conjectural.

I don't think Mr. Ott fully explained his role in this. I think he certainly was a prior litigant in this case, but he was also in this business a competitor, but a friendly competitor.

He had visited the original founder of Mobark, Norville Morre, in Michigan, the little town of Wynn, Michigan, and he knew quite a bit about the business and the people in it. But he recalled that there are other people in this business that have similar equipment and

he says that as far as he knows, everybody in the industry offers braking systems on these things that would stop the machine within a minute or so.

You know, one of the things that Mr. Ott is relying on apparently is the allegations of the complaint. I mean, I'm a little surprised --

THE COURT: Doesn't he have a right to kind of rely on the complaint?

MR. JONAS: Well, he should. Maybe he should rely on paragraph 14 A and B, D, E, and J. He would like to construe these in a way that it suits his version of the facts.

This last motion with Judge James of course -- you know, the judge has not yet entered an order, but I assume he's going to deny my motion to amend based on some attempt to clean this up before we go to trial, but what I think we need to look at is paragraph D.

It says, "In designing and manufacturing the wood chipper machine without a positive hood lock to prevent a hood kickback, even if the device securing the hood was mistakenly opened before the chipper totally stopped" -- now, Mr. Ott has been on this kick about interlocks because it was apparently something he knew about, and it may have some bearing on the case, but that allegation says nothing about an interlock and that

allegation seems to suggest that an alternative design that I'm referring to is the green machine with the bar. That would be one alternative design that had been around for a long time.

I also argued that Mobark is a pretty sophisticated bunch. They're world wide. They make everything from brush chippers to moveable devices that are bigger than most of the -- they're essentially very large devices. They look like graders, excavators and such things. There's a great little piece of film on it that I could -- their advertising --

THE COURT: Well, I'm sure these things are loud and vicious machines.

MR. JONAS: Well, they come in a lot of styles.

THE COURT: I mean, they eat logs. Anything that eats logs is going to be a pretty --

MR. JONAS: Well, this doesn't eat logs. But they've got machines that eat logs.

THE COURT: Grinds up wood.

MR. JONAS: Yes. They've got them that take whole logs.

But the idea that the industry -- and I think the one thing we all agree on, if we put it in words I like better, is that the industry custom in 1996, and actually the industry custom since 1967 and maybe the

industry custom today, is not to worry about all this business about safety. That's the custom that we all agree existed.

Now the case authorities say that's really not enough to rely on. You can't just point at a bad industry custom and say okay.

So we got to the point where Roger Davis said, Well, I've looked at this thing and the thing that's fundamentally wrong with it is that this device that covers the wheel is itself a guard, and that this guard, you know, if you look at it from the point of view of what essentially is an OSHA reg says that, you know, guards shall be such that it itself does not offer an accident hazard in itself.

THE COURT: Let me go back and ask you this. If the machine is not turning, as it's not supposed to be turning when you go in to open the guard, does the guard pose a problem if the machine's not turning? Or even when the machine is turning, does the guard itself provide a -- is there a problem?

MR. JONAS: I mean --

THE COURT: I think that's -- I think you're saying that could be -- cause an accident. But if the guard's doing what it's supposed to be doing, it never causes an accident; is that correct?

MR. JONAS: Well, in a perfect world, if the machine was stopped and the guard was removed.

You know, if you think about the guard over the flywheel of your lawn mower. You wouldn't take it off while the lawn mower is running. Why? Because you might get hurt.

Okay. Now, if it had some quick disconnects on it, you know, so that you didn't have to take a lot of bolts and things out and, you know, it sounded, felt, everything about it seemed to indicate that it was not running, but you, as a point of operation, as one of the routines of getting your grass cut was that you always had to take the guard off to get to the thing, it would be a bad design.

That's what he's saying. He's saying you put this thing together intending that you had to take the guard off to get to the cutting action of the wheel.

THE COURT: Well, how else are you going to get to the cutting action?

MR. JONAS: There are all sorts of cutters that have a fixed hood that they access from the side.

THE COURT: But you still have to be able to get into it at some point in time to change the blades.

MR. JONAS: They do. And Precision Husky's got a real nice one. It's got a one piece hood and it's got a

little screen here and you access the wheel from the side. You never get to this.

But the point I'm trying to get to, you know, I think we took kind of a shot when we said, well, you know, OSHA regs don't matter.

I'd also point out that in this case, Mobark one day made it clear to me that they sell these machines out of the country, in particularly in British Columbia where, in fact, they've got standards that require a mill chipper with a hood to actually have a brake.

Now, I don't know how they get by selling these things in British Columbia, but they do. Maybe British Columbia doesn't care anymore, I don't know, but the idea that there are standards is important.

Well, why is it important? Because their expert says it is. Mr. Smith says he agrees: Both customers and dealers expect and depend on manufacturers to produce equipment that would satisfy OSHA standards. This isn't my expert, this is their expert. He says that's relevant.

The authorities all over the place, OSHA regs govern employers no doubt, and typically not manufacturers, but there is some evidence of a significance and availability of safety standards.

If Mr. Smith, their expert, is correct, the

customers expect and dealers expect them to design a safe machine in compliance with that OSHA reg and probably the British Columbia standard, then it is certainly relevant in some evidence.

THE COURT: Let me go back.

This is a used piece of machinery that had been sold several times before at least you got it; is that correct?

MR. JONAS: Yes, that's certainly correct, Judge.

THE COURT: Do you concede that the machine that was operated in Clarendon County was different from the one that came off of the line from Mobark?

MR. JONAS: Only in the sense that it has some Precision Husky labels on it.

THE COURT: How about for the bolts? Were the bolts missing? Is that a fact?

MR. JONAS: The bolts he's talking about are these along the side.

THE COURT: And those bolts would have to be taken off to take the cover off; is that correct?

MR. JONAS: Certainly they'd have to be removed to get the cover off.

THE COURT: Okay.

MR. JONAS: The problem is that nowhere in the

Precision Husky or the Mobark manual or the illustrations that they provide are those bolts referred to.

I asked their expert where are the bolts? Show me in the manual what you're supposed to do with bolts. Where do I get bolts, how do I put them in, when am I supposed to take them out? They won't do that. You know, they're bolts, you know, get them any place, do anything you want. They never intended those bolts to be used in the production of this machine. It is true that they're there and featured there.

THE COURT: Well, wouldn't that tell you that they're intended to use them if they're putting them on there?

MR. JONAS: This isn't a guessing game.

THE COURT: I mean, to just stick extra bolts on it because that's a cost.

MR. JONAS: Andreal Holland with his 76 IQ wasn't up to that, Judge. You know, he did what he was shown to do. They agree that he's a pretty good worker, or was before he had this traumatic brain injury.

THE COURT: But again, he knew he was not supposed to open the hood. So you could read him the warnings all day long, but he already knew everything that was in -- on a simplistic basis he already knew what a thousand pages of warnings would tell him is don't open

the hood when the wheel's turning.

MR. JONAS: David Clement, the only human factor expert in this case -- you know, Mobark doesn't have an expert except for this fellow at Precision Husky -- says that ain't the case. You know, you've got the opportunity and the industry standards, the ANSI standards that apply to warnings in this so-called hierarchy of --

THE COURT: Well, a warning is preparing somebody who doesn't know. Once somebody knows, then the purpose of a warning is no longer necessary because they already know and they don't need to be warned any further.

MR. JONAS: The idea of a warning is to remind somebody, not just know.

You know, I ran a milling machine once in my life and I made 5,000 pieces a day. I knew exactly what to do, except by the time I got to 4,000 I did it backwards. I had plenty of knowledge. What I didn't have was something to stop me.

THE COURT: Yeah, but that wouldn't be a repetitive thing such as what you're talking about, doing 5,000 a day. This would be something that you do every so often.

MR. JONAS: At least twice a day. But over this course of time, and like I say, I'm just -- my speculation is just that Dr. Clement says we think about those things

in the human psychology area and in human factors design -- in fact, Dr. Clement's testimony about the warnings on this machine essentially say that none of these are effective to do what a competent machine designer and manufacturer would do to comply with ANSI 535. That's a standard. It comes from this hierarchy of safety that every design engineer in the country has known since the 50s. It's taught in every school. First you eliminate the hazard by design, and if you can't do that, you incorporate safety devices, and if you can't do that, you provide warnings. That's a standard. Mobark had to comply with that.

When you look at --

THE COURT: Let's walk through this.

MR. JONAS: Yes, sir.

THE COURT: The hazard of the design would initially be that there's wood chips flying all over the place.

MR. JONAS: The hazard of the design is that this thing has a rotating wheel that is going to run down without any positive indication on the machine to alert somebody when it actually stops.

You've got some indication in the manual to look at the chipper sheave. My guy figured out to stick a stick down it. None of this is addressed on the

machine itself. The hazard is the rundown time.

Now, this isn't the only machine in the world with this. Engineers have been dealing with this --

THE COURT: I mean, that's one of the purposes of these big flywheels is so that inertial motion keeps it going even though it hits a strong force, but I mean that's --

MR. JONAS: The only way to stop it.

THE COURT: That's one of Newton's laws, that the inertial factor is removed.

MR. JONAS: That's correct, Judge.

And a -- I mean, a brake is one option. Counsel points out at someplace it's an expensive option, but it's been around forever.

Every machine that has a flywheel has this issue come up. This idea of interlocks, which is a fancy word for a timed device, okay, something to keep it from opening, you time it and from there, I think, Mr. Davis said they've been manufacturing these things for sometime, you know, on brush chippers. And the question -- they don't want to talk about it because it hurts, I guess, to say there's really engineering knowledge out there. If it hasn't been applied to mill chippers, then that's their argument. But the technology's been around since the 50s. It's not like

they didn't get it. You know, the question is, have they done what they have to.

When you start talking about causation in this case, supposing this ain't a design case, well, then it's a warning case. If they knew about this and they knew that the ANSI 535 standards were in effect, then fine, I'm out of here on a design case, but I've got a warning case.

The reason they don't want to talk about warnings, they want to use everybody else's warnings is because their warning system has failed. There's no evidence that their warnings do anything to address the hazard in this case.

You know, we've got some excellent authority --

THE COURT: I could buy your argument a little better if the man was using the machine in 1997 after it came right out of the mill, but this machine has already been used at another mill with modifications made on it.

MR. JONAS: Well, we don't know about any modifications.

THE COURT: I mean, we know the bolts weren't with it.

MR. JONAS: There were no bolts. But the bolts have no causation.

THE COURT: The bolts kept the hood from

opening; is that correct?

MR. JONAS: The only thing that was used to keep the hood closed were the pins with the cotter keys through them. The bolts were never used on this machine, okay?

THE COURT: Well, it came off the plant with bolts on it.

MR. JONAS: Indeed. And if they wanted to use bolts, I suspect they would have put it in that drawing. But they didn't. They never mention it. There's nothing on the machine that says put the bolts back there. Don't run this without bolts.

This wild kind of summary of the testimony about what was said and how it was said is a little loose.

You know, when we get down to the "don't go near the machine if the hood pins are missing," okay, where's that? You know, I'd like to see all the information -- you know, one of the things about the hood pins that's really perplexing is that Mobark actually makes a machine where you can't -- the machine won't work with the hood pins missing. You can't even start it. You know, their answer to that is that's a brush chipper or some other kind of chipper.

THE COURT: That's a different thing entirely because that would be -- I can understand, and that would

be what you'd need to put into it, but we're talking about residual energy --

MR. JONAS: Yes, sir.

THE COURT: -- at this point. We're not talking about the initial kinetic energy to start it, we're talking about the residual energy.

MR. JONAS: Well, but if the pin had been missing for any -- as it was --

THE COURT: You shut off -- let's say you pull the pin out and you shut it off. You're still going to have residual energy.

MR. JONAS: The question from the beginning is why was the pin missing. And if it was missing --

THE COURT: Well, they can't tell you that because they weren't in the mill that day.

As I understood it, a worker in the mill didn't stick the pin back in. Because I don't think they have the responsibility of standing next to every worker of the machine that they sell from when they sell it until the machine is restored.

MR. JONAS: Well, I think we all can agree on the facts of the case that he wasn't changing the blades when he opened it. I mean, he was investigating it. You know, all this business about what he was doing is pretty clear at this point.

One of the things about, you know -- and I want to get to the warning issues because I think it's probably the stronger part of the case.

You know, when you look at Anderson, I think Counsel cites that as his jumping off point, you ought to also look at Allen versus Long Manufacturing. That's one in which a portable grain auger up-ends and strikes this fellow on the head, fatally injuring him. And they brought -- you know, the warning issue got to all the issues that we're talking about here: The wording, font size, conspicuousness of the warning. And, of course, it didn't address the specific hazard that the Court later pointed out about the imbalance potential of the auger under some conditions. You know, it did say stay away, you know, this is dangerous, but it didn't say, you know, if you unload this this way, it's going to fall down. That's kind of what this is about.

You know, the question about warnings, since Mobark doesn't have any warnings that will come close to addressing Z-535, then they want to jump onto the Precision Husky warning label with the pictogram.

Well, the only evidence so far in this case is from Dr. Clement that says that's misleading. It involves a machine that has the hood latch on it. It involves what he claims is a diagram that doesn't -- is

confusing as to whether it shows the hazard that was involved there.

Now, Mr. Ott wants to argue it clearly shows all this. It doesn't -- there's no testimony to that. The only testimony is it doesn't.

Now, it's better, I think, from my uninformed point of view than what Mobark was trying to do, but it has no backup either. And the only human factors expert says it doesn't cut the mustard. Nothing on this machine says --

THE COURT: This was on the machine. There's no question --

MR. JONAS: They slapped that on in Leeds, Alabama, you know. It ain't a Mobark deal. They put that on for whatever their purpose.

You know, I like Mr. Smith, I think it's a better idea than what Mobark's got, but the facts in this case are that the only expert that's testified says no, it's not sufficient and, in fact, it's more confusing since it doesn't picture that machine. And the circumstances of, you know, the human factors analysis of this aren't satisfied.

I'm not -- you know, the whole issue about foreseeability, you know, we've got a duty to warn under Livingston if this kind of thing's foreseeable, that if

somebody might try to open the hood under some circumstances with the hood pin missing or under some other circumstance, did they get that clear in their mind? Well, they should have.

The Center for Disease Control keeps up with these statistics and Mobark regularly publishes trade publications where the same information is conveyed.

There's hundreds of these machine injuries. And one of the things the CDC says is that given the number of amputations, fatalities and getting struck by flying objects, including hoods, is part of what they analyze and keep records on.

Mobark, as a sophisticated manufacturer, knows all this. They know that getting hit in the head is a real issue. Where is their warning? Since they don't have one --

THE COURT: You can't open the hood when the wheel's turning is a warning.

MR. JONAS: I mean, the question, then, is if you're so hot on telling me where to look, show me where it says so.

You know, if he looks -- that is Mr. Holland -- and it's unexplained how this happens afterwards, but he says, "I checked it twice, it wasn't turning," then you've got the testimony that essentially goes back to --

THE COURT: Well, that's a different issue as to whether or not it was turning or not. I mean, that has nothing to do with design.

MR. JONAS: The question is --

THE COURT: He says he knew and he thought it was not turning, then that's a different thing than the design because basically he was following the warning by making sure that it wasn't. That's a different issue.

MR. JONAS: One of the things Woodrow Woods says is that you actually can't see the wheel turning the pulleys from the position where you take the pins out.

You know, Dr. Clement says you need to be at a station and in a position where those two things happen together; that is, the action and the warning. It didn't happen here, okay? So he says no, that isn't going to comply with ANSI Z-535.

THE COURT: Let me go back.

Your guy obviously knew that it wasn't and he tried to comply at that time. He just made a mistake that it was turning.

MR. JONAS: Well, you can speculate about why.

THE COURT: Well, I don't know why, but I mean, this is a product design liability case. You've got the worker who says he knows and in fact thought it wasn't moving, but he was in error. There's no question about

that. So where is the design error?

MR. JONAS: I don't know if he was in error or not. I know that the only testimony is that that's what he says.

THE COURT: So if it was turning, then he was in error.

MR. JONAS: I think that the issue comes to specifically assuming. I think Roger Davis assumes he was in error, okay, assumes that the only way this could have happened is that the wheel kicked the hood back. Then the question becomes, you know, what are the devices or the warnings that would have prevented it.

I showed you the one that Mr. Smith, their expert, said would have prevented it, okay? Been around -- they've been producing that thing for 30 years. It cost a hundred bucks.

You know, the question about the warnings, Mr. Smith's got a warning. They now claim it's a pretty good warning.

You know, the question is, did Mobark under those circumstances comply with the industry standards that were in effect? Did they comply with the OSHA standard? Was the guard still a hazard at that point? Is that relevant to the design case?

I've shown you an alternative design that's got

nothing to do with interlocks. You know, it has to do -- and it is specifically pled in the pleadings.

You know, there are other allegations in there that specifically address the warnings on the machine.

They want to turn the case on their theory. And, you know, certainly I've been doing this for 37 years, I get it. But, you know, the bottom line is that the facts as were recited, okay, the only relevant ones are how did the accident happen and what is the testimony at this point.

We know that -- you know, I was looking at --

THE COURT: But you're telling me that the facts as they happened is that your guy thought that the wheel wasn't turning and in fact did with his test show that the wheel was not working; is that correct? I mean, am I off on that?

MR. JONAS: I don't think you're off, Judge. I mean, that's a view of what I think is a generalized issue.

I mean, I'm reading from Allen and it says, you know, once the plaintiffs present evidence to support the warning's inadequate, then it becomes an issue.

THE COURT: But your guy followed the warning.

MR. JONAS: There were no warnings. He followed a procedure he made up.

THE COURT: He followed the procedure in order to make sure that the wheel wasn't turning.

If the wheel's not turning you can do anything -- I can get a child to crawl up into those knife blades and they're not going to get cut. He thought it was not turning, but it was.

MR. JONAS: I think that the issue for anybody about procedures -- you know, they've pled -- he didn't argue it, but they've pled sophisticated user and learned intermediary. That's how you get around that, okay?

Now, maybe he'll get up and argue it now, but the bottom line is that if he's a sophisticated user, if Mr. 76 IQ is a sophisticated user, they can get by with that.

And if the learned intermediary defense works, then they can depend on A&K to do this training that never happened.

They haven't proven that. There's nothing in the record to prove that.

You know, this alleged training procedure is from three different people that had --

THE COURT: They should not have to be responsible for his using a stick to -- I mean, that's like somebody -- I mean, he created that method of making sure it was off.

MR. JONAS: If they wanted -- well, he didn't create it.

THE COURT: They didn't tell him to stick a stick up in there, I'm sure, and see if the thing's working.

MR. JONAS: They said "look at the chipper sheave," and then they made a machine without any directions or label that says "look here." No warnings. That's insufficient.

And, you know, if this is a learned intermediary case, you know, then we need to get over on that thing.

I mean, my client followed a variety of procedures that a variety of people taught him. The question is, what about the machine manufacturer, were they sufficient or not?

You know, the warning in Allen versus Long Manufacturing and Gardner versus QHS, which it cites the Fourth Circuit case that's been around forever, both of these fail to convey the risk.

What was the risk? You know, in Gardner it was -- or the grain auger case, the Allen case, was that the thing would tip over. And even though they said before operating be clear, you could die and everything, that's not sufficient.

In Gardner, the warning was use plenty of water and don't let it boil away -- this is a hair roller case, lady fell asleep in the bathtub and bad things happened -- that's not enough, because the manufacturer should have anticipated that this would happen or that the water would boil away at some point.

You know, when you get into Campbell versus Gala Industries, we talk about the testimony of human factors experts.

THE COURT: You've got all these cases? You've provided him all the cases?

MR. JONAS: I did, Judge.

You know, that's a centrifugal dryer in the Pelzer line, that warning, and it focuses on the testimony of the human factors expert.

What I'm pointing to, my best story in explaining why that's important is that there is no other expert here to say otherwise.

You know, Dr. Clement is completely credible on the issue of the ANSI standard and the equivalent of the hierarchy of safety thing that's, I think, under ASTM now. But, you know, you get a jury question if you've got the adequacy of the warnings are being challenged.

I think we already talked about the OSHA regs. There's all sorts of authorities about how you have to

deal with them.

My point about that is pretty simple: That when Roger Davis says that, instead of making fun of him with the snarly "he don't know what he's talking about" story here, only guy in the world that can come up with this, he's not the only guy in the world that came up with the OSHA machine design standard.

Mobark understands completely that interlocks are part of the industry in timing devices. They published it -- in fact, they're quoted in the same article where the rest of their competitors are talking about it. They've got their own version of pins that stop the machine and all.

They want to make the distinction none of this matters because it's 1996 and, you know, by the way, there's a big difference between mill chippers and brush chippers. And there is. Brush chippers have come under regulation that mill chippers have not, except for British Columbia apparently.

I take the point, but it doesn't -- you know, the issue is bigger than that. It goes back to foreseeability and, you know, were these things around, were these generally knowledgeable ideas?

I mean, the guy down the street in Wynn, Michigan, Mr. Morre's cousin I think it is -- or maybe

it's his nephew -- designs a patent two years after this thing with a positive hood lock device. Now, they're all -- all these things are engineering designs that rely on prior patents, most of which go back to the 30s. These were all within the clear understanding. The real problem is --

THE COURT: You got a patent two years after. Doesn't that indicate that it's a novel idea?

MR. JONAS: That just means that that idea on that machine was novel.

THE COURT: Okay.

MR. JONAS: It lists two dozen patents that it relies on.

I've got one from 1954 here. It says an object of the invention is to provide safety means by which the cutter head can ordinally be stopped. I mean, that's a braking mechanism.

But the point I would get to is that when you get involved with Mobark, there's a lot of Mobark cases out there. They have a problem sometimes, and they have in this case, finding any design information about this machine.

Their answers to all the interrogatories and requests for admissions all point me to Norville Morre who designed this machine and has passed away and

nobody's got any records or information or anything that would conceivably help us get to the point that Counsel directs us to, you know, with his case law.

If you have, you know, no information, design information, and your case is basically to argue and you have no way to prove that your warnings are sufficient and all you can do then, I guess -- and maybe it's brilliant -- is to attack on the issue that there are no standards in this industry and we complied with the bad customs of an industry, and by the way, that OSHA standard doesn't mean anything and, you know, whatever the facts are, we'd like to change them a little bit to claim that he was actually changing cutter blades instead of trying to fix a machine.

So I understand why we argue things, but I'll try to conclude this that, you know, between the CDC and all the engineering expertise that Mobark had accumulated since 1957, they couldn't find one engineer to show up and testify, they got a draftsman. The draftsman gives me information that's inconsistent with what they produced in response to interrogatories about these blades. They don't have any design information that anybody could possibly address.

They have shown, and I think they're exactly right, that they have shown that they have complied with

the industry custom as it existed for the last 60 years; that is, they produce a machine that has a rotating cutter that keeps running ten to 15 minutes after you cut off the power.

They have no instructions about whether to feed it or not feed it with a vibrating conveyor. They have no warnings that address the idea of plugging or stopping or pins falling out or anything else.

What they depend on is somebody else to pick up the ball, which is what they're arguing here. Precision Husky ought to be -- in their expertise ought to be aped on to their case and whatever A&K Mulch was doing, they should have picked up the ball because Mobark doesn't want to, or couldn't.

One of the things you asked about was whether this thing had been changed around any, and, you know, Mr. Smith went through his factory, he had all the documents. He says -- I asked him the question, "I understand you don't have any records of the work that was done on this Mobark chipper before it was sold to Mr. Witherspoon."

He said, "I never examined the machine after the accident."

He didn't have any records, but he did say that he had investigated within his work group and testified

that they had not made any alterations to the machine except for cleaning and adding their decals.

And, you know, when I asked him about this business about keeping the vibrating conveyor running, you know, he said, "Look, that's a bad idea." And he also addressed that in his --

THE COURT: That's a different issue.

MR. JONAS: I think it's a reasonable explanation of what was going on with the machine. He described it as slowing down and stopping, and, you know, however that happened, but he anticipates that in his manual for Precision Husky. And, of course, he gives us the information. He's had brake systems available on the chipper that would stop it within a minute. He says everybody in the industry's got them, had them for the last 34 years.

THE COURT: We've been through this.

MR. JONAS: Yes, sir. I think we talked about this.

This Mobark quote from one of their guys says that "standard on all models are safety switches that will shut down chippers if the pin securing the hood is removed."

I guess that's, you know -- depending on how you see the accident, that may be significant.

THE COURT: Are you done?

MR. JONAS: Almost. I'm going for it.

I remember when you used to be a master. You used to have a lot more time.

THE COURT: I was never a master.

MR. JONAS: I'm just teasing. You know, I was thinking your -- didn't you run for master or something? No.

THE COURT: That must be Roger Young.

MR. JONAS: Well, maybe that's what I was thinking about. You know, the last case I had in this courthouse was about 25 years ago.

Other things out of the record, we've got -- Mobark was able to point me to some documents where they decided that they would tell everybody that they had complied with the Michigan OSHA standards, at least that part addressing sawmill equipment.

I don't know if that's particularly important, but it does come down to the issue about there's OSHA standards and how they're recognized by various manufacturers.

With this thing is a bulletin back in 1980. It talks about the paddle-type fan blades.

THE COURT: We talked about that already.

MR. JONAS: Yes. Well, they've got all that

stuff.

This last thing, we had some discussion about whether Mobark had actually complied with discovery or what their recordkeeping was like.

I'm not suggesting Curtis had anything to do with this, but I asked repeatedly for all their invoices and information, even gave them this invoice number that I got.

I got this invoice from Mr. Witherspoon, and this was shortly after the accident.

There's a dispute about when they put these labels, these stickers, these warnings on the machine, whether they were there when this thing happened, and all this.

Anyway, we got this, but Mobark could never find its counterpart in Michigan.

I suggest that what this says is that they were in regular contact with J.C. Witherspoon, Jr. Inc. Mr. Witherspoon himself testified that he had visited Wynn, Michigan on a number of occasions and knew the guy that's running Mobark now, a fellow by the name of Larry Knott.

There's been a certain amount of interaction in this case exchanging information. I'm not suggesting anything other than there is that connection. I think

Mobark's tried to deny it a few times, and it just exists.

That's all I have to say. Thank you, Judge.

THE COURT: Five minutes.

MR. OTT: Hopefully I won't take that long.

Thank you, Your Honor.

Real briefly. On the warning issues, he's cited Allen and some other cases. Those cases go to the sufficiency of the warning. But you don't get to the sufficiency of the warning until there's a duty to warn.

And in this case, Anderson makes clear that the operator/user generally recognizes the danger associated with the product, which Mr. Holland clearly did, because he'd been trained, he'd been warned. He had visual warnings, he had written warnings on the machine right in front of him. And more importantly, he had been reprimanded to the point of being threatened to be fired, to the point where he knew not to do exactly what he did on this particular day.

The sufficiency of our operator's manual, I wish it were in play, but it can't be the proximate cause because it never was presented to Mr. Holland. And so what did he know from his experience was exactly not to do this on this particular day.

The more confusing aspect to me, Your Honor, is

exactly what the defect theory is.

I came into this courtroom today under the assumption based on the evidence and expert testimony that this was a design defect case, and as their expert, their only design defect was that the absence of this interlock or a motion detector is what made it defective and that's why he said that every wood chipper in the world, stationary wood chipper in the world that's ever been manufactured is defective because it doesn't have this brake interlock, including the alternative design that Mr. Jonas says is sufficient to get him past summary judgment.

Mr. Davis, I asked him about these photographs which were in his file and I showed him these other designs and I says, "Those are defective too, aren't they?"

"Yeah."

Every design that's ever been made, according to Mr. Davis, of a stationary wood chipper's defective from the beginning of the world to the present without a brake shift or an interlock or the motion detector.

That's their theory. It's their burden to come forward with their theory. That's the theory that's been presented up until today.

As I said, Judge James heard a motion to amend

to try and add in this brake theory at the conclusion of all discovery, probably for the very reason is he realized he didn't have a feasible alternative design to survive summary judgment. So I'm going to go back and try to add this brake thing in after we've taken all these depositions, which would have to be reopened, and the fact that it wouldn't be a feasible alternative design because it cost $5,000 on a $25,000 piece of the equipment. It was only an option that Precision Husky would offer.

But more importantly, I think, as I heard Mr. Jonas, he says that that is not a design defect case anymore. It's a malfunction case.

Well, I think he falls down a bigger rabbit hole by going that route because the mere fact that a product malfunctions does not establish its defective. That's been true since Bragg and was reiterated by Branham. The mere fact that someone's injured or an accident happened is not proof that a product is defective or unreasonably dangerous.

The only theory presented to this point is the absence of the interlock.

We've shown that there is no alternative design. We've shown that it's not industry custom. In fact, it's never been researched or thought or

incorporated by anyone in the industry.

The bolts issue, and I'll just read real quick from the excerpt to Mr. Davis: "Will you agree with me that to open the hood of a chipper as originally designed you would have to undo four horizontal bolts and two vertical bolts?"

Answer: "I believe that's the case. The photographs seem to show that there were bolts in the hood when it left the factory.

And -- but by the time you inspected the machine all those bolts, all six of those bolts were gone?

I did not see any bolts, correct," quote.

Obviously a manufacturer doesn't have control, especially over a ten-year period, of what happens to its machine. And if someone doesn't keep the operator's manual and if someone adds new fan blades that have less clearance and if someone removed bolts that are part of the process to get into the hood, that cannot be the manufacturer's responsibility.

So, Your Honor, I think that we are entitled to summary judgment, and we so move.

Thank you.

THE COURT: Thank you.

We've got a lot of cases we've got to read, so

I want to go back over these and I will take it under advisement.

You're protected for next week, so that may help a little bit. We'll have you back soon and we'll have you all up for trial.

MR. OTT: Thank you, Your Honor.

MR. JONAS: Thank you, Judge.

Do you want anything more from us, Judge? Probably not.

THE COURT: I think we've heard everything.

MR. JONAS: More than you need.

THE COURT: I need to do some reading.

MR. OTT: Your Honor, I brought the original depositions, the depositions that I myself noticed. I don't know if the Court wants those.

THE COURT: I think we've got the excerpts as to what your argument was.

MR. OTT: Thank you, Your Honor. And I also have copies of the cases cited in our memo if you would like those.

THE COURT: Thank you, gentlemen.

(The proceedings were concluded.)

*** END OF REQUESTED TRANSCRIPT OF RECORD ***

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF SUMTER	)	
Andreal Holland,	)	
	)	
PLAINTIFF,	)	TRANSCRIPT OF MOTION HEARING
	)	C/A #: 2008-CP-14-00461
v.	)	
	)	
Mobark, et al.,	)	
	)	
DEFENDANT.	)	
	)	

March 11, 2011
Clarendon County Courthouse
Manning, South Carolina

BEFORE:

HONORABLE GEORGE C. JAMES, PRESIDING

APPEARANCES:

Donald E. Jonas, Esquire
Attorney for Andreal Holland

Curtis L. Ott, Esquire
Attorney for Mobark

TAKEN BY MELISSA R. SINGLETARY
CERTIFIED VERBATIM REPORTE

INDEX

	PAGE
Case Called	3
Certificate of Service	29

EXHIBITS

(There were no exhibits marked at this motion hearing)

The Court: I know that I've heard motions in this case before. I believe it might have been a Motion to Compel; that's the only thing I can remember. Alright, this is 2008-CP-14-461. Who's motion is it?

Mr. Jonas: This is my Motion to Amend and Supplement the Complaint Your Honor. Just briefly, by way of background, Mr. Andreal Holland was injured while working a saw mill in Alcolu.

The Court: Alcolu.

Mr. Jonas: Alcolu, I'm sorry. I'm not from Manning, but I'll take your correction. For the, while working on this machine, I've got a photograph of this thing, it came from the record. It's a wood chipper machine manufactured by Mobark. Some portion of this machine and this is a two part hood, covering a rotating disk, struck Mr. Holland in the head, causing severe injuries. He is now permanently disabled and suffered a traumatic brain injury. Mr. Holland, of course, through his Guardian ad Litem, his mother, Peggy Knox, brought this suit initially against Mobark Precession Husky who is the re-seller of this machine, the used machine to the saw mill in, actually we refer to it as a/k/n Mulch and J.C. Witherspoon, Jr., Inc. He's well known in this community. Mr. Bob Smith, this fella here, standing next to a similar machine

that he produces, his company is Precession Husky has testified as an expert witness on behalf of the Defendant Mobark in this case and certain statements he's made as an expert witness caused me to file this motion. Just to begin, just a very brief background of the procedural history. We filed this case in March of 2009. You may recall from our hearing last that it was removed to Federal District Court and ultimately remanded in October of 2009. On July 30th of 2010, I made initially another motion to amend and it was consented to, to remove the allegations of negligence and proceed solely on strict liability and the implied warranty period. Shortly after that and following substantial discovery, I moved to voluntarily dismiss all of the Defendants in this case, except for Mobark. Ultimately, in the discovery process, as Your Honor has already once, the Defendant finally named Mr. Bob Smith as it's expert and on an occasion in November of this past year we proceeded to Montgomery, Alabama and took Mr. Smith's deposition. Now since Mr. Smith was no longer a defendant in the case, or his corporation wasn't, there were a variety of things that he was already aware of as a result of his participation. It made his deposition, I think, somewhat more meaningful and eventually, we got to the

point where Mr. Smith addressed two point that require some explanation. The first is that he, as an expert, alleged that it was common knowledge within the chipper industry that Precession Husky manufacture chipper equipment, including this model and bigger and smaller models, all sizes.

The Court: When you say this model are you talking about the green one?

Mr. Jonas: Yes sir. This is a 58 inch, which is typically the size of the disk that is enclosed in this two piece case. That is the same size of the similar Mobark model that this gentleman's working on here. Mr. Smith, of course, sold this very machine to the Witherspoon Group.

The Court: The red one?

Mr. Jonas: The red machine.

The Court: Just call it red and green and that will help me out.

Mr. Jonas: Alright. I like that. Some people insist it's orange, but I call it red. Mr. Smith, from his location in Alabama, sold the Witherspoon Group this red machine in approximately February or March of 2006. It was finally installed at the Witherspoon location in mid April and about five to six weeks later, Mr. Holland incurred his injury while trying

to, in somewhat dispute, what he was doing, but essentially, at some point, he had attempted to remove one of the pins as this gentleman's doing in this red photograph with a hammer. Mr. Holland, on the occasion that he was injured, came to the machine trying to discover why it was not operating properly and discovered one of the pins missing and while he was pulling out the second pin and after he thought the machine had stopped, the wheel had stopped turning, as he got the second pin out the hood came back and slammed him in the head knocking him unconscious with very serious consequences. The issue that's before you, we've got a variety of allegations that came with the original products liability claim and as it was amended in July of 2010, but the two additional matters that have now become important to the case is Mr. Smith's explanation that this type of equipment, this Precession Husky equipment or any similar type of industrial wood chipper equipment, including Mobark, is typically can be equipped with a brake to keep the rotating disk from turning after it's de-powered. This case is really about the fact that it is a known condition of this type of equipment, that because of the substantial weight of that disk, about some place in excess of three

thousand pounds, after it's powered off, as was, is undisputed in this case, that Mr. Holland did power it off, it takes approximately ten to fifteen minutes to run down and stop rotating. The facts are in dispute about how long this machine was left to run down and whether or not it had experienced some sort of mechanical defect that stalled it, but the important point of my motion is that there is now, despite, well after two years of discover, it is now known from the Defendant's expert, that one of the options of this type of equipment is to get a brake installed, a disk type brake that would stop this machine within a minute after de-powering it. I want to take that allegation, or take that fact and make it another allegation of liability in this case that, that Mobark failed to either provide such a machine with an adequate break or any break or to advise whoever was operating the machine that there was no brake installed. Additionally in the discovery and deposition of --- well in the deposition of Mr. Smith it was learned that he agreed that one of the things that customers and dealers expected in the production of wood chipper machines, is that the manufacturers would produce that equipment that would satisfy the applicable OSHA standards that apply to an employer.

My expert, of course, had identified that fact as one of the allegations in this case, but it was not until Mr. Smith agreed that the allegations or that equipping the machine in such a way that the customer and seller of the machine could rely on their design and manufacturing to comply with, in this case, 29CFR29.91910.212. That section has got a sub part two saying that the general requirements for machine guards are that the guard be affixed to the machine where possible and secured and that the guard shall be such that it does not offer an accident hazard in itself.

The Court: Why did the hood kick back?

Mr. Jonas: The hood kicked back, it is alleged that this machine, sometime in the normal process of the shut down procedure, Mr. Holland went and, as I say, it's undisputed, that he powered off the machine. When he did, the procedure there, in the left corner of this photograph, there's something called vibrator. There is a board or a conveyor that continues to feed this machine with the scrap that is being turned into mulch and exhausted through this output feed pipe that essentially runs to this pile in the back. There is a screen inside here that keeps the chip size to what is expected and that any chips that get through this

machine that are outside that chip size, go back into this belt, back down through this area to the vibrating feeder ...

The Court: -----Come through for another bite.

Mr. Jonas: That's exactly Judge.

The Court: Okay.

Mr. Jonas: So, there are two and Mr. Smith identified the problems with the operation of the machine. My client has testified that on approximately two times a week, that this machine does stall and that this vibrating feeder, with materials that come through the middle, and continue to feed into this chute, as well as this screening effect or any, any sort of problem in this out feed pipe will cause such a stall. Mr. Holland has testified that at the end of the day and this is his normal procedure, the mill shuts down, that he goes and powers off the machine ...

The Court: Pulls the pins out to clean the machine.

Mr. Jonas: Well he gets there, but there's a substantial point about the time involved. He knows and everyone knows that operates this equipment and this equipment is automatically fed. There's no regular operator to this. My client's job is further down into the mill as the cut off man on a saw. This thing sits outside the mill and runs on its own. He goes, shuts it off when

he gets the signal, goes back to his position on the line, takes his clean up of his saw, cut off saw operation as well as other areas in the vicinity, he says it takes him ten to fifteen minutes to get that done. During the period of time that this machine, on the day, June the 1st of 2006, when this accident happened, he says that someone at the end of the mill that had a better view of the machine or at least could hear the machine, had some indication that it was making an unusual noise. This machine, in the history of this machine, from Precession Husky is that when, shortly after it was delivered, Mr. Witherspoon called that smiling fellow at the end with the green machine and said that he was detecting a noise that he thought was very noisy in this equipment, this used equipment, and Mr. Smith, on April the 16th, the day after it was set up in operation, sent him a new bearings. Now we don't know what happened, but we know that ...

The Court: ... Well, I know but you're kind of going from point to point without ever completing one. Why, he went back and fiddled with his own thing for ten or fifteen minutes and came back assuming that the machine would be fully powered down?

Mr. Jonas: He would have expected that except that ...

The Court: Alright.

Mr. Jonas: ... before he got back, someone came to him and said it was making some sort of a slapping noise or a noise.

The Court: And then what did that person do?

Mr. Jonas: That person left it to him to address it. Mr. Holland waited a little longer because he thought that enough time had not gone by. He walked outside the mill, looked at the machine and discovered that it had, in his opinion, stopped. His process of checking the rotation of this machine was to take a stick and run it down this chute, where, as he had been told and as he had done for more than a year, he could contact this wheel and determined whether it was still moving. He determined at that point that the machine was not running. He went to his mill supervisor, a fellow by the name of Woodrow Woods. Mr. Woods was in another location in the mill. He advised him to go to another employee who had considerable experience over at Georgia Pacific he had a number of years of saw mill experience.

The Court: Okay, that's fine. I don't need all that. Tell me ...

Mr. Jonas: Finally, finally gets back.

The Court: Alright.

Mr. Jonas: Mr. Frierson is the fellow I'm referring to. He gets back to, Mr. Frierson doesn't have, isn't ready to come to the machine. My client goes back to the machine. Now he has discovered that this pin on this side of the machine is missing. He determines that the machine is still stopped and that there is another pin on the other side of that hood and so he, in an attempt to investigate this, works the other pin out and as he works it out, the hood comes back.

The Court: Why? Because the pin is out?

Mr. Jonas: I mean, one could surmise that the wheel ...

The Court: Okay.

Mr. Jonas: ... at this point, had broken loose and begun to turn.

The Court: So the machine wasn't off?

Mr. Jonas: The machine was powered off.

The Court: But it wasn't, it was still rotating or whatever.

Mr. Jonas: That's the case.

The Court: Alright, so what's your motion?

Mr. Jonas: My motion is to include these additional allegations that ...

The Court: What additional allegations?

Mr. Jonas: One that the guard itself and this provision of OSHA should be allowed to be alleged as an act of,

that supports the strict liability claim. It is Mobark should have, the actual allegation I propose is in failing to design, manufacture, inspect and distribute a chipper machine that complied with OSHA general duty standard, general requirements for all machines. The second thing is that in failing to equip the chipper machine with an effective brake mechanism.

The Court: Now is that proposed amended complaint in the clerk's file?

Mr. Jonas: No sir, it's not. These are two allegations that came out of that, that last ...

The Court: Has your motion to amend been filed?

Mr. Jonas: It has. It just refers generally to the ultimate discovery issues that I don't think are in question here. Both of these matters didn't appear and become developed until late December. Mr. Ott helped me by arranging for me to buy some Mobark parts that only recently, I think early January arrived, that I could further investigate this matter. But Mr. Smith's deposition, and on the day I think following his deposition in Alabama, I came back and made some additional discovery requests that were answered timely I think in mid December that addressed these very things. That is the OSHA standard and the braking mechanism. I don't think these are new issues; I

think they're and they certainly ...

The Court: So what you're saying is you want to allege that they should have equipped the machine with a brake to stop it quicker than pot luck guessing?

Mr. Jonas: Within a minute rather than the fifteen and that it should be a specific allegation if it's not generally alleged in what I've already put out there, that that OSHA general duty standard clause, at least, is a sufficient allegation ...

The Court: Okay.

Mr. Jonas: That's it Judge.

The Court: Mr. Ott?

Mr. Ott: Your Honor nearly five years after the Plaintiff's accident and more than two years after he filed this lawsuit, they now come before this Court for the third time to amend their complaint.

The Court: But they don't want to add a cause of action, they just want to add a specification.

Mr. Ott: They want to add a new defect theory and let me explain why. Your Honor this Court entered a scheduling order for this case under which there was a discovery deadline that's passed, there was a identification expert that the Plaintiff identified and complied with, the Defendant complied with, discovery concluded and after that, after the case has

been on the trial roster now we get this motion to amend to allege a completely new defect theory, never previously raised by Plaintiff's experts and in fact, I asked him specific questions about that as I'll explain in a moment. Allowing the Plaintiff to go forward on this case, now that it's already on the trial roster, now that discovery is concluded, which would require re-opening of multiple depositions to address this new defect theory that's never been previously brought forth today, would simply prejudice us in the amount of time and cost it's going to take. They've had ample time to do all this stuff and they simply haven't done it and the reason they're coming before the court Your Honor, is frankly because their original defect theory was based on the ability for an operator to access a hood and open that hood before the machine had stopped. And what they proposed by way of two experts, a mechanical engineer and human factors expert, was a theory that you should have some sort of brake interlock on this machine that would prevent accessing that hood until the machine had completely stopped. We ran through that theory; it's going to fail because no manufacturer of any wood chipper in the history of the world has ever utilized that design. The only opinion in the history of the

world that it's defective without this interlock, is Mr. Davis.

The Court: Who's that?

Mr. Ott: He is their expert mechanical engineer. If he qualifies he will be allowed, he will try to say that it's defective because you don't have something that absolutely prevents you from accessing that hood, despite multiple warnings on the machine and in the operator's manual, in the training provided by the actual employer and indeed Mr. Holland was reprimanded on multiple times for doing or trying to do exactly what he did on this particular day. And in their complaint, the second amended complaint that they filed, or that was granted in October 2010, Your Honor this is the mechanism of injury, paragraph nine. As the machine slowed, Plaintiff heard a noise in the turning wheel cutting area of the machine and went to consult a supervisor. When he returned to the machine, he mistakenly determined the wheel had stopped turning and attempted to remove the pin securing the two piece hood assembly. Continuing to paragraph ten. As he attempted to remove the pin securing the hood, he came in contact with rotating fan blades and it kicked back the hood and it hit the Plaintiff. That's the only way that this accident could happen. The procedure is

it's visual for the operator or user. I say operator, this is an automatic machine. It's automatically fed by a conveyor, it's normal operation doesn't require anyone to be there. You turn it on, the conveyor starts automatically in the way they have it set up, it goes in, chips, no one needs to be there. In fact, no one is there. The only time you need to get near the machine is to do maintenance on it or twice a day change the cutting knives inside the disk. So that's the only reason for someone to go there, but when they go there, there's a set procedure.

The Court: Why did he go there?

Mr. Ott: Because that's what he would do. He'd daily change the knives on this machine and a smaller Mobark forty eight inch machine that had the exact same procedure, he'd been doing this for two years. On this day, he just did something he wasn't supposed to do. And so that's how he got hurt, it's the only way for him to get hurt.

The Court: And their new theory is ...

Mr. Ott: The new, the new theory now is ...

The Court: There's some kind of brake ...

Mr. Ott: Exactly Your Honor and let me, let me add, just read real quickly a couple of excerpts from their two experts on this, this brake theory because it came up

during my questioning way back on August 31, 2010. Mr. Jonas raised this in response to questions of his own expert about this brake issue, so I explored it and I said, Do you have an opinion Mr. Davis, that this machine is improperly designed because it doesn't have a brake? No, I, I didn't say that. So I addressed that with their expert and they don't have an expert to say that. It came up again with their human factors expert, a Dr. Clement and this is interesting because it shows how futile the motion is because it has to be a reasonable alternative design. Mr. Smith said this was optional equipment and importantly, Your Honor, I didn't sell this machine. My client didn't sell this machine to Plaintiff's employer. We sold it in 1996, it got passed around and the next thing we know we're getting sued in South Carolina. We originally sold it in North Carolina. It went to Precession Husky in Alabama and they refurbished it and sold it to the employer. We never had a chance to offer optional equipment to anyone with respect to this machine and particularly Mr. Holland's employer. Furthermore, Mr. Smith says it costs between four and five thousand dollars to put on this brake. Well, the machine itself was sold for twenty-five thousand dollars. That's not a reasonable alternative design. That can't be

feasible when cost is twenty five percent of what it was sold for. And then, Your Honor, to add onto this cost issue, Dr. Clement, in his deposition, I asked him about that and he said in terms of specific design, I didn't get, unless somebody mentioned the one about having the chipper that had a clutch or brake kind of system in it, which, if it worked, would make it safer, but I don't need the expertise to be able to tell you it would be ungodly expensive in equipment of this size.

The Court: Who said that?

Mr. Ott: His own expert in his deposition on September 13, 2010. So they had considered this and they had not come forward with an opinion that absent this brake, this machine is defective and unreasonably dangerous. They obviously had that opportunity and they never positive that opinion as their defect theory in this case. It came up again when we went to Alabama to depose Mr. Smith, the owner of the seller, a competitor of my client. And I asked him about their actual defect theory having to do with this interlock and he said never heard of it, no one's ever done a feasibility study, no one's ever implemented it in a chipper like this, never heard of an accident such as this one. So, I asked them the ultimate question

because their expert said every, every chipper in the industry that's ever been made is defective. I got him to admit ...

The Court: Alright, we're, I'm trying to draw a distinction. This is procedural issue about the amendment.

Mr. Ott: Right.

The Court: And the rule obviously says that an amendment shall be freely given as long as they're not prejudice, so you're saying now that their new theory would fail anyway, but that is not where the amendment comes in. The amendment comes in to whether or not they should be permitted to allege it.

Mr. Ott: True. The prejudice, actual prejudice, under Rule 15 is interjecting now that a Scheduling Order has expired that when a case is on the trial roster, interjecting a completely new defect theory where they would have to get an expert because they don't have anyone to testify about this, which would require me to potentially have to get an expert. It certainly would require re-opening depositions to address this aspect of the machine. It's going to increase the cost, it's too late in the game, they've had this opportunity since these questions were asked of their own experts in August and September and now that we're

on the trial roster they file a motion in mid January to add this new theory. So, again, you're right Your Honor, I'm saying it would be futile anyway, but the prejudice is actually in terms of costs and the fact that we're ready for trial.

The Court: Alright. There, there are probably a few dozen cases on the amendment rule particularly any case that you know of that says that being late in the game, the extra costs you would incur is something that I can consider as far as prejudice? It's kind of in the eye of the beholder.

Mr. Ott: It is. But that's the ...

The Court: While he's looking for that Mr. Jonas, do you have anything in response to that?

Mr. Jonas: I do Judge. Of course the consent Scheduling Order that Mr. Ott now wants to raise, of course, he didn't comply with. You know, we had what I thought was an agreement to move ahead with this case. Because of the changes of the parties, without having any of these issues back revisited, but if that's the case, of course, then all of the motions have been filed at this point by Mr. Ott are out of time. But I, I didn't raise that issue here and I'm here to amend a complaint as to the specifications of negligence. Primarily because Mobark has been stonewalling the

discovery in this case from the very beginning. They have answered each of the production requests, even now, refusing or at least being unable to provide any information about any of the details of this machine. What they've provided us was a salesman and a draftsman under a 36b specific notice that requested all this back in the fall.

The Court: What was the motion that I heard in October?

Mr. Jonas: That was simply to answer the interrogatories that I had served.

The Court: Did they have any, did, did their failure that you say to comply with the Scheduling Order or discovery have anything to do with this brake theory?

Mr. Jonas: Judge, I don't think it directly did. I mean, the fact that I asked these questions repeatedly about how was this machine equipped? How it was designed? This world class organization, they claim to have five hundred employees and I visited all these folks in Michigan, with substantial numbers of apparently sophisticated people that file patents. I think this particular machine has a dozen or more patents attached to it ...

The Court: Well, I'm not worried about all that.

Mr. Jonas: ... could not address that.

The Court: He says he's been prejudiced. I want to know

why he hasn't been.

Mr. Jonas: The issue of the brake under this, this theory. How was this, I asked early on in this case, what safety mechanisms Mobark designed or produced that essentially would have kept this machine in a safe condition. The answer to that in a number of ways, in request for admissions answers, was not forthcoming. The first time we heard about this was from the deposition of this fellow that they claim is the only expert in this case. This fellow Bob Smith isn't just ...

The Court: When was his deposition taken?

Mr. Jonas: November 19 or 18 of this past year in Montgomery.

The Court: And is that, I signed an order October the 8th, Defendant is to identify potential witnesses and respond to interrogatories or respond to interrogatory number one within ten days. The Defendant is to answer supplemental interrogatory number 32 within ten days. Was that when that witnesses name was disclosed?

Mr. Jonas: I don't recall that they ever named Mr. Smith as an expert.

Mr. Ott: He sued them. Mr. Smith is the President of Precession Husky, he sued them.

The Court: Alright, go ahead.

Mr. Jonas: The answer is no they didn't Judge and at the deposition, because things seemed to be going pretty well for Mr. Ott, he decided to qualify him as an expert. He has no other experts that I'm aware of he's named. I don't have any heartburn about any of this, I just want the benefit of moving forward based on what his expert now claims is a safety mechanism that's available throughout the market of wood chipper machines. It wasn't disclosed ...

The Court: What wasn't disclosed?

Mr. Jonas: That the Mobark machine had the potential to be equipped with a brake or that if it wasn't that some indication in the way of information on the machine or that accompanying the machine would have advised someone that this was not equipped with such an alternative braking system.

The Court: But, but your expert said that, that that's not economically feasible and that he's not saying it's an improper design not to have one.

Mr. Jonas: What he's talking about is Dr. David Clement, a human factors expert who has not offered any opinions about machine design. He's offered opinions about warnings and so he was wondering around in the questions and in his speculation, he thought that a machine with a brake would be more expensive. That's

not being offered as evidence in this case. But the question about whether that's a fair assessment of what the standard is within the industry. You know, we've now become focused on the first issue about whether or not I should be alleged, be allowed to allege that the machine was produced without a brake or ...

The Court: Who's your expert? Who would your expert be?

Mr. Jonas: Mr. or Dr. Clement is the human factors expert that will talk about the warnings and the warning labeling system. Roger Davis is the P.E. that has addressed early on, I think he was the first one to investigate this accident in July of 2006. He has offered an opinion that is primarily based on the theory that that OSHA standard was violated. That the guard itself was hazardous in this case and that it violates 29CFR1910212, sub 2. The issue in the case, I think is finally going to come before the court is whether that standard has any application to Mobark. Mobark produces this equipment and runs it essentially in Michigan. They say they comply with the general duty standard like that in Michigan, then they send this equipment to British Columbia that has yet one more OSHA standard and throughout the United States that have a variety of OSHA standards that follow

from that same general duty clause. If the general duty clause only applies to employers, then I'm going to have a difficult time with that part of his testimony. The thing that drives my, my motion to amend is that Bob Smith, the Defendant's expert, has now said that he believes that the manufacturer is also responsible for complying with that. If Bob Smith is such a expert, and I believe he is, then I have taken the next step forward to be able to show that this machine is defective because it didn't comply with the general duty clause, which is what my expert actually says.

The Court: Alright, anything else Mr. Ott

Mr. Ott: Yes Your Honor. His design ...

The Court: I'm going to hear from you real briefly then Mr. Jonas very briefly, but we're kind of going all over the map here.

Mr. Ott: You specifically asked Mr. Jonas who your expert was and he said only human factors expert addressed in his deposition the issue having to do with the new defect theory of the brake. That's not true. The first, there's only two experts. I've read excerpts from both saying I considered it one, Clement's said ungodly expensive. This is the quote from their mechanical engineer expert who's trying to say the

OSHA standards were violated under his original defect theory. Do you have an opinion that this machine is improperly designed because it doesn't have a brake? No, I didn't say that. That brake is only one means of accomplishing the goal of protecting the operator. I think there are other methods that could likewise have been used, including the two that I mentioned. The mechanical interlock and the electrical interlock. So we raised this, Mr. Jonas raised this questions during his own expert's deposition in August.

The Court: Alright, any cases that say time is the prime factor in determining prejudice?

Mr. Ott: No Your Honor, I just think that the general prejudice would be in this type instance, when you're considering a motion to amend, additional costs and the length of the case.

The Court: Alright. Very briefly Mr. Jonas, anything else?

Mr. Jonas: I'd just like to hand up the memorandum Judge.

The Court: Alright, I guess I should have got that at the beginning. What is the memo about?

Mr. Jonas: It just reviews the actual testimony rather than recollections.

The Court: Well, he's been reading from it. I don't

know if that's a recollection or if he's reading from it. Okay, so this is ...

Mr. Jonas: That's the Plaintiff's memorandum that I prepared. It reviews the testimony and the actual procedural history of the case.

The Court: I guess, in the future give me, give this to me at the beginning so I can have it to follow your argument.

Mr. Jonas: Yes sir.

The Court: Alright, anything else?

Mr. Jonas: Judge, that's all I've got.

The Court: Thank y'all. I'll be in touch with you.

Mr. Jonas: Thank you Judge.

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF CLARENDON)

Peggy Knox, et al.)
)
PLAINTIFF,) TRANSCRIPT OF RECORD
) C/A #:2008-CP-14-00461
vs.)
)
Mobark)
)
DEFENDANT.)
)

CLARENDON COUNTY COURTHOUSE
Friday, October 8, 2010

BEFORE:
HONORABLE GEORGE C. JAMES, JR., PRESIDING JUDGE.

APPEARANCES:

Donald E. Jonas, Esquire
Attorney for Plaintiff

Curtis Ott, Esquire
Attorney for Defendant, Mobark

TAKEN BY MELISSA R. SINGLETARY
CERTIFIED VERBATIM REPORTER

INDEX

	PAGE
Case Called	3
Certificate of Service	22

EXHIBITS

(There were no exhibits marked at this hearing)

The Court: All right. We'll go back to the Motion to Compel in Peggy Knox, I assume it is.

Mr. Jonas: It is, Your Honor.

The Court: Against Morbark Industries.

Mr. Jonas: That's correct.

The Court: All right. Just state you all's appearances for the record so that the Court Reporter will have those down.

Mr. Jonas: Good-morning, Your Honor, my name is Don Jonas appearing for the Plaintiff.

Mr. Ott: Curtis Ott here for Morbark.

Mr. Jonas: Your Honor, the matters before you include two Motions to Compel. The first addresses answers to Interrogatories, standard interrogatory answers 1 and 5, in which the Defendant identified one witness that he was aware of in this case, which was the Plaintiff Holland. If that's the final answer, we're moving down the path here. This is a fairly important case. It involves serious and permanent injuries and disabling injuries to Mr. Holland. This case has been pending for some time. If the Defense is prepared to limit themselves to one witness then I am completely satisfied with that but I want to be certain.

The Court: You've got one witness?

Mr. Jonas: That's there position.

Mr. Ott: No, Your Honor. If I may ...

The Court: Wait a minute. You've got a motion. What are you trying to compel?

Mr. Jonas: Answers to Interrogatories and Request to Produce.

The Court: Okay. Are there any specific ones that he has not answered that you take issue with or is it simple what you said he's listed one witness and that's what you want him to make sure he is going to be stuck with?

Mr. Jonas: Answers 1 and 5 were standard interrogatory answers and that's what he has produced.

The Court: Let me see if I can find what you're talking about.

Mr. Jonas: All I have is a file here that's just got a whole bunch of paper in it. I don't have exactly what you're talking about.

Mr. Jonas: The Answers to Interrogatory 1 was the standard interrogatory. The names and addresses of persons known to parties and counsel.

The Court: I've got it.

Mr. Jonas: He answered it saying he's unaware of any witnesses besides Andreal Holland.

Mr. Jonas: That would be the answer that I received.

The Court: All right. And that answer was given May 26, 2009. All right. Was Mr. Holland unable to ... he's got a guardian ad litem.

Mr. Jonas: He does, Your Honor.

The Court: Does he have some type of mental issue?

Mr. Jonas: Serious and permanent mental injuries. This case arose from an industrial accident involving a wood chipper machine with a two part hood that enclosed a large heavy cutter wheel. At some point, the hood slammed backwards into his head. It caused him severe injuries. He was airlifted to Richland Memorial. He was a fellow that is 33 years old I think now.

The Court: Do you have any other witnesses, Mr. Ott?

Mr. Ott: Yes, Your Honor.

The Court: Have you identified them?

Mr. Ott: Not at this point, but if I may explain, Your Honor.

The Court: All right.

Mr. Ott: To give you a time line this lawsuit was originally filed in State Court way back in March of 2009. We removed it to Federal Court and you'll notice that at the time we answered these originally these standard interrogatories and request for production it has the Federal Court caption and in deed you've already

noted that the date of our response was May 26, 2009. Now, this Motion to Compel was filed fifteen months later on August 4, 2010 and first of all it is a procedural matter. During that fifteen months of time, we actually had to file a Motion to Compel against Mr. Jonas and his client to get them to simply respond to our initial discovery. In fact, we had to have a hearing and that was taken care of. Mr. Jonas also filed a Motion to Compel against a prior co-Defendant who has since been dismissed and so he filed that motion against them. Since that time and during that fifteen months, we have had numerous depositions and during all that time that we spent together never once has Mr. Jonas consulted with me about the sufficiency of our discovery responses. In deed, on the day that the motion was filed August 4, 2010, Mr. Jonas and I were here in Manning, of course, our offices are in Columbia. We were in Manning for seven and a half hours that day deposing witnesses in this case and never once did Mr. Jonas mention anything about a Motion to Compel, "Oh, by the way, I'm about to file against you". I can hand up the envelope, which I kept because I was so surprised the next day when I received this Motion to Compel that we had gone fifteen months since our original discovery answers, numerous depositions and not once had he approached me as he's

required to do, of course, with his duty to consult. Your Honor, the motion itself, both motions themselves, don't even contain Rule 11 affirmation that is required under the rules being affixed to every motion that is filed. So, procedurally, and I'm happy to get into the merits of the case, but procedurally the rules require that these motions be denied because he's never consulted with me about them and more importantly the Rule 11 requirement that is not even affixed to his motion.

The Court: Have you served the State Court Interrogatories on him or just Federal Court ...

Mr. Jonas: Yes, sir. I mean, this has been continuing ...

The Court: Let me ask you this. Did you all have seven and half worth depositions here in August?

Mr. Jonas: We did and I think we went to Michigan and did another seven and a half hours.

The Court: Okay. So, how many witnesses have you all deposed?

Mr. Jonas: I --- at this point, I'd say probably close to eight.

The Court: Did you talk to him about your Motion to Compel like Rule 11 says you have to do?

Mr. Jonas: You know, we've had a continuous dialog for almost a year. I am a little astounded to hear this

this morning but ...

The Court: Well, let's just get right down to it.

Mr. Jonas: Yes.

The Court: You want to know who his witnesses are?

Mr. Jonas: That's all I care about.

The Court: All right. And you'll give him the name of your witnesses?

Mr. Ott: Absolutely.

The Court: Why don't you just do that?

Mr. Ott: Well, Your Honor, as we discussed, we did include in our response at the time we answered, this was first noticed, this accident of June 1, 2006, was the lawsuit to us.

The Court: I understand that but ...

Mr. Ott: At the time we answered ...

The Court: Wait just a second. Why don't you all just go outside and get this thing resolved right now?

Mr. Ott: I tried to yesterday.

The Court: All right. Can't you, couldn't you have gotten the ball rolling by just sending a simply State Court Interrogatories off?

Mr. Ott: We ...

The Court: Technically, when the case is remanded back to State Court, federal discovery is over and you've got to do State discovery. In the scheme of things that

doesn't make any sense because everybody needs to let everybody know who their witnesses are. Have you let him know who your witnesses are?

Mr. Jonas: Yes, sir. In the scope of what Curtis has explained, in May, in response to an Order from the Court, we served extensive responses and supplemented them probably four times since. I've got nothing more from the Defendant. All I want to know is what I'm going to do at trial.

Mr. Ott: Your Honor, we're going to provide the witnesses. Our answers ...

The Court: Why don't you just go ahead and do it?

Mr. Ott: Because our answers refer to the same witnesses that his discovery responses finally identified. Our answers say we deserve the right to call as witnesses at trial, any individuals listed by all the other parties. I can go back and supplement and just bring everybody in. We all know who ...

The Court: Why isn't that good enough?

Mr. Jonas: If that's where we're at, and I don't recall that answer being given. I'm happy with the answer. There's no doubt that, you know, we're going to try this case and I want to know who is going to be called as a witness.

The Court: All right. Let me just go back. You

said in your ...

Mr. Ott: Answer to Number One.

The Court: Federal Court interrogatories?

Mr. Ott: Correct.

The Court: Is that what you're talking about?

Mr. Ott: It's discovery ...

The Court: Mobark reserves the right to call as witnesses, any individuals or witnesses identified by the various parties. Why isn't that good enough, Mr. Jonas?

Mr. Jonas: Your Honor. Let me go back. The various parties, at that point, included Precision Husky was a Defendant, Watford Corporation was another, ANK Mulch was yet another. Each one of these parties identified their on set of witnesses except for Mobark. Now, if that refers to everybody's witnesses who were parties at the time they answered, the list is fairly extensive and I think that ...

The Court: You're not entitled to know who he is going to call, you're entitled to know who he might call.

Mr. Jonas: I think the issue is just simply a very precise one. We're going to try this case, I think, in February. If they are going to call anybody that is not on my witness list, I want to know about it. That's a simple thing.

The Court: Well if they're going to call anybody

who is not on yours or any previous parties witness list, you need to know about it.

Mr. Jonas: Yes, sir.

The Court: That's what you got to tell them.

Mr. Ott: I don't think there are any other witnesses. I'm even happy to go back and say here are all the witnesses.

The Court: Okay. So, you're willing to say today that you are stuck with the witnesses he's listed and any previous parties listed?

Mr. Ott: I will supplement our response to identify all the witnesses. I think that every witness that has been deposed ...

The Court: All right. Just do that within fifteen days, but next time, Mr. Jonas, you've got to do your Rule 11 certification.

Mr. Jonas: I appreciate, in this case, counsel has raised the issue, the first time here this morning ...

The Court: Well ...

Mr. Jonas: ... I appreciate it.

The Court: He didn't have to raise it because the Rule has raised it for him.

Mr. Jonas: Yes, sir.

The Court: On the flip side. We've been talking for five or ten minutes about something that you all

could have resolved either by arm wrestling or by phone call.

Mr. Ott: Agreed.

Mr. Jonas: It goes considerably further than that, Your Honor. The --- and without any reservation there are State Court interrogatories that were served continuously since the point that it was remanded that there has been no effective response to. Again, all I care about is if there is not going to be a response then I want to go to trial with that assurance.

The Court: What State Court interrogatories have you served on Mr. Ott?

Mr. Jonas: Yes, sir. We had the second Motion. Interrogatory Number 32, request number 15.

The Court: Let me, I don't --- I don't have that. So, maybe you can hand that up to me.

Mr. Jonas: Yes, sir.

The Court: You have his answers as well?

Mr. Ott: They contain that.

The Court: All right. These start at Number 12.

Mr. Ott: It's number 32.

The Court: Number 32, you're talking about?

Mr. Ott: Yes, sir.

The Court: So, you're moving to compel a response to that?

Mr. Jonas: To Interrogatory Number 32 and Request 15. All right.

The Court: All right. So, the first issue is resolved. You can supplement your interrogatory answers within ten days on the names of witnesses.

Mr. Ott: I will.

The Court: Just list them by name.

Mr. Ott: I'm happy to do that.

The Court: Identify the persons responsible for compliance with machine design standards and regulations at Mobark from 1990 through 2006. You objected to that interrogatory as vague, overly board, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence. What, is that going to require me to get into the specific issues concerning what kind of machine is involved?

Mr. Ott: Yes.

The Court: Again, I'm not picking on anybody but you all said this was going to take ten minutes. All right. So, what's wrong with that interrogatory?

Mr. Ott: What's wrong with it. Because the machine was created in 1996. Anything after 1996 is irrelevant as far as design standards. It's not limited to his defect allegations in any way shape or form. More importantly, we've already taken the 30(b)(6) deposition of my client

in Michigan where he asked these questions and he was given the response which is indicated in other discovery answers that the person who designed this machine Norval Morey died in nineteen, I think it was 1996 and the machine standards have just continued along those lines and we've produced people to explain the answer to this question as well as many other questions asked during the corporate deposition.

The Court: Mr. Jonas?

Mr. Jonas: Yes, sir. We certainly did take the deposition. At which time they indicated that they didn't have any person involved in --- that was responsible and could respond to that interrogatory. The I.D. a person is responsible for compliance of machine designs since 1990 until 1996 when this was produced after Mr. Morey died is a critical part of determining what standards they did try to comply with.

The Court: Don't interrupt him.

Mr. Ott: I'm not.

The Court: You can have a seat. It's just distracting when people stand up.

Mr. Jonas: So, Mr. Morey died. He was the original designer that has been established but the question becomes in the half a dozen years before this machine was produced what did they do to update the standards of this

machine that had been designed in the sixties. There are standards and regulations that apply to this that continue on after the original design.

The Court: What kind of machine is this again?

Mr. Ott: This is a woodchipper machine that has -- - it's probably as big as half of the bench and has a big hood over the top of it that encloses a cutter mechanism.

The Court: Okay. So, it's a woodchipper. Is it a specific model?

Mr. Jonas: It's a Mobark Model 58. This one has got a serial number that is identified in that interrogatory ...

The Court: All right. So, who was the person responsible for compliance with machine design standards in 1996?

Mr. Ott: Your Honor, there were no standards applicable to this machine as admitted by their expert. So, the question itself begs another question about are there any ANCI Standards, any other OSHA standards even though OSHA doesn't apply to the manufacturer that apply to this machine and their expert has admitted there are no specific standards or regulations directly applicable to this type of machinery.

The Court: Doesn't that answer the question?

Mr. Jonas: It doesn't ...

The Court: ... standards and there is nobody responsible for the standards.

Mr. Jonas: Well, this is not a small manufacture in the back yard. This is a group that has large manufacturing facilities, design engineers, they manufacture equipment that would fill this room. They had design engineers. The question is did any of them participate in the design or alteration of the design of this machine. They identified the Michigan OSHA standard and despite what counsel says the expert witness identified the OSHA standard as part of a series of regulations that do apply back to the machine designer. That's argumentative.

The Court: You all have totally lost me.

Mr. Jonas: Yes, sir.

The Court: I'm --- I'm struggling. I'm not a mechanic. I don't know all this stuff. Have you all ever talked about this interrogatory?

Mr. Jonas: We spent hours with it, Judge.

The Court: I'm talking about his answer to it. Have you all ever talked about it?

Mr. Ott: Yes, we have. There's no rule of a affirmation, we've never discussed this and it has been fully discovered through the 30(b)(6). He just doesn't like the answer.

Mr. Jonas: All I want is a no, there is none. If that's the answer, away we go. He can't have it both ways.

Mr. Ott: It's a completely objectionable question when it's narrowed down to this ...

The Court: Well, there is --- how much time did you put down on the Motion cover sheet to argue this motion?

Mr. Jonas: Ten minutes a piece for each of these.

The Court: I think we've taken up that time. What I don't understand is why you all can't just talk about it. I don't, Mr. Ott, I don't see how the interrogatory itself is overly broad. You all know this case inside and out. Evidentially it involves a complicated piece of equipment. We could spend three or four hours here and you all could teach me about this machine. The design history of it and it's predeccessors and the subsequent models of the machine and what would you have accomplished?

Mr. Jonas: All this is anticipating the conclusion of our discovery process, Judge, and that's why the urgency to it.

The Court: Is there is anyway that you could give him a hint how to refine just a answer?

Mr. Ott: Sure.

The Court: Who design the machine?

Mr. Ott: Norval Morey.

The court: And he's dead?

Mr. Ott: Yes. And the machine is essentially the same as it's been since 1967 up until today. We've provided him ...

The Court: He designed it in 1967?

Mr. Ott: Yes, Your Honor. We've provided him all the engineering change notices, all the drawings for all the parts that are at issue.

The Court: What was the term compliance with machine, design and standards mean? What does that mean to you?

Mr. Ott: It means what standards are applicable and what regulations are particularly applicable to this machine and ...

The Court: And who's responsible ...

Mr. Ott: ... who's responsible ...

The Court: Who is responsible for compliance with those standards?

Mr. Ott: Norval Morey until he ...

The Court: He's dead.

Mr. Ott: He's dead and nothing has changed since.

The Court: He died in 1996, who has been responsible for the ten years after that?

Mr. Ott: We've continued to manufacture according to the original design with very few changes since 1967.

The Court: All right. The changes that were made, who oversaw those and made sure they were done properly?

Mr. Ott: They're listed on the engineering drawings and we've talked about them during the 30(b)(6) deposition. The problem with this question is it is not limited to this product.

The Court: Well, it is now.

Mr. Ott: Okay.

The Court: I'm saying it's limited to this product. Is that suitable, Mr. Jonas?

Mr. Jonas: Certainly, Judge.

The Court: Okay. So, it's Norval Morey for Thirty years and then there are other people for the ten years after that.

Mr. Ott: That made very minor, I think nothing ...

The Court: Identify those people.

Mr. Ott: We have.

The Court: In writing. Wouldn't that satisfy you?

Mr. Jonas: Yes, sir.

The Court: Have they already been deposed?

Mr. Ott: Yeah, by 30(b)(6) we have identified everybody.

The Court: Am I over simplifying this?

Mr. Ott: I don't think so.

Mr. Jonas: I think it's a simple question, Judge. The answer is exactly what is the problem.

The Court: Okay. Just answer that. I'm limiting it to this machine or if you think the first cousins of the machine that would be relevant, perhaps it would be, but I can't get into all of that today. There is just no way that I could learn the ins and outs.

Mr. Ott: Limited up until the date of production 1996? I mean, what happened after that ...

The Court: Why is what happened after that irrelevant?

Mr. Jonas: In any products case foreseeability of changes is part of the evidence chain. I mean, there's no doubt ...

The Court: If he's entitled to have it and that's admissible, that can be dealt with later?

Mr. Ott: I would say no. I think our recent Supreme Court opinions have made it very clear that Bragg and the post manufacture of evidence is not admissible, it's not ...

The Court: Do you have a copy of Bragg?

Mr. Jonas: This isn't a post manufacture of evidence. This is a designed feasibility evidence. The Federal Courts ...

The Court: Tell him who those people are. If it's not admissible at trial, I'm familiar with the case that you are talking about, but I don't think those are discovery cases those are trial admissibility cases.

Mr. Ott: I agree with that, Your Honor.

The Court: I just think if you all would --- the next time Mr. Jonas you've got to file a Rule 11 certification.

Mr. Jonas: Yes, sir.

The Court: And you all could have had this conversation over the phone before you filed the motion and then he would be able to tell me I tried to get this and he's told me to go jump in a lake.

Mr. Jonas: I appreciate it. I'll file the Rule 11 affidavit, Judge, but there has been a dialog that's been continuous for six (6) months.

The Court: Well, you can say that consultation would serve no useful purpose. That complies with my rule too.

Mr. Jonas: Thank you, Judge.

The Court: All right. Get that information within ten (10) days.

8

STATE OF SOUTH CAROLINA COUNTY OF CLARENDON Andreal Holland by his Guardian Ad Litem Peggy Knox, Plaintiff, vs. Morbark, Inc, Precision Husky Corporation, A & K Mulch, LLC, Watford Industry, Inc. Defendants.	IN THE COURT OF COMMON PLEAS THIRD JUDICIAL CIRCUIT 2008 CP 14-0461 Notice and Motion For Reconsideration And To Amend and Alter Judgment And Order

To: Curtis L. Ott, Esquire, Attorney For Defendant Morbark, Inc.

YOU WILL PLEASE TAKE NOTICE that the Plaintiff by and through the undersigned counsel, will move the Honorable Judge, on the tenth (10th) day following service hereof, or as soon thereafter as counsel may be heard, pursuant to Rule 59 and 52 of the South Carolina Rules of Civil Procedure, to reconsider and amend the findings and conclusions of the Order, copy attached as Exhibit A, from the hearing of this matter on March 11, 2011, or set aside the Order dated April 13, 2011, filed with the Court on June 2, 2011 and received by Plaintiff's Counsel on June 15, 2011, on the following grounds:

Plaintiff's motion is made on the grounds that the order denying Plaintiff's Motion To Amend and Supplement the complaint misapprehended, omitted or incorrectly determined matters of record and legal issues supporting the motion to amend and supplement Plaintiff's complaint.

In support of such motion the Plaintiff shall rely on memorandum to be provided, the pleadings and attachments previously filed and such other materials as may be properly presented.

Beaufort, South Carolina
June 16, 2011

Donald E. Jonas, Esquire
PO Box 99
Lexington, SC 29071
Attorney For Plaintiff

2011 JUN 20 AM 11:47
BEULAH G. ROBERTS
CLERK OF COURT
CLARENDON COUNTY, SC

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Beulah G. Roberts
CLERK OF COURT
CLARENDON COUNTY, SC

00184

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF CLARENDON) THIRD JUDICIAL CIRCUIT

Andreal Holland by his Guardian Ad Litem Peggy Knox,

Plaintiff,

vs.

Morbark, Inc, Precision Husky Corporation, A & K Mulch, LLC, Watford Industry, Inc.

Defendants.

2008 CP 14-0461

Notice and Motion For Reconsideration And To Amend and Alter Judgment And Order

BEULAH G. ROBERTS CLERK OF COURT CLARENDON COUNTY, SC 2011 JUN 16 AM 11:29

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DATE 6/16/11
Beulah G. Roberts
CLERK OF COURT
CLARENDON COUNTY, SC

To: Curtis L. Ott, Esquire, Attorney For Defendant Morbark, Inc.

YOU WILL PLEASE TAKE NOTICE that the Plaintiff by and through the undersigned counsel, will move the Honorable Judge, on the tenth (10th) day following service hereof, or as soon thereafter as counsel may be heard, pursuant to Rule 59 and 52 of the South Carolina Rules of Civil Procedure, to reconsider and amend the findings and conclusions of the Order, copy attached as Exhibit A, from the hearing of this matter on March 31, 2011, or set aside the Order dated May 27, 2011, yet to be filed and served, on the following grounds:

Plaintiff's motion is made on the grounds that the order granting summary judgment either misapprehended, omitted or incorrectly referred and decided matters of record and contested evidence and made conclusions that do not meet the applicable legal standard for determining and granting summary judgment.

In support of such motion the Plaintiff shall rely on the attached memorandum, the pleadings and attachments previously filed and such other materials as may be properly presented.

Beaufort, South Carolina
June 13, 2011

Donald E. Jonas, Esquire
PO Box 99
Lexington, SC 29071
Attorney For Plaintiff

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CLARENDON	)	Civil Action No.: 2008-CP-14-0461
Andreal Holland by his Guardian Ad Litem Peggy Knox,	)	
Plaintiff,	)	
vs.	)	**DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**
Morbark, Inc.,	)	
Defendant.	)	

Defendant Morbark, Inc. hereby moves this Court to enter an order granting it summary judgment as to all of Plaintiff's causes of action pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. Defendant so moves because there is no genuine issue as to material fact and Defendant is entitled to judgment as a matter of law on the following grounds:

1. That Morbark's wood chipper was not in a defective condition unreasonably dangerous to the user when it left Morbark's hands;

2. That Morbark's wood chipper was not at the time of the accident in essentially the same condition as when it left Morbark's hands;

3. That Plaintiff's defect theories, based on an alleged design defect, fail because Plaintiff has not proven an alternative feasible design;

4. That Plaintiff's causes of action are by Plaintiff's misuse of the wood chipper and S. C. Code Ann. § 15-73-20 (2005);

5. That Morbark had no duty to warn because Plaintiff himself recognized the dangers associated with the wood chipper;

6. That Plaintiff's causes of action are barred by the sophisticated user doctrine;

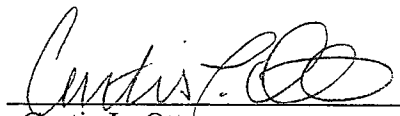
7. That Plaintiff's causes of action are barred by the learned intermediary doctrine; and

8. That the proximate cause of Plaintiff's alleged injuries was not a defect in the wood chipper, but rather Plaintiff's failure to follow Morbark's instructions and the protocol established by Plaintiff's employer for operating the machine.

This motion is based on the pleadings, discovery responses, depositions, and the substantive and procedural law of the State of South Carolina.

TURNER, PADGET, GRAHAM & LANEY, P.A.

February 17, 2011

By: 

Curtis L. Ott
David C. Marshall
Post Office Box 1473
Columbia, SC 29202
Phone: (803) 254-2200
Fax: (803) 799-3957

ATTORNEYS FOR DEFENDANT

STATE OF SOUTH CAROLINA COUNTY OF CLARENDON Andreal Holland by his Guardian Ad Litem Peggy Knox Plaintiff, Vs. Morbark, Inc, Precision Husky Corporation, A & K Mulch, LLC, Watford Industry, Inc. Defendants,	IN THE COURT OF COMMON PLEAS THIRD JUDICIAL CIRCUIT 2008 CP 14-00461 Notice and Motion For Protective Order

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DATED 1/13/11
CLERK OF COURT
CLARENDON COUNTY, SC

TO: Curtis L. Ott, Esquire, Attorney for Defendant Morbark, Inc.
Darrell W. Carter, Esquire, Attorney For Axis Insurance Company

YOU WILL PLEASE TAKE NOTICE that the Plaintiff by and through his Guardian Ad Litem Peggy Knox and the undersigned counsel, will move, on the tenth (10th) day following service hereof, or as soon thereafter as counsel may be heard, pursuant to Rule 30 of the South Carolina Rules of Civil Procedure, to address and appropriately limit the time and manner of conducting the deposition of Andreal Holland to allow the Plaintiff the opportunity to have frequent breaks in the proceeding as may be necessary and to allow the Plaintiff and his guardian ad litem to interpose requests to examining counsel for clarification of questions presented to an appropriate level of understanding by the Plaintiff.

In support of such motion the Plaintiff shall rely on the pleadings, appointment of the GAL and matters previously addressed in the deposition of Plaintiff's medical providers and including the prior reports and deposition of neuropsychologist Robert E. Desaych, PhD. and such other authorities and materials as may be properly presented.

Jan. 12, 2011
Lexington, South Carolina

Donald E. Jonas, Esquire
PO Box 99
Lexington, SC 29071
(803) 609-1484/309-2483
Fax (803) 957-3119

Rule 11 Affidavit

The below signed counsel verifies that prior to filing this motion that he communicated with opposing counsel and proposed an agreement between counsel to address the manner in which the deposition of Andreal Holland would be conducted but that opposing counsel has made no reply and that it is unlikely that further consultation would resolve the matter.

Donald E. Jonas, Esquire
Attorney For Plaintiff

STATE OF SOUTH CAROLINA COUNTY OF CLARENDON	)	IN THE COURT OF COMMON PLEAS THIRD JUDICIAL CIRCUIT 2008 CP 14-00461
Andreal Holland by his Guardian Ad Litem Peggy Knox Plaintiff, vs. Morbark, Inc, Precision Husky Corporation, A & K Mulch, LLC, Watford Industry, Inc. Defendants,	)	Notice and Motion To Amend/Supplement Complaint

TO: Curtis L. Ott, Esquire, Attorney for Defendant Morbark, Inc.

YOU WILL PLEASE TAKE NOTICE that the Plaintiff by and through the undersigned counsel, will move, on the tenth (10th) day following service hereof, or as soon thereafter as counsel may be heard, pursuant to Rule 15 of the South Carolina Rules of Civil Procedure, 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 during discovery.

In support of such motion the Plaintiff shall rely on the pleadings and discovery materials on file and such authorities and materials as may be properly presented.

January 12, 2011
Lexington, South Carolina

Donald E. Jonas, Esquire
PO Box 99
Lexington, SC 29071
(803) 609-1484/309-2483
Fax (803) 957-3119

CERTIFIED TRUE COPY OF ORIGINAL FILED IN THIS OFFICE
DATE 1/13/11
CLERK OF COURT
CLARENDON COUNTY, SC

Rule 11 Affidavit

The below signed counsel verifies that prior to filing this motion that he either communicated with opposing counsel regarding such motion or that consultation would serve no useful purpose or could not be timely held.

Donald E. Jonas, Esquire
Attorney For Plaintiff

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THIRD JUDICIAL CIRCUIT
COUNTY OF CLARENDON	)	
	)	2008 CP 14-0461
Andreal Holland by his Guardian Ad Litem Peggy Knox	)	
Plaintiff,	)	Plaintiffs Second Notice Of Motion
vs.	)	And Motion To Compel
	)	Defendant Morbark, Inc.
Morbark Inc, Precision Husky Corporation, A & K Mulch, LLC, Watford Industry, Inc.	)	
Defendants,	)	

YOU WILL PLEASE TAKE NOTICE that the Plaintiffs, by and through their undersigned counsel, will move, on the tenth (10^{th}) day following service hereof, or as soon thereafter as counsel can be heard, for an order, pursuant to Rule 37 of the South Carolina Rules of Civil Procedure, requiring the Defendant Morbark, Inc. to fully respond to Plaintiff's Interrogatory #32 and Requests For Production #15, copies attached, and compelling compliance with Rules 33 and 34 of the South Carolina Rules of Civil Procedure.

In support of such motion the Plaintiff shall rely on the pleadings and attachments hereto, the applicable rules and procedures and such cases and other authorities as may be properly presented.

Columbia, S.C.

September 1, 2010

DONALD E. JONAS, ESQUIRE
PO Box 97
Columbia, SC 29202
(803) 309-2535
(803) 957-3119 Facsimile
jonastrialatty@netscape.net

2010 SEP -7 PM 1:21

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CLERK OF COURT
CLARENDON COUNTY, SC

STATE OF SOUTH CAROLINA)) COUNTY OF CLARENDON)	IN THE COURT OF COMMON PLEAS THIRD JUDICIAL CIRCUIT
) Andreal Holland by his Guardian Ad) Litem Peggy Knox)) Plaintiff,) vs.)) Morbark Inc, Precision Husky) Corporation, A & K Mulch, LLC,) Watford Industry, Inc.)) Defendants,))	2008 CP 14-0461 Plaintiffs Notice Of Motion And Motion To Compel Defendant Morbark, Inc.

YOU WILL PLEASE TAKE NOTICE that the Plaintiffs, by and through their undersigned counsel, will move, on the tenth (10th) day following service hereof, or as soon thereafter as counsel can be heard, for an order, pursuant to Rule 37 of the South Carolina Rules of Civil Procedure, compelling compliance with Rules 33 and 34 of the South Carolina Rules of Civil Procedure and requiring the Defendant Morbark, Inc. to fully respond to Plaintiff's Interrogatories #1, 5, #14, #18, #19, and Requests For Production #6, #7, and to provide a privilege log for any responses and documents Defendant is claiming privilege.

In support of such motion the Plaintiff shall rely on the pleadings and attachments hereto, the applicable rules and procedures and such cases and other authorities as may be properly presented.

Columbia, S.C.

August 4, 2010

DONALD E. JONAS, ESQUIRE
PO Box 97
Columbia, SC 29202
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2010 AUG -4 PM 2:17

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CLERK OF COURT
CLARENDON COUNTY, SC

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Beulah S. Roberts
CLERK OF COURT
CLARENDON COUNTY, SC

00192

STATE OF SOUTH CAROLINA COUNTY OF CLARENDON Andreal Holland by his Guardian Ad Litem Peggy Knox Plaintiff, vs. Morbark Inc, Precision Husky Corporation, A & K Mulch, LLC, Watford Industry, Inc. Defendants,	IN THE COURT OF COMMON PLEAS THIRD JUDICIAL CIRCUIT 2008 CP 14-00461 NOTICE OF MOTION AND MOTION TO AMEND AND SUPPLEMENT COMPLAINT

2010 JUL 30 P 4:11
CLERK OF COURTS
CLARENDON COUNTY, S.C.

To: Curtis L. Ott, Esquire, Turner, Padgett, Graham & Laney, PA; Saunders M. Bridges, Jr., Esquire, Aiken, Bridges, Nunn, Elliott, & Tyler, PA; John A. Ecton, Esquire, Ecton Law Firm; J.Calhoun Land, IV, Esquire, Land, Parker & Welch, PA; Joel C. Bailey, Esquire, Lightfoot, Franklin & White; Darrell W. Carter, Esquire, Sweeney Wingate & Barrow, P.A.

YOU WILL PLEASE TAKE NOTICE that the Plaintiff by and through the undersigned counsel, will move, on the tenth (10th) day following service hereof, or as soon thereafter as counsel may be heard, pursuant to Rule 15 of the South Carolina Rules of Civil Procedure, to amend and supplement the complaint.

In support of such motion the Plaintiff shall rely on the proposed pleadings and attached hereto, and such authorities and materials as may be properly presented.

Columbia, South Carolina
July 23, 2010

Donald E. Jonas, Esquire
PO Box 97
Columbia, SC 29202
(803) 309-2535/309-2483
Fax: (803) 957-3119
jonastrialatty@netscape.net

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THIRD JUDICIAL CIRCUIT
COUNTY OF CLARENDON	)	
	)	2008 CP 14-00461
Andreal Holland by his Guardian Ad Litem Peggy Knox	)	
	)	PROPOSED
Plaintiff,	)	AMENDED AND SUPPLEMENTAL
vs.	)	COMPLAINT
	)	
Morbark Inc,	)	
	)	
Defendant,	)	
	)	

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DATE 1/30/15
CLERK OF COURT
CLARENDON COUNTY, SC

The Plaintiff, Andreal Holland, by his duly appointed Guardian Ad Litem would respectfully show:

JURISDICTION AND VENUE

1. Plaintiff Andreal Holland is a citizen and resident of Clarendon County, State of South Carolina, and on June 1, 2006, suffered a severe and permanent head injury while servicing a Morbark, Model 58, 150 h.p. wood chipper machine, serial # 914, while he was employed as a machine operator at A&K Mulch, LLC/J.C. Witherspoon, Inc. at a saw mill operation in Alcolu, South Carolina.

2. Peggy Holland is the mother of Andreal Holland and was appointed his conservator by the Clarendon County Probate Court and was duly appointed as his guardian ad litem for the purpose of prosecuting this action.

3. Upon information and belief the Defendant Morbark, Inc., hereafter Defendant Morbark, is a corporation duly organized under the laws of the State of Michigan and is a successor corporation to various Morbark entities; on or about 1996 they designed, manufactured, marketed, sold and distributed the Morbark Model 58, 150 h.p. wood chipper machine, serial # 914, that was operated by Plaintiff on June 1, 2006.

4. Upon information and belief, the Defendant Morbark designed, produced, manufactured, inspected, distributed, promoted the sale of its products and services, including the Morbark wood chipper model here involved, and placed into the stream of commerce various Morbark equipment through nationally circulated trade publications, internet advertising and various means intended to reach customers in South Carolina with the reasonable expectation that those goods and products, support and parts services would be purchased, used and consumed in South Carolina.

5. That the acts and omissions hereafter alleged against Defendant Morbark caused injury to the Plaintiff.

6. On or about April 2006 Plaintiff's employer purchased and installed the used Morbark Model 58 wood chipper machine here involved at its sawmill operation at Alcolu, SC .

7. The Court has jurisdiction of Defendant Morbark pursuant to S.C. Code Ann. § 36-2-803 (1976).

8. The venue of this action is properly placed in Clarendon County, South Carolina.

FOR A FIRST CAUSE OF ACTION
(Strict Liability)

9. On June 1, 2006, at approximately the end of his shift, the Plaintiff powered off and locked out the Morbark Model 58 chipper machine he was operating in preparation for inspecting, cleaning and changing the cutting knives of the machine. As the machine slowed Plaintiff heard a noise from the turning wheel cutting area of the machine and went to consult his supervisor. When he returned to the machine he mistakenly determined the wheel had stopped turning and attempted to remove the pins securing the two piece hood assembly.

10. As the Plaintiff attempted to remove the pins securing the two piece hood assembly, it came in contact with the rotating fan blades and caused the hood to suddenly kick back and strike the Plaintiff in the head causing severe and permanent injuries to the Plaintiff.

11. The Defendant Morbark is engaged in the business of forest products processing equipment machine design, manufacture and sale and specifically including the manufacture and sale of the wood chipper machine here involved.

12. At all times mentioned, the Defendant Morbark undertook a duty to design, manufacture, inspect, sell and distribute the wood chipper machine here involved with operational and maintenance features complying with industry standards and practices adequate to assure the machine was safe to use and suitable for the expected and intended use by operators with a wide range of training, industrial experience, reading and comprehension ability, and alertness.

13. The duty to design and manufacture the wood chipper machine included a duty to prevent and warn of known and forseeable dangers inherent to the operation of the wood chipper, including the danger related to the extended "run down" or "coast" time of the chipper disc.

14. Plaintiff is informed and believes that the wood chipper machine here involved was defective; and that Defendant Mobark breached its duty to manufacture, design and inspect the wood chipper machine to assure the operational and maintenance features of the machine were adequate to assure the machine was safe to use and suitable for the expected and intended use, and perform those duties with due care to prevent the known and forseeable dangers of the design and use of the wood chipper machine in one or more of the following particulars:

a. In designing and manufacturing the wood chipper machine without a motion detector and signal system to determine when the rotating wheel had stopped turning;

b. In designing and manufacturing the wood chipper machine without a securely fitted hood/cutter access door with positively secured and fitted hinge assembly upon which to rotate;

c. In designing and manufacturing the wood chipper machine without an interlock device to prevent the hood from opening until the rotating wheel had stopped turning;

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

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

h. In designing and manufacturing and thereafter promoting, selling and distributing the chipper machine without prominently displayed cleaning, maintenance and operating instructions and warnings conveying the serious nature of injury or death that would result in the event the pins securing the hood/cutter disc section were removed while the rotating chipper disc was still turning, even slowly tuning;

i. In failing to inspect the chipper machine here involved to assure it was equipped with operational and maintenance features of the machine were adequate to assure the machine was safe to use, and suitable for the expected and intended use;

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

15. Upon information and belief, at no time was the Morbark wood chipper machine altered or changed in any material manner, and at the time of the accident on June 1, 2006, Plaintiff was using the machine in a manner in which it was intended and was forseeable.

16. The Morbark wood chipper machine here involved was in a defective condition, not fit for the purpose for which it was intended due to the defects here alleged and was unreasonably dangerous to the Plaintiff at the time that it was designed, manufactured, inspected, sold, resold, ultimately installed at the saw mill in Alcolu, SC, including at the time it was being used by the Plaintiff on June 1, 2006.

17. As a direct and proximate result of the Defendant's acts, omissions and delicts, Plaintiff was seriously injured and the Defendant is strictly liable for Plaintiff's injuries and damages pursuant to §15-73-30 et seq. of the Code of Laws of the State of South Carolina, 1976, as amended, in designing, manufacturing, inspecting distributing and/or selling a defective wood chipper machine, and Plaintiff is entitled to an award of actual and consequential damages in such amount as may be awarded by a jury.

FOR A SECOND CAUSE OF ACTION
(Implied Warranty)

18. The pertinent allegations of the preceding paragraphs are realleged as fully as if repeated verbatim.

19. Defendant Morbark had a duty to the Plaintiff/machine operator and undertook an implied warranty of merchantability that the wood chipper machine was fit for the particular purpose for which it was intended, as heretofore alleged.

20. The Defendant Morbark impliedly represented that it had the skill, knowledge and expertise to properly design, manufacture and distribute the Morbark chipper machine free of defects and further warranted its operating and maintenance features and characteristics were in accord with industry standards and practices adequate to assure the machine was safe to use and suitable for the expected and intended use.

21. The Defendant Morbark breached its duty and implied warranty of merchantability by distributing and/or selling the Morbark wood chipper machine that was defective in design, testing and manufacture that did not contain operating and maintenance features and characteristics adequate to assure the machine was safe to use and suitable for the expected and intended use and without prominently displayed and understandable instructions advising the user of the cleaning and maintenance procedures and adequate warnings to the operator of the known and foreseeable dangers.

WHEREFORE, Plaintiff prays for judgment against the Defendant Morbark and for an award of actual and consequential damages in such amount as may be awarded by a jury, together with the costs of this action, and for such further relief as this Court may deem fit, just and proper.

Columbia, S.C.

July 23, 2010

Donald E. Jonas, Esquire (Bar No. 3084)
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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THIRD JUDICIAL CIRCUIT
COUNTY OF CLARENDON	)	
	)	2008 CP 14-0461
Andreal Holland by his Guardian Ad Litem Peggy Knox,	)	Plaintiff's Memorandum In Support Of Motion For Reconsideration And To To Amend and Alter Judgment And Order Denying Motion To Amend
Plaintiff,	)	
Vs.	)	
Morbark, Inc, Precision Husky Corporation, A & K Mulch, LLC, Watford Industry, Inc.	)	
Defendants.	)	

BEULAH G. ROBERTS CLERK OF COURT CLARENDON COUNTY, SC
2011 JUN 24 PM 12:46

CERTIFIED TRUE COPY
OF ORIGINAL FILED IN THIS OFFICE
DATE 6/24/11
Beulah G. Roberts
CLERK OF COURT
CLARENDON COUNTY, SC

To: Curtis L. Ott, Esquire, Attorney For Defendant Morbark, Inc.

This memorandum is in support of Plaintiff's Motion for Reconsideration and To Alter Or Amend Judgment and Order pursuant to Rule 59 and 52 of the South Carolina Rules of Civil Procedure. The Order denying Plaintiff's Motion To Amend And Supplement, dated April 13, 2011, was not mailed from the Clerk's office until June 2, 2011. The misaddressed correspondence from the Clerk was not received until June 15, 2011. A copy of the unfiled order was received by counsel on June 7, 2011. Counsel promptly served and filed a Motion For Reconsideration And To Alter And Amend Judgment And Order on June 16, 2011, clocked at the Clerk's Office on June 20, 2011. This Memorandum is filed in Support of the Motion To Reconsider, etc.

Plaintiff's Motion For Reconsideration is made on the grounds that the order denying Plaintiff's Motion To Amend and Supplement either misapprehended, omitted or incorrectly referred to matters of record and made conclusions that do not meet the applicable legal standard for determining and granting such motion. [1] The legal standard for considering motions made pursuant to S.C.R.C.P. 15(a), "strongly favors amendments and the court is encouraged to freely

[1] **Rule 15. AMENDED AND SUPPLEMENTAL PLEADINGS**
(a) Amendments. A party may amend his pleading - - - Otherwise 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.- - -

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented, whether or not the original pleading is defective in its statement of a cause of action or defense. If the court deems it advisable that the adverse party plead thereto, it shall so order, specifying the time therefor.

grant leave to amend. See H. Lightsey, J. Flanagan, South Carolina Civil Procedure, 288 (2nd Ed.1985)". Jarrell v. Seaboard Systems R.R., Inc., 294 S.C.183, 363 S.E.2d 398, 399 (S.C. App. 1987) To overcome such presumption the Court cited the case of Stanley v. Kilpatrick , 357 S.C. 169, 592, S.E.2d 296 (2004) and surprisingly concluded that Morbark was prejudiced by a lack of opportunity to address and respond to the so called "new allegations" by the Plaintiff. Order, page 3)

Although the Court is not required to make separate findings and conclusions in it's order denying Plaintiff's motion, the order only sparingly refers to the history of the case and evidentiary matters to reach generalized conclusions that are unsupported by the record. The order omits or incorrectly refers to various matters of record including:

1. The actual history of the proceedings demonstrates that the amendment was timely and presented no new or surprising allegations and was based on the November 18, 2010 testimony of Defendant's expert Bob Smith and Morbark's answers to discovery made in late December 2010.

a. The Plaintiff was injured on June 1, 2006, while he was working at A&K Mulch, LLC, when he was seriously and permanently injured when he was struck in the face with the hood portion of a Morbark 58" horizontal feed, top discharge wood chipper machine that had been installed at A&K Mulch, LLC in mid April, 2006. At approximately 4:15 p.m. on June 1, 2006, Plaintiff went to investigate a noise coming from the Mobark 58" chipper that was located outside the mill building where he normally worked. He had earlier turned off the power to the machine and "locked out and tagged out". Although suffering from a significant intellectual handicap, Plaintiff was deposed and testified that near the end of his work day on the day he was injured that he turned off the power to the machine and allowed the vibrating feeder to continue to feed the machine and dispose of the material that was still coming down the line as he had been shown. He stated that this was the first time that day he had turned off the machine because his foreman had advised him at lunch that the machine was cutting well and that the blades did not need changing. The shut off and power disconnect were located at the back of the building, away from the outside machine location. After shutting off the power Mr. Holland returned to his regular work station at the cut-off saw some distance away and continued to clean up around his work station. (Depo. Holland, pp. 117, ll. 5-14; 118, ll. 1-18) He stated that he continued cleaning up at the cut-off saw location for about 5-7 minutes when another worker told him that they heard a tapping noise coming from the machine. He stated that he waited a few more minutes and then went to investigate. Depo. Holland, pp. 118, ll. 19-25; 119, ll. 4-8; 120, ll. 9-15) He stated that when he arrived at the machine that it appeared to be stopped and that he didn't hear anything. To be certain the machine was stopped he threw a board into the feed opening of the machine and determined the cutting wheel had stopped and that there was something wrong with the machine. (Depo. Holland, pp. 119, ll. 9-16; 120, ll. 9-20; 121, ll. 1-11, 20-25) He testified that he then went to find Woodrow Woods, the foreman. (Depo. Holland , pp. 120, 6-25; 122, ll. 1-11) He further testified that Mr. Woods told him to find "Mr. Leroy", another saw mill employee to look at the chipper. Plaintiff testified he found "Mr. Leroy" who was busy apparently selling snack items from his private "canteen" and that he would come when he finished. (Depo. Holland, p. 122, ll. 17-25; 136, ll. 21-24) Plaintiff testified that he

then went back to the chipper and began cleaning up and when "Mr. Leroy" didn't arrive he went to look for him again but didn't find him. He testified that he then went back to the chipper and discovered one of the pins securing the hood was missing on the left side as he faced the machine from the feed location. (Depo. Holland, p. 137, ll. 6-20) He testified that he then removed the clip securing the remaining right side pin from the hood and as he worked the pin out, the hood flew back and hit him in the face and knocked him unconscious. (Depo. Holland pp. 123, ll. 10-15; 124, ll. 3-8; 128, ll. 1-11; 129, ll. 21-24; 138, ll. 22-25; 139, ll. 1-10)

b. Morbark is a sophisticated manufacturer of wood processing equipment distributed throughout the United States, Canada and Europe. Morbark has a long history of patented wood processing devices and is well aware of the state of industry developments, including chipper safety issues. In March 1996, Morbark produced the Model 58 Morbark Wood Chipper Serial # 914, initially designed in the early 1960's. The Morbark chipper machine was designed to be fed by a vibrating feeder conveyor without operator assistance. The machine was eventually purchased by J.C. Witherspoon, Jr., Inc. in a used condition from Precision Husky in Leedz, Al. and was installed at the Witherspoon lumber yard in mid April 2006. Despite repeated specific production requests to Morbark for all invoices, parts and equipment shipments, correspondence, record of ownership, etc. to Witherspoon, Morbark answered it had no such material. Despite specific requests for production and a 30(b)(6) deposition of Morbark in Winn, MI., Morbark also testified it had no machine design information or witness to address the issues relating to engineering compliance with traditional machine design criteria, i.e. hierarchy of design principles or OSHA and other code compliance issues and as not able to produce any notes, files or other documentation of design information or considerations that were originally prepared or considered The Morbark chipper here involved did not include: (1) a mechanical hood lock device in the design of the 58" wood chipper machine similar to the mechanical lock device incorporated by their competitor Precision Husky Corp., to prevent the hood kicking back if the machine operator mistakenly attempted to open the hood before the chipper disc had totally stopped; (2) did not employ an electronic interlock timer that would prevent the hood from opening while the cutter disc was turning; (3) did not include a general warning decal that specifically warned against the risk of operator head injury.

The Plaintiff submitted a memorandum, deposition testimony and discovery responses detailing the extensive record and testimony in the case.[2] Although no order has been entered

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[2] Plaintiff filed the following materials prior to the hearing:

Depositions and Exhibits:

06/30/10-original deposition of James Witherspoon and exhibits;
08/04/10-copy of the deposition of Woodrow Woods and exhibits 1-11;
08/04/10-copy of deposition of Robert Roseboom and exhibits 1-3;
08/24/10-original 30(b)(6) depositions of Defendant Morbark, Inc, including depositions of 30(b)(6) witnesses Larry Noch and 30(b)(6) witness James Strong and exhibits;
08/31/10-copy of deposition of Roger E. Davis, PE, and exhibits #1-14;
09/13/10-copy of deposition of David E. Clement, Ph.D., and exhibits 1-9;
11/18/10-copy of deposition of Defendant's expert witness Bobby Ray Smith and Exhibits # 1-14;
01/14/11-copy of deposition of Andreal Holland and exhibit 1;
01/28/10-copy of deposition of Peggy Knox.

Discovery and Responses

Defendant Morbark's Responses To Plaintiff's Request For Production # 1-11 (3/26/09);

amending the Plaintiff's complaint, the thrust of this action without such amendment is strict liability and implied warranty. SC Code Sect. 15-73-30 incorporates by reference section 402A of the Restatement (Second) of Torts (1965). The strict liability rule applies if the chipper machine was in a defective condition not contemplated by the ultimate consumer and was unreasonably dangerous to the user. In a products liability case the Plaintiff must establish three things, regardless of the theory on which he seeks recovery: 1) that he was injured by the product; (2) that the product, at the time of the accident, was in essentially the same condition as when it left the hands of the defendant; and (3) that the injury occurred because the product was in a defective condition unreasonably dangerous to the user." Madden v. Cox, 284 S.C. 574, 579, 328 S.E.2d 108, 112 (Ct.App.1985) citing Prosser, Law of Torts 671-72 (4th ed. 1970). Fundamentally the Plaintiff has the ultimate burden of proving causation in fact and legal cause at trial and must produce some evidence to counter the Defendant's summary judgment motion at this stage of the case. Rush v. Blanchard, 310 S.C. 375, 426 S.E.2d 802 (1993); Oliver v. South Carolina Dep't of Hwys. and Pub. Transp., 309 S.C. 313, 422 S.E.2d 128 (1992); Vinson v. Hartley, 324 S.C. 389, 477 S.E.2d 715 (Ct.App.1996).

Plaintiff contends that any reasonable view of the record presented would have concluded that the amendments proposed by the Plaintiff were based on the discovery provided by the Defendant and that there was no unexpected surprise or prejudice to this Defendant.

The original allegations by Plaintiff against Morbark included:

12. At all times mentioned, the Defendant Morbark undertook a duty to design, manufacture, inspect, sell and distribute the wood chipper machine here involved with operational and maintenance features complying with industry standards and practices adequate to assure the machine was safe to use and suitable for the expected and intended use by operators with a wide range of training, industrial experience, reading and comprehension ability, and alertness.

13. The duty to design and manufacture the wood chipper machine included a duty to prevent and warn of known and forseeable dangers inherent to the operation of the wood chipper, including the danger related to the extended "run down" or "coast" time of the chipper disc.

14. Plaintiff is informed and believes that the wood chipper machine here involved was defective; and that Defendant Mobark breached its duty to manufacture, design and inspect the wood chipper machine to assure the operational and maintenance features of the machine were adequate to assure the machine was safe to use and suitable for the expected and intended

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Responses #12-28 (7/27/10);
Responses, #29-36 (11/19/10);
Defendant Morbark's Answers To Plaintiff's Interrogatories:
Answers #1-20 (3/27/09);
Answers #21-32 (7/27/10);
Defendant Morbark's Responses To Plaintiff's Request To Admit:
Responses # 1-16 (7/27/10);
Responses # 17-19 (9/9/10);
Response #20 (11/19/10).

use, and perform those duties with due care to prevent the known and forseeable dangers of the design and use of the wood chipper machine in one or more of the following particulars:

a. In designing and manufacturing the wood chipper machine without a motion detector and signal system to determine when the rotating wheel had stopped turning;

b. In designing and manufacturing the wood chipper machine without a securely fitted hood/cutter access door with positively secured and fitted hinge assembly upon which to rotate;

c. In designing and manufacturing the wood chipper machine without an interlock device to prevent the hood from opening until the rotating wheel had stopped turning;

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

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

h. In designing and manufacturing and thereafter promoting, selling and distributing the chipper machine without prominently displayed cleaning, maintenance and operating instructions and warnings conveying the serious nature of injury or death that would result in the event the pins securing the hood/cutter disc section were removed while the rotating chipper disc was still turning, even slowly tuning;

i. In failing to inspect the chipper machine here involved to assure it was equipped with operational and maintenance features of the machine were adequate to assure the machine was safe to use, and suitable for the expected and intended use;

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

2. **The basis of the additional allegations proposed by the Plaintiff in the amended/supplemental complaint arose from testimony presented by the Defendant's expert witness, Bob Smith who testified on November 18, 2010. It is noteworthy that Morbark first introduced Mr. Smith as an expert at his deposition on November 18 and did not provide supplemental responses to discovery unti late December 2010. Mr. Smithh's expert testimony included the following:**

1. That he had no knowledge of the ANSI Z535 machine warning design requirements or presumably whether the Morbark labeling system complied. (Depo. Smith, p. 97)

2. That chipper equipment produced by Precision Husky was sold across the US and in British Columbia. (Depo. Smith, p. 97)

3. That both customers and dealers expected and depended on the manufacturer to produce equipment that would satisfy OSHA standards. (Depo. Smith p. 98)

4. That he had no knowledge of the OSHA Standard from the British Columbia Government (part 27.41) referring to a requirement that mill chippers with a hood must have an effective brake. (Depo. Smith pp. 98-99)

5. That it was common knowledge within the industry that Precision Husky manufactured chipper equipment (all sizes) with a brake that would stop the rotation of the disc within one minute. (Depo. Smith pp. 99-100) I believe all manufacturers offer that. (Depo. Smith, p. 101)

6. That Mr. Smith's knowledge of the accident was based on his conversation with J.C. Witherspoon. (Depo. Smith p. 88)

7. That Precision Husky produced a chipper with a an alternately designed two piece hood with a hood lock that rotates back against the two part hood as a locking device and a visual port and screen on the side of the hood where the disc can be seen. (Depo. pp. 82, 83, 84, 85)

8. That if the rotating hood lock was in position and there was an internal malfunction of the machine that kicked the some force against the hood, the hood lock would keep it from opening. (Depo. p. 111)

8. On April 13, 2006 Precision Husky sent a set of shaft bearings to J.C. Witherspoon because of complaints that the machine was making noise. (Depo. Smith, p. 73-74)

9. That Mr. Smith had no knowledge or information regarding the decals that were on the Morbark machine when it was received by Precision Husky and that Precision Husky did no maintenance on the machine but did apply warning labels they used on Precison Husky equipment that actually had a hood lock that was not part of the Morbark design. (Depo. Smith pp.76- 77)

10. That operating a chipper machine being automatically fed by a vibrating conveyor could "plug" and stall the chipper if the conveyor was allowed to continue to feed the machine after the chipper was shut off. (Depo. Smith, pp. 90) Other reasons the machine might plug include an excessive amount of oversized chips, worn out fan blades, holes in the lower casing band or the hood, holes in the blow pipe, blow pipe to narrow, holes in the blow pipe transition. (Depo. Smith, p. 118)

3. **The sum of the additional allegations proposed based on the testimony of Mr. Smith and further discovery responses by the Defendnat Morbark were:**

Morbark failed to design, manufacture, inspect and distribute a chipper machine that complied with OSHA General Duty Standard 29 CFR 1910.212, General Requirements For All Machines.

Morbark failed to equip the chipper machine with an effective brake mechanism;

4. The procedural history of this case includes the following:

a. On July 9, 2010, the Court entered a Consent Scheduling Order requiring the parties to promptly identify all expert witnesses, complete discovery and file all dispositive motions by November 19, 2010. Defendant failed to comply with that order.

b. On July 30, 2010, Plaintiff moved to amend and supplement the complaint to delete the allegations of negligence and to proceed on the remaining causes of action for strict liability and implied warranty. On about August 23, 2010, the Plaintiff moved to voluntarily dismiss all of the Defendants except Morbark . Thereafter a consent stipulation of dismissal was entered as to Defendants A&K Mulch, LLC, Watford Industry, Inc. and Precision Husky Corporation. No order was entered addressing the Plaintiff's Motion To Amend and dismissing the additional defendants. The hearing on Oct. 8, 2010, referred to at page 2 of the Court's order, related to Plaintiff's motion to compel and no order was ever entered granting Plaintiff's July 28, 2010 motion to amend.

c. On January 12, 2011, the Plaintiff filed a second motion to amend and supplement the complaint based on the deposition of the Defendant's expert witness who was deposed on Nov. 18, 2010 and the service of Defendant's answers to discovery in late December following the Court's order from the hearing on Oct. 8, 2010.

d. On January 31, 2011, Plaintiff's counsel filed an additional motion for a protective order addressing the Plaintiff's scheduled deposition based on the Plaintiff's medical and neuropsychological condition.

e. In February 2011 Defendant Morbark filed its untimely Motion For Summary Judgment.[3]

2. <u>Omitted and/or incompletely referenced factual issues</u>

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[3] (grounds #1) the machine was not in a defective condition at the time of the accident;
(grounds #2) the machine was not in the same condition as when it left Morbark's hands in 1996;
(grounds #3) Plaintiff's alleged design defect theory failed because of lack of proof of a feasible alternate design;
(grounds #4) Plaintiff's actions constituted "misuse";
(grounds #5) Morbark had no duty to warn because the Plaintiff recognized the danger;
(grounds #6) Plaintiff's causes of action are barred by the sophisticated user defense;
(grounds #7) Plaintiff's injuries are barred by the leaned intermediary defense;
(grounds #8) Plaintiff's injuries were caused by the failure to follow protocols established by Morbark and the employer.

The Order (pages 3-4) incorrectly identifies and attempts to analyze the testimony of experts in this case. Specifically, the testimony of David Clement, PhD. is limited to human factors issues and has nothing to do with the machine design issue regarding a brake. The testimony regarding a brake came from Defendant's expert Smith who testified that he believed all chipper manufacturer's, including Morbark offered such option. The further attempt to rule on the factual issue of the significance of the cost of such a brake as a ground to deny the motion to amend is error. A review of the testimony of Plaintiff's experts Dr. Clement and Roger Davis, PE and Defendant's expert Smith reveals the actual basis of the motion to amend.

David Clements-Plaintiff's Human Factors Expert

David Clements, Ph.D., a retired university professor with decades of experience teaching and consulting in the area of human factors research, design, analysis and forensics, was presented as a human factors expert. His qualifications include human factors planning and analysis and particularly in factors related to warnings, instructions, operator capabilities, perception and awareness. On deposition he offered his opinion regarding the dangers presented by the lengthy run down time of the machine after it is powered off, the effectiveness of the various warnings and "safety" mechanisms incorporated in the machine design, alternative safety and warning designs and features and the requirements of ANSI Z535. He testified that: (1) the design of the chipper is flawed because the hood could be inadvertently opened before the disc had stopped turning (Depo. Clement, pp. 62-63); (2) It is likely that a person will come to rely on insufficient cues that the disc has stopped turning and that this can be avoided with effective warnings complying with ANSI Z535 at the point of action as a step in the so called Heirarchy of Safety, ASTM WK28145 (Depo. Clement, pp. 64-65, 67, 76-77, 89-92); (3) an effective warning would include signaling at the location where the person is going to remove the hood/guard (Depo. Clement pp. 66-67); (4) the Morbark decals did not address the specific hazard of being struck in the head by the hood guard of the machine and the bootleg Precision Husky warning label that was added to the Morbark machine was not an effective warning and was designed for a different machine (Depo. Clement, pp. 69-72); (5) the designed Morbark warnings that were applied at the Morbark factory before the machine sold did not comply with the ANSI 535 standard because they have no description of the hazard or outcome (Depo. Clement., pp. 85-86); (6) the Morbark warnings and manual did not meet the requirements standards for an adequate warning and warning system required by ANSI Z535.

Roger Davis, PE, Warren Group- Plaintiff's expert engineer

Mr. Davis is the only professional engineer witness in the case and the only one that investigated this accident shortly after the event. He offered his opinion regarding the dangers presented by the lengthy run down time of the machine after it is powered off, the effectiveness of the various warnings and "safety" mechanisms incorporated in the machine, alternative safety and warning designs and features and the requirements of OSHA 29 CFR1910.212, General Requirements for All Machines requiring that "*The guard shall be such that it does not offer an accident hazard in itself*".

Specifically Mr. Davis testified: (1) the design of the chipper is flawed because the chipper hood itself, acting as a guard of the rotating disc, is a danger and in violation of 29 CFR

1910.212 (2) (Depo. Davis, pp. 22, 82-85, 105-106); (2) even if the industry custom regarding the attachment of the hood was similar to the Morbark design in 1996, it is not sufficient to comply with a standard of safety that should be used (Depo. Davis, p. 89); (3) there are available alternate deigns of mill wood chippers with moveable hoods that prevent "kick back" including the 58"wood chipper manufactured by Precision Husky and as testified to by Defendant's expert Bob Smith, President of Precision Husky; (4) the Precision Husky Corp. wood chipper referredto has a two piece hood design with a hood lock that rotates back against the two part hood as a locking device and a visual port and screen on the side of the hood where the disc can be seen; (5) if the rotating hood lock of the Precision Husky wood chipper was in position and there was an internal malfunction of the machine that kicked against the hood, the hood lock would keep it from opening and striking the operator; (6) there are mobile wood chippers with adaptable interlock designs that prevent the hood from opening while the disc is turning (Depo. Davis p. 89); (7) the interlock timing device that he opined should be incorporated in the hood/guard design as referred to in the report of his investigation was readily available (Depo. Davis p. 103); (8) the British Columbia OSHA Standard (part 27.41) referring to a requirement to have an effective brake on mill chippers with moveable hoods was applicable to wood chippers and including Morbark chippers that are sold in British Columbia (Depo. Davis pp. 159-160); (

Bob Smith-Precision Husky Corp.-Defendant's expert

Bob Smith, the owner of Precision Husky Corp., the company that resold the chipper to J.C. Witherspoon, testified as an expert witness for Morbark on November 18, 2010. He testified: (1) that he had no knowledge of the ANSI Z535 machine warning design requirements or presumably whether the Morbark labeling system complied with ANSI Z535 and had nothing to offer in opposition to the testimony regarding warnings that was offered by Plaintiff's expert (Depo. Smith, p. 97); (2) that Precision Husky produced an alternative design mill wood chipper with a two piece hood with a hood lock that rotates back against the two part hood as a locking device and a visual port and screen on the side of the hood where the disc can be seen (Depo. Smith, pp. 82, 83, 84, 85); (3) that if the rotating hood lock was in position and there was an internal malfunction of the machine that kicked against the hood, the hood lock would keep it from opening and striking the operator (Depo. p. 111); (4) on April 13, 2006, soon after the machine was sold to Witherspoon, Precision Husky sent a set of shaft bearings to J.C. Witherspoon because of complaints that the machine was making noise (Depo. Smith, p. 73-74); (5) the chipper equipment produced by Precision Husky and Morbark was sold across the US and in British Columbia and based on his extensive knowledge and long history in the wood chipper manufacturing business that in his opinion both customers and dealers of wood chipper manufacturers expected and depended on the manufacturer of such equipment to produce equipment that would satisfy OSHA standards including machine guarding standards (Depo. Smith pp. 97-98); (6) although he was knowledgeable about applicable U.S. OSHA standards he had no knowledge of the OSHA Standard from the British Columbia Government (part 27.41) referring to a requirement that mill chippers with a hood must have an effective brake (Depo. Smith pp. 98-99); (7) that it was common knowledge within the industry that Precision Husky manufactured chipper equipment (all sizes) with a brake that would stop the rotation of the disc within one minute and that all manufacturers offer that option (Depo. Smith, pp. 99-101); (8) his entire knowledge of the accident was based on his conversation with J.C. Witherspoon (Depo. Smith p. 88); (9) he had no knowledge or information regarding the decals that were on the

Morbark machine when it was resold to Witherspoon and that Precision Husky did no maintenance on the machine but did apply their proprietary warning labels that they used on their Precison Husky manufactured chippers that actually pictured the Precision Husky hood lock that was not part of the Morbark design (Depo. Smith pp.76- 77); (10) in his opinion operating a chipper machine being automatically fed by a vibrating conveyor could "plug" and stall the chipper if the conveyor was allowed to continue to feed the machine after the chipper was shut off (Depo. Smith, pp. 90); (11) that other reasons the chipper machine might plug include an excessive amount of oversized chips, worn out fan blades, holes in the lower casing band or the hood, holes in the blow pipe, blow pipe too narrow, holes in the blow pipe transition. (Depo. Smith, p. 118)

Conclusion

For all the reasons referred to the Court is requested to reconsider and amend and alter its judgment and order and set the case for trial.

Beaufort, South Carolina
June 29, 2011

Donald E. Jonas, Esquire
PO Box 99
Lexington, SC 29071
Attorney For Plaintiff

STATE OF SOUTH CAROLINA COUNTY OF CLARENDON	IN THE COURT OF COMMON PLEAS THIRD JUDICIAL CIRCUIT
Andreal Holland by his Guardian Ad Litem Peggy Knox, Plaintiff, Vs. Morbark, Inc, Precision Husky Corporation, A & K Mulch, LLC, Watford Industry, Inc. Defendants.	2008 CP 14-0461 Plaintiff's Memorandum In Support Of Motion For Reconsideration And To To Amend and Alter Judgment And Order

CERTIFIED TRUE COPY
OF ORIGINAL FILED IN THIS OFFICE
DATE 6/16/11
Beulah H. Roberts
CLERK OF COURT
CLARENDON COUNTY, SC

To: Curtis L. Ott, Esquire, Attorney For Defendant Morbark, Inc.

This memorandum is in support of Plaintiff's Motion for Reconsideration and To Alter Or Amend Judgment and Order pursuant to Rule 59 and 52 of the South Carolina Rules of Civil Procedure. The Order granting summary judgment is attached to Plaintiff' motion and is dated May 27 but has apparently not been filed and served. A copy of the unfiled order was received by counsel on June 7, 2011 along with correspondence from opposing counsel dated June 1, 2011.

Plaintiff's motion is made on the grounds that the order granting summary judgment either misapprehended, omitted or incorrectly referred and decided matters of record and contested evidence and made conclusions that do not meet the applicable legal standard for determining and granting summary judgment.

Although the Court is not required to make separate findings and conclusions in it's order granting summary judgment, the order only obliquely refers to the history of the case and contested evidentiary matters to reach generalized conclusions that are unsupported by the contested evidence. The order omits or incompletely refers to various matters of record and evidentiary issues including:

1. Legal standard that should have been applied

The Court makes reference to Rule 56 and various decisions that make the simple point that a "party opposing summary judgment must do more than rely on mere allegations." (Order p. 2) Surely the Court is aware of the extensive record that was submitted in opposition to this motion and that such characterization is inapposite.[1] Plaintiff contends that the correct legal

[1] Plaintiff filed the following materials prior to the hearing:
Depositions and Exhibits:
06/30/10-original deposition of James Witherspoon and exhibits;

standard for analyzing the Defendant's motion should have included the line of reasoning expressed in Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E. 2d 688 (2000) and Donahue v. Multimedia, Inc., 362 S.C. 331, 337, 608 S.E.2d 162, 165 (Ct. App. 2005) concluding that in determining whether any triable issues of fact exists, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party and that summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts or where further inquiry into the facts of the case is desirable to clarify the application of the law. Plaintiff further contends that any reasonable view of the record presented would have concluded that Plaintiff established a record from which the Court should have determined that there was more than "a mere scintilla of evidence" presented as to each element of the Plaintiff's case that ultimately must be proven at trial by a preponderance of the evidence and that the record does not support granting Defendant's motion on grounds that it has the burden of proof. Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

1. Omitted and/or incomplete history of the case

a. On July 9, 2010, the Court entered a Consent Scheduling Order requiring the parties to file all dispositive motions by November 19, 2010. On about August 23, 2010, the Plaintiff moved to voluntarily dismiss all of the Defendants except Morbark. Thereafter a consent stipulation of dismissal was entered as to Defendants A&K Mulch, LLC, Watford Industry, Inc. and Precision Husky Corporation.

b. On July 30, 2010, Plaintiff moved to amend and supplement the complaint to delete the allegations of negligence and to proceed on the remaining causes of action for strict liability and implied warranty. No order was entered addressing the Plaintiff's Motion To

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08/04/10-copy of the deposition of Woodrow Woods and exhibits 1-11;
08/04/10-copy of deposition of Robert Roseboom and exhibits 1-3;
08/24/10-original 30(b)(6) depositions of Defendant Morbark, Inc, including depositions of 30(b)(6) witnesses Larry Noch and 30(b)(6) witness James Strong and exhibits;
08/31/10-copy of deposition of Roger E. Davis, PE, and exhibits #1-14;
09/13/10-copy of deposition of David E. Clement, Ph.D., and exhibits 1-9;
11/18/10-copy of deposition of Defendant's expert witness Bobby Ray Smith and Exhibits # 1-14;
01/14/11-copy of deposition of Andreal Holland and exhibit 1;
01/28/10-copy of deposition of Peggy Knox.

Discovery and Responses

Defendant Morbark's Responses To Plaintiff's Request For Production # 1-11 (3/26/09);
Responses #12-28 (7/27/10);
Responses, #29-36 (11/19/10);
Defendant Morbark's Answers To Plaintiff's Interrogatories:
Answers #1-20 (3/27/09);
Answers #21-32 (7/27/10);
Defendant Morbark's Responses To Plaintiff's Request To Admit:
Responses # 1-16 (7/27/10);
Responses # 17-19 (9/9/10);
Response #20 (11/19/10).

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Amend and dismissing the additional defendants. On January 12, 2011, the Plaintiff filed a second motion to supplement and amend the complaint based on the deposition of the Defendant's expert witness who was deposed on Nov. 18, 2010, and service of Defendant's supplemental answers to discovery served on or about December 29, 2010. On January 31, 2011, Plaintiff's counsel filed a motion for a protective order addressing the Plaintiff's scheduled deposition based on the Plaintiff's medical and neuropsychological condition.

c. The Plaintiff's current allegations address Morbark's: (par. 12) duty to design, manufacture, inspect, sell and distribute the wood chipper machine with operational and maintenance features complying with industry standards and practices adequate to assure the machine was safe to use and suitable for the expected and intended use by operators with a wide range of training, industrial experience, reading and comprehension ability, and alertness; (par. 13) duty to design and manufacture the chipper to prevent and warn of known and forseeable dangers inherent to the operation of the wood chipper, including the danger related to the extended "run down" or "coast" time of the chipper disc; (par. 14) failure to design and manufacture the machine: (par. 14 a.) without a motion detector and signal system to determine when the rotating wheel had stopped turning; (par. 14 b.) without a securely fitted hood/cutter access door with a positively secured and fitted hinge assembly upon which to rotate; (par. 14 c.) without an interlock device to prevent the hood from opening until the rotating wheel had stopped turning; (par. 14 d.) without a positive hood lock to prevent a hood kick back, even if the device securing the hood was mistakenly opened before the chipper disc had totally stopped; (par. 14 e.) without prominently displayed cleaning, maintenance and operating instructions and warnings, including warnings conveying the serious nature of being hit in the head in the event the pins securing the hood/cutter disc section were removed while the rotating chipper disc was still turning, even slowly tuning; (par. 14 h.) without prominently displayed cleaning, maintenance and operating instructions and warnings conveying the serious nature of injury or death that would result in the event the pins securing the hood/cutter disc section were removed while the rotating chipper disc was still turning, even slowly tuning (par. 14 i.). The Plaintiff further alleged Morbark failed to inspect the chipper machine to assure it was equipped with operational and maintenance features that were adequate to assure it was safe to use and suitable for the expected and intended use (par. 14 j.), and in promoting, selling and distributing the chipper without adequate operational and maintenance features and understandable instructions to assure it was safe to use.

d. In February 2011 Defendant Morbark filed its untimely Motion For Summary Judgment.[2]

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[2] (grounds #1) the machine was not in a defective condition at the time of the accident;
(grounds #2) the machine was not in the same condition as when it left Morbark's hands in 1996;
(grounds #3) Plaintiff's alleged design defect theory failed because of lack of proof of a feasible alternate design;
(grounds #4) Plaintiff's actions constituted "misuse";
(grounds #5) Morbark had no duty to warn because the Plaintiff recognized the danger;
(grounds #6) Plaintiff's causes of action are barred by the sophisticated user defense;
(grounds #7) Plaintiff's injuries are barred by the leaned intermediary defense;
(grounds #8) Plaintiff's injuries were caused by the failure to follow protocols established by Morbark and the employer.

2. Omitted and/or incompletely referenced factual issues

a. Plaintiff's primary job while employed at A&K Mulch was to operate the cut off saw. Eventually he was given the responsibility of changing the wood chipper knives on various models of wood chippers used by his employer. Typically the knives would be changed once or twice per day depending on the foreman's decision and direction. Plaintiff's training to change the chipper knives was informal and was conducted by various employees who had experience with a variety of wood chipper equipment but who also had no formal training changing the chipper knives on the Morbark machine involved. The testimony from foreman Woods is that the machine operation manual was kept at the office but that the machine operation was typical of similar wood chippers. The Plaintiff was injured on June 1, 2006, while he was working at A&K Mulch, LLC, when he was struck in the head with the hood portion of a Morbark 58" horizontal feed, top discharge wood chipper machine that had been installed at A&K Mulch, LLC in mid April, 2006. The hood of the machine was damaged and a "new" remanufactured hood was constructed by a local fabricator who attempted to measure and construct the hood from the damaged part. The "new" hood was placed on the machine shortly after the accident and few weeks before the machine was inspected and photographed by Roger Davis, PE, on behalf of the workers' compensation carrier.

b. At approximately 4:15 p.m. on June 1, 2006, Plaintiff went to investigate a noise coming from the Mobark 58" chipper that was located outside the mill building where he normally worked. He had earlier turned off the power to the machine and "locked out and tagged out". According to the statements of various witnesses, including the plant manager Woodrow Woods and Plaintiff's expert witness Roger Davis, the internal chipper disc/wheel that incorporated the removable chipper knives continues to turn approximately 10-15 minutes after it is powered off. Although there were no witnesses to the accident, foreman Mr. Woods speculated that Mr. Holland may have been struck by the chipper hood when he removed the remaining pin on the side of the hood that held and locked the hood in position and that the hood had kicked back striking the Plaintiff in the face. Plaintiff's account of the accident was more detailed and emphasized that he did not open the hood but that it had opened unexpectedly after he removed the remaining pin securing it.

c. Plaintiff was discovered next to the machine in an unconscious condition by co-worker Leroy Frierson. He was eventually transported by EMS to Clarendon Cty. Hospital and air evacuated to Richland Memorial Hospital with massive facial injuries and was immediately placed on a ventilator and underwent multiple facial surgeries to address the severe comminuted fracture mandible and left zygomatic-maxillary complex and orbital fracture with allogeneic grafting and implants (Stryker fracture plate, compression plate, angle fracture plate, six hole angle eye plate, six hole locking straight plate, ten hole curred plate, twenty-four hole straight plate-mid face, multiple cross-pin bone screws), removal of various teeth and bone fragments. Plaintiff was eventually weaned from the ventilator and on June 14, 2006, and was transferred to Carolinas Rehabilitation Hospital in Charlotte. There he received medical care and rehabilitation services including physical, occupational and speech therapy while being maintained on a Bolus feeding tube in a neurobehavioral unit and maintained on Elavil and Trazodone. Therapy included treatment of infection proximate to PEG tube and urinary tract and monitoring of his

tracheostomy site. He experienced an episode of syncope without repetition. Plaintiff was discharged from Carolinas Rehabilitation on June 27, 2006. On discharge he was noted to require supervision for auditory reception and maximum to moderate assistance for attention, problem solving and memory.

d. As a result of being struck in the head by the hood section of the machine the Plaintiff also sustained traumatic brain injury from which he is permanently and totally disabled. Prior to the accident the Plaintiff (dob 2/10/75) had a lifelong problem with dyslexia and reading comprehension but worked regularly at manual labor jobs and was described as a good worker. Since the accident he has been examined and tested on three occasions by neuro-psychologist Dr. Robert Deysachs. On April 9, 2009, Dr. Deysach reported that the results were consistent with traumatic brain injury and previous testing and that Plaintiff had a verbal IQ of 64 (1st percentile) and a full scale IQ score of 76. Peggy Knox, Plaintiff's mother and his appointed GAL, describe his personality change and lack of cognitive function and attention span as dramatic.

e. On July 27, 2006, Plaintiff's expert, Roger E. Davis, PE, The Warren Group, conducted an investigation and examined the machine. The only other person that closely examined the machine following the accident was Woodrow Woods, the mill foreman.

f. Morbark

Morbark is a sophisticated manufacturer of wood processing equipment distributed throughout the United States, Canada and Europe. In March 1996 Morbark produced the Model 58 Morbark Wood Chipper Serial # 914, initially designed in the early 1960's by a now deceased Mobark employee and began as a production unit around 1969, in March 1996. The Morbark chipper machine was designed to be fed by a vibrating feeder conveyor without operator assistance The machine was eventually purchased by J.C. Witherspoon, Jr., Inc. in a used condition from Precision Husky in Leedz, Al. and was installed at the Witherspoon lumber yard in mid April 2006. Despite repeated specific production requests to Morbark for all invoices, parts and equipment shipments, correspondence, record of ownership, etc. to Witherspoon, Morbark answered it had no such material. (See Morbark Response to Production # 24, #33, #34) Despite specific requests for production and a 30(b)(6) deposition of Morbark in Winn, MI., Morbark testified it had no machine design information or witness to address the issues relating to engineering compliance with traditional machine design criteria, i.e. hierarchy of design principles or OSHA and other code compliance issues and as not able to produce any notes, files or other documentation of design information or considerations that were originally prepared or considered. Although Morbark chose not to produce a design engineer or other expert in response to Plaintiff's 30(b)(6) deposition requests, the documents produced in response to discovery and as deposition exhibits establish that Morbark has a long history of patented wood processing devices and is well aware of the state of industry developments, including chipper safety issues.

The actual machine involved here had an attached label with a list of patents that Morbark presumably believed applied to this machine and others identified in discovery that referred to their own patents and a range of machines and design considerations that Morbark either invented or reviewed in its business operations since the late 1950's. The Morbark chipper here involved did not include a mechanical hood lock device in the design of the 58" wood chipper machine similar to the mechanical lock device incorporated by their competitor Precision

Husky Corp., to prevent the hood kicking back if the machine operator mistakenly attempted to open the hood before the chipper disc had totally stopped. The Morbark design also did not employ an electronic interlock timer that would prevent the hood from opening while the cutter disc was turning.

It is uncontested that Morbark did not provide a general warning decal that specifically warned against the risk of operator head injury and has disavowed any "credit" for any warning/failure to properly warn created by the Precision Husky label that was attached to the machine presumably directed to the danger of attempting to open the hood of a Precision Husky Wood Chipper with equipped with a stop bar while the chipper was turning. Morbark's witness testified that he lacked information to advise whether the chipper design complied with Michigan OSHA General Industry Standard R408.15231 (Part 52 Sawmills) and that the "only method" provided by Morbark to detect motion of the chipper wheel on the 48" and 58" wood chipper machine is contained in the Chipper Safety and Operators Manual, "After power is disengaged, chipper will coast (rotate) for several minutes until it completely stops. Check the chipper sheave to verify it has stopped before opening the hood". Jim Strong, the Morbark draftsman presented by Morbark as a 30(b)(6) witness, testified that the chipper machine involved here was originally equipped with a heavy duty (5") disc and T-1 inserts fans that were different than the standard model 58" machine with a 4" disc and produced a typical 5/8"-7/8" clearance between the blades and the hood. Based on some photos of the machine taken by Roger Davis in 2006, a few weeks after the accident, Mr. Strong testified that the blades on the machine at the time of the accident were not Morbark blades and that the clearance between the remanufactured hood and blades was approximately ¼". Neither the heavy duty disc nor fans were identified in the operation or parts manual nor was the machine so marked with notice of such alteration. With the exception of the addition of three Precision Husky labels that were applied to the moveable hood section of the machine there was no testimony or evidence to support the notion that the original Morbark labeling decals on the machine at the time of the accident were not as designed by Morbark

i. Plaintiff's deposition.

Although suffering from a significant intellectual handicap, Plaintiff was deposed and testified that near the end of his work day on the day he was injured that he turned off the power to the machine and allowed the vibrating feeder to continue to feed the machine and dispose of the material that was still coming down the line as he had been shown. He stated that this was the first time that day he had turned off the machine because his foreman had advised him at lunch that the machine was cutting well and that the blades did not need changing. The shut off and power disconnect were located at the back of the building, away from the outside machine location. After shutting off the power Mr. Holland returned to his regular work station at the cut-off saw some distance away and continued to clean up around his work station. (Depo. Holland, pp. 117, ll. 5-14; 118, ll. 1-18) He stated that he continued cleaning up at the cut-off saw location for about 5-7 minutes when another worker told him that they heard a tapping noise coming from the machine. He stated that he waited a few more minutes and then went to investigate. Depo. Holland, pp. 118, ll. 19-25; 119, ll. 4-8; 120, ll. 9-15) He stated that when he arrived at the machine that it appeared to be stopped and that he didn't hear anything. To be certain the machine was stopped he threw a board into the feed opening of the machine and determined the cutting wheel had stopped and that there was something wrong with the machine. (Depo. Holland, pp. 119, ll. 9-16; 120, ll. 9-20; 121, ll. 1-11, 20-25) He testified that he then

went to find Woodrow Woods, the foreman. (Depo. Holland , pp. 120, 6-25; 122, ll. 1-11) He further testified that Mr. Woods told him to find "Mr. Leroy", another saw mill employee to look at the chipper. Plaintiff testified he found "Mr. Leroy" who was busy apparently selling snack items from his private "canteen" and that he would come when he finished. (Depo. Holland, p. 122, ll. 17-25; 136, ll. 21-24) Plaintiff testified that he then went back to the chipper and began cleaning up and when "Mr. Leroy" didn't arrive he went to look for him again but didn't find him. He testified that he then went back to the chipper and discovered one of the pins securing the hood was missing on the left side as he faced the machine from the feed location. (Depo. Holland, p. 137, ll. 6-20) He testified that he then removed the clip securing the remaining right side pin from the hood and as he worked the pin out, the hood flew back and hit him in the face and knocked him unconscious. (Depo. Holland pp. 123, ll. 10-15; 124, ll. 3-8; 128, ll. 1-11; 129, ll. 21-24; 138, ll. 22-25; 139, ll. 1-10)

j. Woodrow Woods deposition

The only other person with any relevant information regarding the accident was Woodrow Woods who came on the scene after Mr. Frierson notified him. Mr. Woods testified rtegarding his knowledge of the accident: (1) he was first aware of the incident when Leroy Frierson came to him while he was in the "front" of the big mill, working in the saw cab, about 200' from the opposite end of the mill where the chipper was located outside the mill (WW Depo. pp. 16, 133); (2) he first went to the chipper area to determine Plaintiff's condition and then went to the office to call 911 (WW Depo. p. 17); (3) that Plaintiff was found face down, behind and more or less parallel with the machine, feet closest to the machine (WW Depo. pp. 103-104); (4) he stayed with the Plaintiff until EMS arrived (WW Depo. p. 19); (5) that he did not have any information as to the amount of time that had elapsed between the time Plaintiff had powered off the machine and the time of the accident (WW Depo. p. 105-106); (6) he estimated the time for the disc to stop after the chipper power was shut off was 10-15 minutes (WW Depo. p. 20); (7) that he was not aware of any prior incidents in which Plaintiff had opened the hood while the disc was turning and that he would have written him up for a safety violation if he had (WW Depo. p. 51); (8) as a foreman Mr. Woods had the responsibility to "write up employees" for violation of procedures including absenteeism, tardiness and safety issues (WW Depo. pp.87-92); (9) that he would obtain the forms to document the write up from the main office and submit the forms to be filed and reviewed by J.C. Witherspoon, Jr., but that the only written reports addressing Plaintiff Holland were for absenteeism (WW Depo. pp. 90- 92)

Mr. Woods also testified regarding his knowledge of the chipper machine and procedures: (1) he recalled that the original 48" Morbark chipper that was at the small mill location was replaced by the 58" chipper in mid April 2006, a few weeks before the Plaintiff's injury (WW Depo. p. 38); (2) that the chipper slowed progressively after switching off the chipper power, with the disc first moving very fast and slowing as the momentum dissipates. He also stated that if the chipper had material being fed to it by the separately controlled vibrating conveyor that it would slow down more quickly (WW. Depo. p. 106-108) ; (3) that he was aware that there were occasions that the feeder either did not operate properly or was not shut off and material continued to be fed to the chipper (WW Depo. pp. 107, 138-139); (4) that if the vibrator was not turned off and continued to feed the chipper it would choke it and stop it (WW Depo. p. 108); (5) that even if the disc was turning very slowly that it "can do a lot of damage"

(WW Depo. pp. 40, 109, 110, 120, 141); (6) that if the chipper was moving very slowly you could not hear it moving; (7) that it was not possible to see whether the disc is turning while in the position to remove the cotter keys (WW Depo. pp. 43-44); (8) that there was no formal procedure to change the chipper knives but that he knew the procedure from his 35 years of saw mill experience (WW Depo. pp. 24-25, 63); (9) that he had the operator's manual for the Morbark chipper in his office but did not require the person changing the blades to read it but would expect persons performing maintenance on the chipper to read it. (WW Depo. pp. 44-47)

Regarding the decals that were on the machine, Mr. Woods testified that there were numerous decals on the 58" machine when it was installed but that they (he and Jimmy Witherspoon) put more decals on the machine, showing someone getting hit in the head, sometime after it was installed (WW Depo. pp. 38-40, 63, 135); that he had changed bearings on various chippers and may have changed them on the 58"chipper but could not remember. (WW Depo. p. 128-131) Regarding the moveable hood of the chipper, he stated that there was a wobble between the hood and hood hinge pin that could have allowed the hood to strike the fan if the pins securing the hood were removed. (WW Depo. pp. 115-116, 121, 122)

Mr. Woods further testified that following the accident he inspected the machine and that it was powered off at the time of the accident. He also stated that the hood was normally secured in the closed position with two pins secured in place with retaining clips. (WW Depo. pp. 20-21, 119) He also testified that after the accident he saw significant damage to the hood, no damage to the pins securing the hood and some damage to a fan blade. (WW Depo. pp. 53-54, 116, 119)

j. Robert Roseboom deposition

Rob Roseboom is an A&K employee and the supervisor of the "small mill" also known as the "scrag mill". Mr. Roseboom started working at A&K Mulch beginning in July 2004 and was initially hired to do machine maintenance and work in shipping and receiving until he was asked to supervise the small mill operation. (RR Depo. p. 60) He did not see the accident and thought it may have occurred at lunch time. He recalled he was first aware of the incident when he saw Woodrow Woods, the big mill supervisor, running to the office. He recalled that in April 2006, the 48" Morbark Chipper was replaced with the 58" Morbark chipper and that the original 48" Morbark chipper was moved to the small mill. (RR Depo. pp. 56, 66) Mr. Roseboom agreed that the accident could have happened if the disc was barely moving and the pins were removed without actually having to pull back the hood. (RR Depo. p. 73) He estimated the time for the disc to stop after the power was shut off, assuming it did not have anything being fed into it, was 3-4 or 5-10 minutes. (RR Depo. pp. 18, 76) He stated that if the chipper had material being fed to it after it was powered off that it would slow down more quickly. (RR Depo. p. 76) He testified that if the vibrating feeder was not turned off first and material continued to be fed into the machine it would jam the machine, plug it up and stop it or make it run erratically. (RR Depo. pp. 77-78, 83) He also stated that even though the vibrating chipper was designed to feed the chipper without operator assistance that sometimes an unusual size or shape piece of wood would hang up and possibly clog up the machine. (RR Depo. pp. 82-83) He also agreed that the pieces being fed to the chipper at the big mill could be up to 16' long. (RR Depo. p. 78) He also stated that in the event the chip separator (cyclone) clogged up that it would back up the chipper which would continue to try to chip until it stopped. (RR Depo. pp. 83-84) Regarding the decals

that were on the machine, Mr. Roseboom recalled that there were numerous decals on the machine but prior to the accident did not recall seeing the Precision Husky decals on the chipper depicting the diagram of the hood striking the operator. (RR Depo. p. 26)

David Clements-Plaintiff's Human Factors Expert

David Clements, Ph.D., a retired university professor with decades of experience teaching and consulting in the area of human factors research, design, analysis and forensics, was presented as a human factors expert. His qualifications include human factors planning and analysis and particularly in factors related to warnings, instructions, operator capabilities, perception and awareness. On deposition he offered his opinion regarding the dangers presented by the lengthy run down time of the machine after it is powered off, the effectiveness of the various warnings and "safety" mechanisms incorporated in the machine design, alternative safety and warning designs and features and the requirements of ANSI Z535. He testified that: (1) the design of the chipper is flawed because the hood could be inadvertently opened before the disc had stopped turning (Depo. Clement, pp. 62-63); (2) It is likely that a person will come to rely on insufficient cues that the disc has stopped turning and that this can be avoided with effective warnings complying with ANSI Z535 at the point of action as a step in the so called Heirarchy of Safety, ASTM WK28145 (Depo. Clement, pp. 64-65, 67, 76-77, 89-92); (3) an effective warning would include signaling at the location where the person is going to remove the hood/guard (Depo. Clement pp. 66-67); (4) the Morbark decals did not address the specific hazard of being struck in the head by the hood guard of the machine and the bootleg Precision Husky warning label that was added to the Morbark machine was not an effective warning and was designed for a different machine (Depo. Clement, pp. 69-72); (5) the designed Morbark warnings that were applied at the Morbark factory before the machine sold did not comply with the ANSI 535 standard because they have no description of the hazard or outcome (Depo. Clement., pp. 85-86); (6) the Morbark warnings and manual did not meet the requirements standards for an adequate warning and warning system required by ANSI Z535.

Roger Davis, PE, Warren Group- Plaintiff's expert engineer

Mr. Davis is the only professional engineer witness in the case and the only one that investigated this accident shortly after the event. He offered his opinion regarding the dangers presented by the lengthy run down time of the machine after it is powered off, the effectiveness of the various warnings and "safety" mechanisms incorporated in the machine, alternative safety and warning designs and features and the requirements of OSHA 29 CFR1910.212, General Requirements for All Machines requiring that "*The guard shall be such that it does not offer an accident hazard in itself*".

Specifically Mr. Davis testified: (1) the design of the chipper is flawed because the chipper hood itself, acting as a guard of the rotating disc, is a danger and in violation of 29 CFR 1910.212 (2) (Depo. Davis, pp. 22, 82-85, 105-106); (2) even if the industry custom regarding the attachment of the hood was similar to the Morbark design in 1996, it is not sufficient to comply with a standard of safety that should be used (Depo. Davis, p. 89); (3) there are available alternate deigns of mill wood chippers with moveable hoods that prevent "kick back" including the 58"wood chipper manufactured by Precision Husky and as testified to by Defendant's expert

Bob Smith, President of Precision Husky; (4) the Precision Husky Corp. wood chipper referredto has a two piece hood design with a hood lock that rotates back against the two part hood as a locking device and a visual port and screen on the side of the hood where the disc can be seen; (5) if the rotating hood lock of the Precision Husky wood chipper was in position and there was an internal malfunction of the machine that kicked against the hood, the hood lock would keep it from opening and striking the operator; (6) there are mobile wood chippers with adaptable interlock designs that prevent the hood from opening while the disc is turning (Depo. Davis p. 89); (7) the interlock timing device that he opined should be incorporated in the hood/guard design as referred to in the report of his investigation was readily available (Depo. Davis p. 103); (8) the British Columbia OSHA Standard (part 27.41) referring to a requirement to have an effective brake on mill chippers with moveable hoods was applicable to wood chippers and including Morbark chippers that are sold in British Columbia (Depo. Davis pp. 159-160); (

Bob Smith-Precision Husky Corp.-Defendant's expert

Bob Smith, the owner of Precision Husky Corp., the company that resold the chipper to J.C. Witherspoon, testified as an expert witness for Morbark on November 18, 2010. He testified: (1) that he had no knowledge of the ANSI Z535 machine warning design requirements or presumably whether the Morbark labeling system complied with ANSI Z535 and had nothing to offer in opposition to the testimony regarding warnings that was offered by Plaintiff's expert (Depo. Smith, p. 97); (2) that Precision Husky produced an alternative design mill wood chipper with a two piece hood with a hood lock that rotates back against the two part hood as a locking device and a visual port and screen on the side of the hood where the disc can be seen (Depo. Smith, pp. 82, 83, 84, 85); (3) that if the rotating hood lock was in position and there was an internal malfunction of the machine that kicked against the hood, the hood lock would keep it from opening and striking the operator (Depo. p. 111); (4) on April 13, 2006, soon after the machine was sold to Witherspoon, Precision Husky sent a set of shaft bearings to J.C. Witherspoon because of complaints that the machine was making noise (Depo. Smith, p. 73-74); (5) the chipper equipment produced by Precision Husky and Morbark was sold across the US and in British Columbia and based on his extensive knowledge and long history in the wood chipper manufacturing business that in his opinion both customers and dealers of wood chipper manufacturers expected and depended on the manufacturer of such equipment to produce equipment that would satisfy OSHA standards including machine guarding standards (Depo. Smith pp. 97-98); (6) although he was knowledgeable about applicable U.S. OSHA standards he had no knowledge of the OSHA Standard from the British Columbia Government (part 27.41) referring to a requirement that mill chippers with a hood must have an effective brake (Depo. Smith pp. 98-99); (7) that it was common knowledge within the industry that Precision Husky manufactured chipper equipment (all sizes) with a brake that would stop the rotation of the disc within one minute and that all manufacturers offer that option (Depo. Smith, pp. 99-101); (8) his entire knowledge of the accident was based on his conversation with J.C. Witherspoon (Depo. Smith p. 88); (9) he had no knowledge or information regarding the decals that were on the Morbark machine when it was resold to Witherspoon and that Precision Husky did no maintenance on the machine but did apply their proprietary warning labels that they used on their Precison Husky manufactured chippers that actually pictured the Precision Husky hood lock that was not part of the Morbark design (Depo. Smith pp.76- 77); (10) in his opinion operating a chipper machine being automatically fed by a vibrating conveyor could "plug" and stall the

chipper if the conveyor was allowed to continue to feed the machine after the chipper was shut off (Depo. Smith, pp. 90); (11) that other reasons the chipper machine might plug include an excessive amount of oversized chips, worn out fan blades, holes in the lower casing band or the hood, holes in the blow pipe, blow pipe too narrow, holes in the blow pipe transition. (Depo. Smith, p. 118)

3. Incorrect analysis

As presented the Court's Order granting summary judgment parses and characterizes the allegations of the Plaintiff's complaint and the contested facts and expert opinions apparently in an attempt to simplify and square this case with various cases and recent decisions.

Although an order has not been entered amending the Plaintiff's complaint, the thrust of this action without such amendment is strict liability and implied warranty. SC Code Sect. 15-73-30 incorporates by reference section 402A of the Restatement (Second) of Torts (1965). The strict liability rule applies if the chipper machine was in a defective condition not contemplated by the ultimate consumer and was unreasonably dangerous to the user. In a products liability case the Plaintiff must establish three things, regardless of the theory on which he seeks recovery: 1) that he was injured by the product; (2) that the product, at the time of the accident, was in essentially the same condition as when it left the hands of the defendant; and (3) that the injury occurred because the product was in a defective condition unreasonably dangerous to the user." Madden v. Cox, 284 S.C. 574, 579, 328 S.E.2d 108, 112 (Ct.App.1985) citing Prosser, Law of Torts 671-72 (4th ed. 1970). Fundamentally the Plaintiff has the ultimate burden of proving causation in fact and legal cause at trial and must produce some evidence to counter the Defendant's summary judgment motion at this stage of the case. Rush v. Blanchard, 310 S.C. 375, 426 S.E.2d 802 (1993); Oliver v. South Carolina Dep't of Hwys. and Pub. Transp., 309 S.C. 313, 422 S.E.2d 128 (1992); Vinson v. Hartley, 324 S.C. 389, 477 S.E.2d 715 (Ct.App.1996).

a. Affirmative defenses

Rule 7 (b) SCRCP requires the grounds of Defendant's motion to be stated with particularity. Presumably the Court acted on such motion and the specific grounds raised and it should not be necessary for an appeal in this matter to have to rely on interpretation to understand the grounds on which the Court has granted the summary judgment. Not mentioned in the Court's Order is the burden of the Defendant as to those matters raised as affirmative defenses. The Court's Order presumably fails to address the legal standards and uncontested evidence that it relied upon in considering Defendant's motion addressing the various affirmative defenses, grounds 4-8. A simple statement that the Court has granted this untimely motion, or not, on the grounds 4-8 will clarify the issues for appeal.

Ground #4-the affirmative defense of misuse and the supporting evidence upon which the Court relied to find and conclude the Plaintiff used the machine for a purpose neither intended nor foreseeable to Morbark and was aware of the inherent danger to his safety of such use. Gardner v. Q.H.S., Inc., 448 F.2d 238 (4th Cir. 1971); 63 Am. Jur. 2d Products Liability Sect. 41 (1997); 63A Am. Jur. 2d Products Liability Sect. 1148 (1997); 72 C.J.S. Supp. Products Liability Sect. 47 (1975). Sears Roebuck &Co. v. Harris, 630 So.2d 1018, 1028 (Ala. 1993) (proof that a product was used as intended is not an element of a prima facie case and ordinarily is a factual issue for the jury. Horn v. Fadal Machining Centers, LLC, 972 So. 2d 63, 79 (Al. 2007) (1007

W.L. 431427) citing McIsaac v. Monte Carlo Club, Inc., 587 So. 2d 320, 324 and Hannah v.Gregg, Bland & Berry, 840 So.2d 839, 860-61;

Ground #5-the affirmative defense of "no duty to warn" and the supporting evidence upon which the Court relied to find and conclude that the danger that proximately caused the Plaintiff's injury was generally known and recognized by the product user. Anderson v. Green Bull , Inc., 332 S.C. 268, 471 S.E.2d 708 (Ct. App. 1996); Dema v. Shore Enterprises, Ltd. 312 S.C. 528, 435 S.E. 2d 875 (Ct. App. 1993); Restatement (Second) of Torts, Sect 402A cmt. 1 (1986) There is nothing in the record to support Morbark's claims that the instructions and "warnings" it attached to the machine complied with the standards of ANSI Z535. Apparently recognizing the problem with such claim Morbark additionally argued that no warnings were required because Plaintiff had worked on the machine in the past and was aware of the danger. The evidence in the case is that whatever training the Plaintiff received was incomplete and inconsistent and that he was unaware of the specific hazard of removing the remaining pin from the hood/cutter guard and the hood unexpectedly flying open. Further, it is unchallenged that Plaintiff suffered from serious reading and comprehension problems before this accident that Plaintiff's expert opined should have been forseeable to the manufacturer in designing the machine operation instructions and warnings.

Grounds 6, 7, 8-the affirmative defenses of sophisticated user, learned intermediary and failure to follow protocols and the supporting evidence upon which the Court relied to find and conclude that the employer was aware and had knowledge equal to the manufacturer's knowledge of the inherent danger of the separately controlled vibrating conveyor continuing to feed the chipper and causing it to stall and that an operator may attempt to remove the remaining pin from the two piece hood and that the hood would unexpectedly be launched forward and strike the operator in the head and instituted and properly trained the employee with regard to the procedure and specific hazards. Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 462. S.E.2d 321 (Ct. App. 1995); Willis v. Raymark Indus., Inc., 905 F. 2d 793 (4th Cir. 1990); Goodbar v. Whitehead Bros., 591 F.Supp. 552 (W.D.Va.1984), aff'd sub nom. Beale v. Hardy, 769 F.2d 213 (4th Cir.1985); O'Neal v. Celanese Corp., 10 F.3d 249 (4th Cir.1993).

b. Grounds for the motion that address the plaintiff's burden

(Grounds #1, #2) The Court has found and concluded that the chipper machine was not in a defective condition when it was manufactured or at the time of the accident. The Court further determined that the machine was not in the same condition as when it was manufactured by Morbark in 1996. The Plaintiff contends however that the evidence is contested as to these matters and that the findings and conclusions by the Court go beyond the proper analysis of summary judgment. The evidence addressing the defective design issue and supporting the fact that the design defect was a proximate cause of the accident includes the testimony of Roger Davis, PE, that the design violated the principles of the so called Heirarchy of Safety, ASTM WK28145, and also violated the provisions of OSHA 29 CFR1910.212 General Requirements for all machines requiring that "The guard shall be such that it does not offer an accident hazard in itself". Morbark has produced nothing to indicate that the chipper complied with the standards referred to and has taken the position that the so called mill chipper industry has no design and safety standards at all. That conclusion is contrary to the testimony of Plaintiff's expert witness Davis and Morbark's own expert witness, Bob Smith, that the provisions of OSHA 29

CFR1910.212 General Requirements For All Machines carry through to the manufacturer who is expected to produce a machine that is in compliance with the both the federal standard and similar Michigan OSHA standard that Morbark has advised that it complies with. These facts are uncontested yet the Order ignores these critical facts and literally defaults deciding the issue of whether these established facts constitute a design defect. Similarly, the evidence is uncontested that the Morbark labeling and warnings on the machine failed to comply with ANSI Standard Z535 and that such failure is proof of a design defect. The Order instead makes the unsupported statement that "many of the decals - - - were gone. (Order p. 11) Moreover, the failure to even address the proximate cause of the accident as related to the allegations and evidence that there was not a specific hazard warning that the machine could be stalled and that the hood presented a danger independent of the rotating cutter assembly and that area and methods to determine where and how the machine could be checked with clear visibility by the operator to assure it was completely stopped make the entire analysis of the failure to warn irrelevant.

The Order also finds and concludes that the machine was not in essentially the same condition as when it was manufactured, apparently pointing to the testimony of Morbark draftsman Jim Strong who testified that the post accident photos of the machine he looked at revealed fans on the disc that were not the items that the disc was equipped with in 1996. The technical details of this issue come down to the fact that this machine #914 was produced with a heavy duty disc and was equipped with a fan blade item # 40239-580 (designed horizontal width of 5 5/16") rather than the standard disc and fan blade item # 30160-580 (designed horizontal width of 6 7/16") as was featured in the Morbark Machine Manual that accompanied the machine. According to Morbark witness Mr. Strong the design clearance between the blades and manufactured hood was a minimum 5/8". Mr. Strong's deposition however revealed that he never inspected the machine after the accident and made his opinion that the replacement blades he observed on the machine after the accident were the same blades that were on the machine at the time of the accident. His testimony also failed to address the fact that the Roger Davis photo of the machine taken weeks after the accident included a hood assembly that had been remanufactured by a local fabricator, not Morbark, after the original hood was damaged in the he accident. In total, Mr. Strong's testimony as to the condition of the machine at the time of the accident and whether there was adequate clearance between the hood and cutter assembly is entirely without any foundation and should not have been included as either a finding or basis of any conclusion in the Court's Order. Further, the very fact that Morbark produced machine #914 without specific parts identification that it included an oversize cutter and T-1 inserts either in the operation and parts manual or by label attached to the machine is independently proof of a defective failure to warn issue. The significance of these details is that the only person to inspect the machine and make measurements shortly after the accident was Roger Davis, PE. Who determined the clearance between the cutter assembly, fans and machine hood were adequate and not a cause of the accident. The conjecture referred to in the order that such matters were causative is without support.

Grounds #3- Plaintiff's alleged design defect theory allegedly failed because of lack of proof of a feasible alternate design. The Order in this case refers to one of the opinions of Plaintiff's expert Roger Davis that the similar mobile wood chipper equipment contains electrical interlock devices that essentially time out the maximum run down time of the machine before the hood can be opened. In his deposition testimony Mr. Davis cited a variety of machines and

patents that address and incorporate the interlock hood concept. His second alternative design opinion was that the locking bar design of the Precision Huskyv 58" chipper that had been produced since at least the early 1980's would have prevented the Plaintiff from being struck in the head by the hood kicking back. In its Order (pages 7-8) however the Court analyzed only the interlock timing device and analyzed the alternative design according to the factors it considered relevant as addressed in the recent decision in Branham v. Ford Motor Company, 390 S.C. 203, 701 S.E.2d 5 (2010). It is unexplained why the Court did not address the specic testimony of Morbark expert Bob Smith concluding that the 58" Precision Husky chipper manufactured by Precision Husky and the 58" Morbark chipper here involved were very similar machines other than the locking bar device over the moveable hood. According to Mr. Smith, the locking bar/handle device would prevent a hood kick back if the hood were mistakenly opened while the disc was still slowly turning. Further, the Court's Order did not mention the evidence submitted of mobile chippers with safety devices that prevent the hood from being opened while the disc rotates, available mill chippers with brakes that effectively stop the machine within one minute, etc. and decades of similar devices in a variety of product applications, for the purpose of this motion those matters are not necessary to consider

Conclusion

For all the reasons referred to the Court is requested to reconsider and amend and alter its judgment and order and set the case for trial.

Beaufort, South Carolina
June 13, 2011

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Lexington, SC 29071
Attorney For Plaintiff

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CLARENDON	)	Civil Action No.: 2008-CP-14-0461
Andreal Holland by his Guardian Ad Litem Peggy Knox,	)	
Plaintiff,	)	
vs.	)	**MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**
Morbark, Inc.,	)	
Defendant.	)	

INTRODUCTION

Plaintiff Andreal Holland, through his mother and Guardian ad Litem, Peggy Knox, filed this product liability lawsuit to recover damages for injuries Plaintiff allegedly sustained from a wood chipper manufactured by Defendant Morbark, Inc. Morbark moves for summary judgment and submits this memorandum in support.

LEGAL STANDARD

Summary judgment is appropriate "if 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 v. Moss*, 284 S.C.208, 211, 325 S.E.2d 69, 70 (Ct.App. 1985).

FACTS

The following facts are undisputed. The subject machine is 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 p. 12, ll. 14-23 (Exhibit A)] The next known detail of the chipper is that J. H. Chewning Lumber Company, Inc. out of Spotsylvania, Virginia traded it in to former co-Defendant Precision Husky Corporation in Alabama on August 24, 2005.[1] 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 J. C. Witherspoon, Jr., the principal owner of Plaintiff's employer, A&K Mulch, LLC in Alcolu, South Carolina. [Precision Husky Corporation's November 23, 2009 answers to Plaintiff's Interrogatory Nos. 7, 8 and 10 (Exhibit B); copy of warning decal affixed by Precision Husky (Exhibit C); Smith p. 29, l. 18 – p. 32, l. 6 (Exhibit D)] 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 p. 28, ll. 7-19 (Exhibit D); Witherspoon p. 135, l. 17 – p. 136, l. 8 (Exhibit E)]

Plaintiff started working at A&K Mulch's saw mill on April 5, 2004. [Witherspoon p. 105, ll. 11-19 (Exhibit E)] His primary job was to operate a cut off saw. [Plaintiff p. 89, ll. 10-14 (Exhibit F)] However, after a few months, he began changing the cutting knives on a smaller

[1] Plaintiff originally sued Precision Husky, A&K Mulch, LLC and Watford Industry, Inc. in addition to Morbark. Plaintiff subsequently dismissed all Defendants except Morbark.

model Morbark chipper that A&K Mulch used until it purchased the subject chipper. [Plaintiff p. 75, l. 24 - p. 76, l. 18 (Exhibit F)]

Because the stationary chipper was fed by an automatic conveyer, the chipper itself does not require an operator to cut the wood or oversee its operation. [Davis p. 54, l. 24 - p. 55, l. 19 (Exhibit G)] 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 Plaintiff, had never seen the manual. [Plaintiff p. 89, ll. 22-23 (Exhibit F); Witherspoon p. 64, l. 19 – p. 65, l. 17; p. 111, ll. 17-24 (Exhibit E)] 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 disc, the chipper can take as long as fifteen minutes to stop. The chipper was not to be opened until the disc stopped, and an employee could visually confirm in three separate places whether the disc was moving. The employee could also feel the vibrations and hear if the disc was still moving. [Plaintiff p. 104, l. 11 - p. 105, l. 19 (Exhibit F)] According to Witherspoon, who has been around chippers his entire life, "there's no doubt when one of these things is turning." [Witherspoon p. 53, l. 10 – p. 54, l. 11 (Exhibit E)] Once the disc 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 Plaintiff's accident. [Noch p. 104, l. 7 – p. 105, l. 9; p. 108, l. 8 – p. 109, l. 8 (Exhibit A); Strong p. 55, l. 4 – p. 56, l. 8 (Exhibit H); Davis p. 62, l. 18 – p. 65, l. 23 (Exhibit G)] Employees generally changed the knives during the lunch shift and when the cutting mill shut down at the end of the day. [Witherspoon p. 43, ll. 7-9; p. 116, l. 7 – 118, l. 21 (Exhibit E)]

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

Despite this knowledge, Plaintiff 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 Complaint ¶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]

Based on these allegations, Plaintiff asserts causes of action for statutory strict liability and breach of implied warranty. In support, Plaintiff 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 concludes the chipper is defectively designed because it does not have an interlock to prevent opening the hood until the drum stops

moving. [Davis Report pp. 5-6 (Exhibit I)] 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 p. 11, ll. 4 – 10 (Exhibit J)] This opinion is a design opinion that reiterates Davis' 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 (Exhibit J)] Specifically, he is critical of Precision Husky's warning decal and diagram with which Morbark had no involvement. Clement also is critical of Morbark's original warnings and instructions in the Operator's Manual, but Plaintiff 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. [Plaintiff p. 89, l. 22 - p. 90, l. 5 (Exhibit F); Noch p. 22, l. 15 – p. 23, l. 3 (Exhibit A)]

Importantly, the fan blades on the chipper at the time of Plaintiff's accident were not the ones Morbark originally installed, and indeed were not 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 after a replacement hood, fabricated by former co-Defendant Watford Industry, was attached. [Noch p. 109, l. 9 – p. 110, l. 8 (Exhibit A); Strong p. 31, l. 18 – p. 32, l. 17; p. 35, l. 17 – p. 36, l. 25 (Exhibit H); Davis p. 65, l. 21 – p. 71, l. 5 (Exhibit G)]

LEGAL ARGUMENT

I. The chipper was not in substantially the same condition at the time of the accident, and Plaintiff cannot prove that the wood chipper was defective and unreasonably dangerous.

In any products liability action, regardless of the theory of recovery pursued, the plaintiff bears the burden of proving: (1) he was injured by the product; (2) that 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)). In cases involving equipment and machinery, determining 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). "Strict liability is not equivalent either to absolute liability or to insurance of the safety of the product's users. Likewise, the mere fact that a product malfunctions does not . . . establish the product was defective." *Bragg*, 319 S.C. at 544, 462 S.E.2d at 328.

Recently, in *Branham v. Ford Motor Company*, 390 S.C. 203, 701 S.E.2d 5 (2010), the South Carolina Supreme Court reviewed the requirements in a design defect case, which is Plaintiff's theory. The court noted that South Carolina law traditionally employed two tests to determine whether a design defect rendered a product unreasonably dangerous: (1) the consumer expectations test; and (2) the risk-utility test. *Id.* at 218, 701 S.E.2d at 13. The consumer

expectations test analyzes a product from the consumer's standpoint – whether the product is unreasonably dangerous to the user based on the foreseeable conditions and circumstances surrounding use of the product. *Id.*; *see also Claytor*, 277 S.C. at 262, 286 S.E.2d at 131. Under the risk-utility test, "a product is unreasonably dangerous and defective if the danger associated with the use of the product outweighs the utility of the product." *Branham*, 390 S.C. 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)). "[N]umerous 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). Furthermore, "by its very nature, the risk-utility test requires a showing of a reasonable alternative design." *Id.* at 219, 701 S.E.2d at 13.

After reviewing the legislative history, application of the risk-utility test in other jurisdictions and South Carolina precedent, the court found that the consumer expectations test was better suited for manufacturing defect cases and ill-suited for design defect cases. Thus, the court held "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.

Morbark is entitled to summary judgment on both causes of action because Plaintiff cannot prove the chipper was defectively designed and unreasonably dangerous at the time it left Morbark's hands under the risk-utility test. Moreover, Plaintiff does not have the required evidence of a feasible alternative design, available in 1996 when Morbark manufactured and sold the chipper.

A. **The chipper was substantially modified and crucial parts were missing between 1996 and 2006.**

The chipper that Plaintiff alleges injured him was not the chipper Morbark originally built and sold. By the time of Plaintiff's accident, the original fan blades were replaced with fan blades manufactured by an unknown company. These substitute fan blades had less clearance from the hood than that shown in Morbark's drawings, thus increasing the possibility of the blades striking the hood. Furthermore, the extra safety provided by the original horizontal and vertical bolts that secured the hood and had to be removed before accessing the blades was eliminated by the simple fact that they were lost by the time A&K purchased and used the chipper. The same is true for multiple warning decals affixed to the chipper when it left Morbark's hands in 1996; warnings that, if followed, would have made Plaintiff's accident impossible. Accordingly, these substantial modifications and omissions render Plaintiff unable to prove the common product liability element of substantially similar condition.

B. **The failure to incorporate the additional safety device urged by Plaintiff's expert does not render the wood chipper defective and unreasonably dangerous.**

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).

Branham quoted this excerpt and reaffirmed the court's "longstanding approval" of this principle. The court further noted:

> 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).

Applying this principle to Plaintiff's design defect theory requires dismissal. Davis' defect opinion does not criticize the 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. However, even assuming an interlock would make the chipper safer does not mean "a jury question is created" to overcome Morbark's motion. *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 cases, *Bragg* and *Holst v. KCI Konecranes International Corporation*, 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, the South Carolina Court of Appeals 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 Court should reach the same conclusion.

C. No other wood chipper in the world incorporates the safety device urged by Plaintiff's design expert.

This conclusion is particularly required in cases where no one has ever adopted the design advanced by a plaintiff's expert. Davis admits he is not aware of any manufacturer that incorporates his recommended design or even of 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 research 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 p. 89, l. 8 - p. 90, l. 14 (Exhibit G)]

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.

.
.
.

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 p. 93, l. 17 - p. 95, l. 6 (Exhibit G)] Plaintiff's other expert, Clement, concedes these same crucial points. [Clement p. 19, ll. 11-18; p. 20, ll. 4-7; p. 23, ll. 8-23 (Exhibit J)]

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 p. 42, l. 18 - p. 43, l. 12 (Exhibit D)]

Mr. Smith has worked with wood chippers for more than fifty years and has more experience in this industry than anyone he knows. [*Id.* at p. 16, ll. 9-12; p. 17, ll. 1-10 (Exhibit D)]. Plaintiff stipulated Smith is an expert in chipper design and manufacture, and Smith opines that the subject chipper, manufactured by his competitor, is neither defective nor unreasonably dangerous to a reasonable degree of scientific certainty. [*Id.* at p. 11, ll. 1-5; p. 43, l. 13 – p. 46, l. 2 (Exhibit D)]

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). 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*)).

Plaintiff'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 p. 72, l. 12 – p. 74, l. 14; p. 82, ll. 7-17; p. 88, l. 7 – p. 89, l. 3 (Exhibit G); Clement p. 39, ll. 7-18 (Exhibit J)] 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 Plaintiff'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).

D. Plaintiff cannot prove the requisite alternative feasible design.

A second basis on which *Bragg* and *Holst* affirmed judgment was the failure "to introduce evidence of a feasible design alternative." *Bragg*, 319 S.C. 546, 462 S.E.2d at 330. As stated above, *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, the 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.

Plaintiff's claims fail for the same reasons. "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 p. 208, l. 20 - p. 209, l. 7 (Exhibit G) (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. As in *Bragg* and *Holst*, and recently reaffirmed by *Branham*, this theoretical, conceptual alternative design without scientific risk-utility analysis does not meet Plaintiff's burden, and summary judgment must be granted.

II. Plaintiff's failure to warn claims fail as a matter of law.

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)). 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; therefore, the seller is not liable for any injuries caused by the use of the product if the user ignores the warning. Further, 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).

Moreover, 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)).

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 (Exhibit K)]. Exit photographs evidence those decals on the chipper. However, by the time of Plaintiff's accident ten years later, most if not all of those decals, including the one instructing that the decals not be removed, were gone. 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. Plaintiff ignored or violated every one of these warnings and prohibitions. [Davis p. 16, l. 14 - p. 17, l. 1 (Exhibit G); Clement p. 41, l. 11 – p. 42, l. 2 (Exhibit J)] Furthermore, it is undisputed that if he had heeded these warnings and obeyed these instructions, it was **impossible** for him to injure himself as he did. [Davis p. 60, l. 1 - p. 61, l. 9 (Exhibit G); Witherspoon p. 94, l. 8 - p. 95, l. 1, p. 127, l. 19 – p. 128, l. 3 (Exhibit E)] Thus, under these undisputed facts, there can be no liability for failure to warn.

A. **Plaintiff was aware of the inherent dangers of using the chipper.**

Although these warnings and instructions that Morbark delivered with the chipper at the time of sale were not with the chipper when Plaintiff injured himself, Precision Husky, the company that sold the chipper to A&K Mulch, had affixed a detailed warning showing by words and pictogram exactly what would happen to a user that operated the hood before the chipper had stopped turning. [Precision Husky 3 (Exhibit C); Witherspoon p. 126, l. 7 – p. 127, l. 18 (Exhibit E); Plaintiff p. 111, ll. 8-9 (Exhibit F)]. Plaintiff admitted that the specific manner of injury would be getting hit in the head just as he alleges happened in this accident. [Plaintiff p. 109, ll. 8-15 (Exhibit F)] 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 Plaintiff, 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, every employee understood the words and diagram. 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 Plaintiff knew and recognized 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.

[Plaintiff p. 111, ll. 8-9 (Exhibit F)]

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.

[Plaintiff p. 111, l. 20 - p. 112, l. 16 (Exhibit F)]

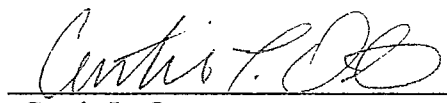
Therefore, under *Anderson*, the chipper is not defective and unreasonably dangerous. *Anderson*, 322 S.C. at 270-71, 471 S.E.2d at 710; *see also S.C. Code Ann.* § 15-73-20 ("If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.").

CONCLUSION

On June 1, 2006, Plaintiff 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 opened 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 or designed and no manufacturer has ever researched or considered, much less implemented. By Davis' account, every stationary chipper in the world is defective because none of them would have prevented Plaintiff's injury. South Carolina law requires Morbark's motion be granted.

TURNER, PADGET, GRAHAM & LANEY, P.A.

March 25, 2011 By: 

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ATTORNEYS FOR DEFENDANT

INDEX OF EXHIBITS

Exhibit	Description
A	Deposition transcript of Larry Noch (Pages 1, 10-13, 22-25, and 102-113)
B	Precision Husky Corporation Responses to Plaintiff's Interrogatories (Objection ¶¶1-2 and Responses ¶¶ 4-11)
C	Sticker affixed by Precision Husky Corporation
D	Deposition transcript of Bobby Ray Smith (Pages 1, 11, 16-17, 28-32, and 42-46)
E	Deposition transcript of James C. Witherspoon, Jr. (Pages 1, 43, 53-54, 57-58, 64-65, 90-91, 94-95, 105, 111, 113-118, 126-128, and 135-136)
F	Deposition transcript of Andreal Holland (Plaintiff) (Pages 1, 75-76, 82-84, 89-90, 100-107, 109, and 111- 112)
G	Deposition transcript of Roger E. Davis (Pages 1, 16-17, 54-55, 60-74, 82, 88-90, 93-95, and 208-209)
H	Deposition transcript of James Strong (Pages 1, 28-39, and 52-59)
I	Report of Roger E. Davis (Pages 1, and 5-6)
J	Deposition transcript of David E. Clement (Pages 1, 11-13, 19-20, 23, 39, and 41-42)
K	Morbark document numbers 24, 40-42, 62, 65, 70-71, 73-74, 76, 87-91

09:12:05

STATE OF SOUTH CAROLINA)
)
COUNTY OF CLARENDON)

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT

2008 CP 14-0461

ANDREAL HOLLAND by his Guardian Ad Litem PEGGY KNOX,

Plaintiff,

- vs -

MORBARK, INC., PRECISION HUSKY CORPORATION, A&K MULCH, LLC, WATFORD INDUSTRY, INC.,

Defendants.

VIDEOTAPE DEPOSITION OF LARRY NOCH

Taken by the Plaintiff on Tuesday, the 24th day of August, 2010, at 1985 Ashland Drive, Suite C, Mt. Pleasant, Michigan at 9:36 a.m.

APPEARANCES:

For the Plaintiff:
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Columbia, SC 29202
(803) 309-2535

For the Defendant Morbark:
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For the Defendant Axis Insurance:
(Via telephone)
MR. DARRELL W. CARTER, Esq.
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(803) 256-2233

EXHIBT A

09:45:18 **interrogatory questions and production materials. There's**
09:45:24 **materials that have been produced and provided to me from the**
09:45:27 **various interrogatories and depositions and production from**
09:45:33 **the other parties in this matter.**
09:45:35 Q. Okay. Anything else, sir?
09:45:42 A. **I'm sure there is. I don't recall every --**
09:45:45 Q. All right. One of the things that I wanted to start our
09:45:51 deposition this morning is I understand in response to one of
09:45:53 the questions that was asked in discovery as to who designed
09:46:02 the machine that was involved in the injuries to Mr. Holland,
09:46:05 there came back a response that Norval Morey, the owner and
09:46:11 apparently designer of this machine, was the sole source of
09:46:17 knowledge about the machine. Is that your understanding?
09:46:25 A. **Are you asking me who designed the machine or who has**
09:46:27 **knowledge about the machine?**
09:46:29 Q. Well, let's start with -- it's a difficult question because
09:46:32 Mr. Morey apparently -- let's introduce Mr. Morey. I know
09:46:36 he's passed away at this point, but what was his role in
09:46:40 Morbark?
09:46:42 A. **Norval Morey was the founder of Morbark.**
09:46:45 Q. All right. And as I recall the documents, it goes back to
09:46:51 1957 when the company was founded?
09:46:52 A. **Yeah, I think that's about right. '57 it started,**
09:46:58 **incorporated shortly after that.**
09:47:00 Q. Okay. Basically I think the promotion material indicates that

09:47:05 it started with one piece of equipment, a debarker, I guess?
09:47:09 A. **Right.**
09:47:09 Q. All right. And now it employs 500 people and has
09:47:18 international distribution and lots of different types of
09:47:20 equipment?
09:47:20 A. **Doesn't employ 500 people. We do sell our products worldwide,**
09:47:27 **yes.**
09:47:27 Q. Let me ask you a little bit more about that. Regardless of
09:47:30 how it got started, by whatever nature of information that's
09:47:38 been made available to you, can you tell me when the Morbark
09:47:45 58" Horizontal Feed, Top Discharge Chipper, Serial Number 914
09:47:56 was produced?
09:47:59 A. **Specifically Serial 914?**
09:48:03 Q. Yes.
09:48:03 A. **I believe it was in '96.**
09:48:06 Q. All right.
09:48:08 A. **I'd have to look at the sales or the build file that we**
09:48:12 **produced to verify that for sure, but that's my recollection.**
09:48:16 Q. All right.
09:48:30 MR. JONAS: Have that marked.
09:48:31 (Deposition Exhibit Number 3 marked.)
09:48:32 BY MR. JONAS:
09:48:32 Q. All right. I'm going to hand you some previously produced
09:48:35 Morbark documents. Okay. These -- because we've got counsel
09:48:39 on the phone in Columbia, these are Morbark documents one

09:48:44 through eleven, and then some photographs which I've got
09:49:02 copies here. I've got the originals in my file or at least
09:49:06 color copies of Morbark 88 through 91. Are these documents
09:49:10 you produced previously?
09:50:17 A. **Well, I'd say, yes, I'm looking at one here that I don't --**
09:50:22 **doesn't look familiar to me.**
09:50:24 Q. Which document is that?
09:50:27 A. **There's one called certified material test report.**
09:50:31 Q. All right.
09:50:33 A. **It could have been in that set. I just don't recall seeing**
09:50:36 **it.**
09:50:36 Q. All right.
09:50:37 A. **But if it was in our set, then okay.**
09:50:39 Q. All right. From those documents, can you tell me when the
09:50:47 Serial Number 914 was produced?
09:50:52 A. **Yes.**
09:50:53 Q. What date was that?
09:51:05 A. **Produced February 9 of '96.**
09:51:09 Q. Okay. And from that document, can you tell who it was sold
09:51:16 to?
09:51:19 A. **Johnson-Sherman Company.**
09:51:21 Q. Where are they located?
09:51:23 A. **Goldsboro, North Carolina.**
09:51:26 Q. All right. Now, just going back to the question about the
09:51:33 design of this machine and Mr. Morey's role in it, do you know

09:51:39 when that machine -- that model or series of machines was
09:51:44 first designed and produced?
09:51:49 A. **I can tell you that, investigating when the first machine was**
09:51:56 **produced, I can take you back to 1969 --**
09:51:59 Q. Okay.
09:52:00 A. **-- with the information I've been able to pull from our**
09:52:05 **records. Whether that was when the machine was designed, I do**
09:52:10 **not know.**
09:52:10 Q. Let me understand what machine was actually designed and take
09:52:24 it back to 1969, I think maybe the discovery documents claim a
09:52:29 few years earlier than that, but what machine or type of
09:52:34 machine is this that you're familiar with that was produced in
09:52:40 1969?
09:52:41 A. **It's a Stationary 58", Top Discharge Wood Chipper.**
09:52:47 Q. All right.
09:52:49 MR. JONAS: Let's go ahead and get this one marked.
09:52:57 (Deposition Exhibit Number 4 marked.)
09:52:58 THE WITNESS: Again, I think you said designed in
09:53:00 1969. That's not -- my testimony was that I was able to find
09:53:04 records that we produced it in 1969.
09:53:04 BY MR. JONAS:
09:53:08 Q. And I take your point. You weren't involved in the design of
09:53:11 the machine yourself?
09:53:12 A. **No, sir.**
09:53:13 Q. When did you come to Morbark?

10:07:02 A. **He's in our drafting design department.**
10:07:06 Q. Did you obtain ECNs from Mr. Strong?
10:07:12 A. **I don't recall Mr. Strong pulling those together for me, no.**
10:07:17 Q. Do you know who did?
10:07:19 A. **I don't recall specifically, no.**
10:07:22 Q. All right. Let's go back to the question about the machine which you are here to talk about, the original job order invoice and photographs produced, which is number three. You had indicated from the documents here that you had an actual date of production, and I wanted to be sure what those documents relate to. Do you do similar documents and inventory and a checklist and photographs of each machine that Morbark produces?
10:08:02 A. **Yes.**
10:08:03 Q. All right. So the fact that you have original photographs from 1996 when this machine apparently was completed and shipped, I mean, that is typical of what Morbark does?
10:08:18 A. **Yes.**
10:08:18 Q. All right. And those documents -- let me show you the originals since all I provided you was copies. I think we had Morbark 88 there. Just to refer back to it, this photograph was taken at what point in the process?
10:08:59 A. **These are exit photos.**
10:09:01 Q. Okay. And by that you mean what?
10:09:04 A. **They're being ready to put on a truck to be delivered.**

10:09:08 Q. All right. So this is finally inspected and out the door just before it gets on the truck photo?
10:09:14 A. **Right.**
10:09:14 Q. All right. And I think we have 90. Maybe it's in that stack, but Morbark 90 is just another view of the same machine?
10:09:33 A. **Same angle.**
10:09:34 Q. All right. This has got two numbers on it, 913 and 914. What is that about?
10:09:42 A. **I -- it appears to me that Johnson-Sherman ordered two machines at one time so --**
10:09:48 Q. I see.
10:09:49 A. **-- they're being delivered at the same time. And the exit photos are of the two.**
10:09:54 Q. All right. Now, the markings that are on the machine, these -- at least from the view we're looking at in 88 and 90, this would conform to Morbark's labelling system?
10:10:10 A. **What do you mean by that, "labelling system?"**
10:10:13 Q. I think in the documents, there's a checklist item that refers back to whether the Morbark warning labels are placed on the machine. Is that your understanding? I mean, is that an inspection item?
10:10:37 A. **You got to show me the document. I don't know what document you're talking about.**
10:10:40 Q. I'm asking you in a general way, does Morbark put warning labels on their machines before they send them out?

10:10:48 A. **Yes.**
10:10:48 Q. All right. And is that an item that's quality controlled?
10:10:55 A. **I think there's documents that identify what -- what decals are placed on machines, yes.**
10:11:00
10:11:02 Q. All right. So at the point of particularly Serial Number 914 leaving the shop, it had been inspected by the time that this -- these photographs were taken?
10:11:10
10:11:16
10:11:18 A. **Well, I didn't personally do the inspection, so I don't know if --**
10:11:21
10:11:23 Q. Well, if they follow -- I'm sorry.
10:11:25 A. **I don't know if the photographs were taken -- at what stage of completion those photographs were taken, but generally speaking, exit photos are taken when the machines are completed.**
10:11:31
10:11:34
10:11:38
10:11:38 Q. Well, the question is specific. Okay. You've already said these are exit photos. Are they exit photos or are they something else?
10:11:45
10:11:49
10:11:49 A. **They are photos that I was able to obtain out of our exit photo files and library.**
10:11:52
10:11:55 Q. All right. So at the time then that -- if we follow what Morbark's exit photo reveals here, we've got one side of the machine at least pictured in 88, in Morbark 88 and Morbark 90, and if I follow what this color scheme is, this is apparently an orange color, a Morbark color?
10:12:00
10:12:06
10:12:13
10:12:20
10:12:24 A. **Yes.**

10:12:24 Q. All right. You can identify Morbark equipment by the orange reddish color?
10:12:29
10:12:32 A. **That's a Morbark normal standard color, yes.**
10:12:35 Q. All right. That's different from other manufacturers; other manufacturers use different colors typically?
10:12:40
10:12:43 A. **Typically, yes.**
10:12:44 Q. All right. So if you were to look at a green-colored machine, would you know what you were looking at?
10:12:48
10:12:50 A. **Morbark would paint them green if the customer asked them to, sure.**
10:12:54
10:12:54 Q. All right. All right. Well, let's go back to this. Okay. As I see this machine then, at least from the right side, there's one sticker, one warning sticker on the moveable section of this hood. Do you agree?
10:12:58
10:13:01
10:13:05
10:13:09 A. **Yes.**
10:13:09 Q. All right. Now, there's no labels or warning information on the back trailing edge of this moveable hood?
10:13:15
10:13:19 A. **There is not.**
10:13:19 Q. All right. I take it that there's other labels on different parts of the machine? I show you Morbark 89. Okay.
10:13:26
10:13:36 A. **Uh-huh.**
10:13:36 Q. All right. These other labels that are shown here, these are, as I understand, warning labels that Morbark originated and applied to this type of equipment?
10:13:43
10:13:48
10:13:51 A. **I don't know about your characterization as warning labels.**

12:51:42 Q. All right. So you're indicating a clockwise, looking at --
12:51:45 **A. Clockwise looking at this picture.**
12:51:47 Q. Yes. Number 21 there.
12:51:49 **A. Yeah.**
12:51:49 Q. All right. And in terms of the design, we're looking at the side of the machine where apparently the opposite side from where the motor is at and the belts and all?
12:52:07 **A. I can't tell by looking at it. This looks like the top of the infeed.**
12:52:11 Q. Okay.
12:52:14 **A. So I'm going to say that the shaft protrudes out the other side in order to run it.**
12:52:19 Q. So we wouldn't look at this side to see whether or not the machine was running?
12:52:28 **A. If you're looking at the -- for the sheave, it would be on the other side.**
12:52:32 Q. All right.
12:52:35 **A. There's a pin on the other side too.**
12:52:45 Q. All right. So if the chipper was slowly moving, I guess the question is, do you know anything about the run-down time of the disc after it's powered off?
12:52:57 **A. I have an understanding of it. My understanding is that it can vary depending on material that might be in there. It can vary on the speed that it's traveling when it was shut off. But five to ten, twelve minutes --**

2:53:18 Q. Okay.
2:53:20 **A. -- thereabouts is my understanding of the range.**
2:53:22 Q. All right. So one consideration would be what's being fed into the chute or could be material being fed in there even after it's powered off?
2:53:34 **A. Well, it doesn't stop immediately when the power is shut off, so the disc still turns until it comes to a stop. But there's material, if the conveyor is still running, the material will still go until it -- until that material could cause friction to make it stop or if there's no material, have less friction, travel longer. You know, there's just variables that would -- could -- could make it be different.**
2:54:03 Q. So that the idea of having it powered off, the feed still producing the material into the machine, even after the power's off, for some period, the disc would have enough force to grind that material or to cut that material?
(Mr. Strong returns to conference room.)
THE WITNESS: I'm not sure what force would be capable of doing once you go power off.
BY MR. JONAS:
Q. All right. But the shutdown time or the run-down time in that disc would depend on the material being fed into it at the time?
A. That could be one of the things.
Q. All right. The condition of the machine, the bearings would

12:54:41 be another?
12:54:41 **A. Yes. There could be a number of reasons why it would run shorter or longer.**
12:54:46 Q. I think we're almost done.
12:54:47 (Deposition Exhibit Number 22 marked.)
12:55:39 BY MR. JONAS:
12:55:39 Q. I'm going to show you what's been marked as Deposition 22, Exhibit 22. And just by way of illustration, I mean, I represent this to you as a postaccident photograph of the machine involved, but my question goes as to the pin that holds, secures the moveable section of the hood to the machine itself.
12:56:07 In the parts manual, do you know anything about this, how it's supposed to be held in place or its tolerances?
12:56:15 **A. Well, there's a locking nut right there. Once the pin is put in and you tighten down the lock pin and that holds it in place.**
12:56:25 Q. All right. So the proper procedure for opening the hood would be what?
12:56:30 **A. Make sure it's come to a complete stop.**
12:56:33 Q. Yes.
12:56:35 **A. And then remove your vert -- or your horizontal flange bolts that are not in this picture and the vertical flange bolts that are contained on both sides of the chipper, and then remove your pins and put in your -- then put your lock, disc**

12:57:00 **lock in, open your door.**
12:57:02 Q. Okay.
12:57:03 **A. That's generally the way I would describe it.**
12:57:06 Q. All right. Would you write in where those flange bolts are at that you're referring to.
12:57:11 **A. Circle them?**
12:57:12 Q. Yes. That would be great.
12:57:13 **A. Well, there's two here. There's one there. And there's the same number on the other side.**
12:57:20 Q. All right. The bolts that are intended to be there, do you see them in that picture?
12:57:27 **A. No, I don't.**
12:57:29 Q. All right. And in that picture can you see how the hood is being held in place?
12:57:37 **A. Well, I see one hood pin on this side, but I can't see the other side.**
12:57:43 MR. JONAS: All right. Give me just a second. I think we're -- let me see here. I think we're done here. Let's go off the record.
12:57:59 VIDEOTAPE TECHNICIAN: We're going off the record at 12:58 p.m.
12:58:03 (Conference off the record.)
13:02:09 VIDEOTAPE TECHNICIAN: We are going back on the record at 1:02 p.m.
13:02:30 BY MR. JONAS:

106

13:02:33 Q. All right. Mr. Noch, couple of other points. The -- you
13:02:42 mentioned that Woodchuck, I guess it is, is one of the
13:02:49 manufacturers that's in the vicinity, is that my
13:02:53 understanding?
13:02:53 **A. No.**
13:02:54 Q. Okay. Do you know the Woodchuck people?
13:02:57 **A. Yes, I do.**
13:02:59 Q. All right. Have you ever looked at their system for securing
13:03:06 the hood until the disc is stopped to rotate?
13:03:10 **A. Woodchuck?**
13:03:11 Q. Woodchuck, yes.
13:03:12 **A. I have not.**
13:03:13 Q. All right. What about Bandit, have you looked at their system
13:03:17 for securing the hood before the chipper disc is stopped?
13:03:20 **A. A stationary chipper?**
13:03:24 Q. Any type of chipper, have you ever seen a hood-securing device
13:03:27 that prevents the hood from being opened while the disc is
13:03:32 turning?
13:03:33 **A. I am not familiar with a -- with a mechanism that stops -- or**
13:03:40 **that prevents you from being able to open the hood while it's**
13:03:43 **turning.**
13:03:43 Q. How about Vermeer, are you familiar with their product?
13:03:49 **A. I know of the Vermeer, yes.**
13:03:51 Q. All right. You're -- if I follow your answer, you're not
13:03:55 aware that they also have such a mechanism to prevent the hood

107

13:03:59 --
13:03:59 **A. Well, I mean, what I'm aware of is that they have mechanisms**
13:04:03 **that will stop the machine from running if the hood is open.**
13:04:11 **It doesn't stop the hood from being opened if it's running.**
13:04:16 **That's my understanding.**
13:04:17 Q. Do you keep up with the technical information in the industry,
13:04:22 is it your job to do that?
13:04:23 **A. Well, I've become familiar based on these kind of activities**
13:04:27 **so --**
13:04:28 Q. All right.
13:04:29 **A. But as far as keeping up on it, I'm not sure what you mean by**
13:04:35 **that.**
13:04:35 Q. Well, I mean, there are materials that are common to everybody
13:04:35 in the wood processing machine design industry, aren't there?
13:04:43 I mean, there's all grades of professional publications?
13:04:49 MR. OTT: Objection to form.
13:04:50 THE WITNESS: There's trade journals. There's
13:04:55 associations that refer to these industries, whether it be
13:04:59 Tree Care Or the Forestry Association. We're familiar with
13:05:04 those, sure.
13:05:05 BY MR. JONAS:
13:05:05 Q. Morbark advertises in all of them, or most of them? I don't
13:05:09 know if all of them.
13:05:10 **A. We place ads in those kinds of journals, sure.**
13:05:14 Q. And regularly give interviews?

108

13:05:15 **A. We'll interview. We'll interview users and customers.**
13:05:15 Q. All right.
13:05:20 **A. We're -- we're part of the industry.**
13:05:22 MR. JONAS: All right. That's all the questions I
13:05:26 have. Thanks.
13:05:27 EXAMINATION
13:05:27 BY MR. OTT:
13:05:28 Q. Just to clarify a couple of things. You've seen the exit
13:05:33 photographs for the actual machine Mr. Holland was apparently
13:05:39 trying to open the hood of when he was injured, right?
13:05:42 **A. Yes, I have.**
13:05:43 Q. Are the vertical flange bolts shown in those exit photographs?
13:05:48 **A. Yes.**
13:05:49 Q. Are the horizontal flange bolts shown in those exit
13:05:53 photographs?
13:05:53 **A. Yes.**
13:05:53 Q. You've already identified that on the postaccident
13:05:58 photographs, they are not shown, those bolts in those
13:06:02 photographs, correct?
13:06:03 **A. That's right.**
13:06:03 Q. How do you go about getting to the hood with respect to those
13:06:09 bolts? To open the hood, what do you have to do with those
13:06:13 bolts as it leaves our hands as shown in the exit photographs?
13:06:18 **A. You mean before you can open the hood, what has to happen?**
13:06:20 Q. Right.

109

13:06:21 **A. You've got to remove those six bolts and then you've got to**
13:06:25 **remove the two horizontal lock pins before that will be free**
13:06:33 **enough to open on its hinge pin.**
13:06:35 Q. How do you go about freeing those six bolts, the horizontal
13:06:44 and vertical?
13:06:45 **A. Well, you'd have to get your wrench and your tools and go to**
13:06:49 **each one individually and take them off like you take bolts**
13:06:54 **off.**
13:06:54 Q. Having reviewed the postaccident photographs that have been
13:07:01 produced in this case and comparing them to the condition of
13:07:04 this particular machine and when it left Morbark in 1996, have
13:07:09 you noticed any other differences or changes?
13:07:12 **A. Yes.**
13:07:13 Q. Tell us about those.
13:07:16 **A. Well, those six bolts are not in place. There's -- the decals**
13:07:27 **are different. And the fan blade that's on the machine is not**
13:07:39 **a Morbark fan blade as was on it when it left the factory.**
13:07:44 Q. How does the fan blade that's on the machine apparently at the
13:07:51 time of the accident compare to the one that was on the
13:07:55 machine when it left Morbark?
13:07:59 **A. It's bigger, wider.**
13:08:03 Q. Does Morbark sell that type of fan blade?
13:08:12 **A. No.**
13:08:12 Q. Do you know who manufactured that fan blade?
13:08:15 **A. No.**

110

3:08:16 Q. Do you know when it was put on this machine?
3:08:18 A. **No, I don't.**
3:08:19 Q. If it's bigger and wider, how does that input -- or impact the potential for striking the hood?
3:08:28 A. **Well, if it's wider, then there's less clearance on the inside of that housing between the fan blade and the side of the housing and/or the hood section. Be less -- far less clearance than what Morbark provides in their standard build.**
3:08:52 MR. OTT: That's all I have.
3:09:03 MR. JONAS: I have a couple more.
3:09:05 EXAMINATION
3:09:05 BY MR. JONAS:
3:09:06 Q. What is the clearance between the hood and the standard fan blades as this machine was equipped?
3:09:14 A. **Mr. Strong is going to have better specifics for you on that, but my understanding is the Morbark clearance is just under an inch. Three-quarters to an inch.**
3:09:31 Q. Okay.
3:09:36 A. **You'd have to ask Jim. He'll know for sure.**
3:09:39 Q. All right. So when we look at -- I want to go back to the stationary part -- chipper parts manual, which you're referring to in your testimony now, number 58" Chipper, you said two things, I guess. One is you refer to the bolts. Do you find the bolts in that parts list?
3:10:06 A. **There's no bolts in any Morbark parts manuals. Bolts are not**

111

3:10:13 **an item that we supply in the parts manuals.**
3:10:16 Q. But the pins are?
3:10:18 A. **The two -- the two top pins are, yes.**
3:10:21 Q. This deposition exhibit that you produced today, number two, which apparently is another reference to the hood design, this is -- how do you represent this? I mean, are these changes to the machine we're concerned about?
3:10:45 A. **You'll have to ask Jim about what -- what the prints are telling you. He would be more familiar than I will.**
3:10:48 (Ms. Jonas returns to deposition.)
3:10:48 BY MR. JONAS:
3:10:54 Q. All right. So in terms of the materials that are part of number two here, Deposition 2, your testimony is you don't know what all this is about?
3:11:08 A. **No. That's not what I said.**
3:11:11 MR. OTT: Objection to form.
3:11:11 BY MR. JONAS:
3:11:18 Q. Well, to the extent you can answer, will you answer the question.
3:11:19 A. **Sure.**
3:11:19 Q. What are these things?
3:11:19 A. **They're prints of the hood.**
3:11:19 Q. Right. Is this the hood design that was on the machine at the time that the accident happened? This is a 1996 version.
3:11:24 A. **I'm not sure. Jim would be able to answer that.**

112

3:11:36 Q. All right. I'm just going to ask again. I mean, can you -- what do you know about Exhibit 2?
3:11:50 MR. OTT: Objection. Form.
3:11:51 THE WITNESS: Well, I don't know the answer to the first question you asked me. Do you have another?
3:11:57 BY MR. JONAS:
3:11:57 Q. Did you review these?
3:11:59 A. **I've seen them, yes.**
3:12:00 Q. Okay. Well, let's look at them then. Okay. At the time that -- I see the pin, at least a modification of the pin as referred to here in the drawing, looks like it's got a hole in the pin. Is that where this three-quarter-inch diameter times 11-inch, I guess -- looks like it's nine inches out across the working part. Do you know anything about this? Is this a change?
3:12:38 A. **It's a print of the pin as of the revision dates dated on the print.**
3:12:46 Q. Okay. 1989?
3:12:48 A. **So in 1989, that's what that print -- or that part number's print is. If that continues to be the print or the part in use as of 1996 when the machine was built, that's why we would produce it, because it's relevant to the Serial Number 914.**
3:13:10 Q. Well, look at number three here, which is the pin in the parts manual. Okay. Is that -- just to be sure we're looking at the same thing.

113

3:13:28 A. **It says part number 30107-480. This is 30107-480.**
3:13:34 Q. All right. So looking then at Deposition Exhibit 2, we've got a specific drawing of the pin with a hole in it?
3:13:43 A. **Yeah.**
3:13:44 Q. Okay. It's not pictured in the parts manual, but this obviously is the pin that went into the original production of the Serial Number 914?
3:13:55 A. **It is pictured in the parts manual.**
3:13:58 Q. But without the hole?
3:14:00 A. **Well, I don't know. Can you see if there's a hole in that picture or not? Pretty small.**
3:14:04 Q. All right.
3:14:09 A. **I can't tell if there's a hole or not in that picture.**
3:14:11 Q. All right. I think you've answered the question. All right. So at the time then that these changes were made, all these changes applied to the 1996 model?
3:14:22 MR. OTT: Objection.
3:14:22 BY MR. JONAS:
3:14:23 Q. On Exhibit 2?
3:14:24 MR. OTT: Objection. Form.
3:14:26 THE WITNESS: I don't know that. Jim will help you get through that.
3:14:30 BY MR. JONAS:
3:14:32 Q. All right. So according to your information, it was -- the original Morbark fans that are part of, and shown in this

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THIRD JUDICIAL CIRCUIT
COUNTY OF CLARENDON	)	
	)	
Andreal Holland by his Guardian ad Litem Peggy Knox	)	
	)	
Plaintiff,	)	CIVIL ACTION NO.
	)	2008-CP14-0461
v.	)	
Morbark, Inc.; Precision Husky Corporation; A&K Mulch, LLC; Watford Industry, Inc.	)	
Defendants.	)	

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DATE 11/25/09
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CLERK OF COURT
CLARENDON COUNTY, SC

2009 NOV 25 P 12:02
BEULAH S. ROBERTS
CLERK OF COURT
CLARENDON COUNTY, SC

PRECISION HUSKY CORPORATION'S RESPONSES TO PLAINTIFF'S INTERROGATORIES

Defendant Precision Husky Corporation ("Precision Husky") hereby responds to the Interrogatories of Plaintiff Andreal Holland by his Guardian ad Litem Peggy Knox ("Holland") as follows:

GENERAL OBJECTIONS

1. These responses are made solely for the purpose of this action. Each response is made subject to all objections as to competence, materiality, relevance or other objection as to admissibility that may apply in the event that any such response, or the information contained therein, is sought to be used in court. Precision Husky expressly reserves all such objections.

2. Precision Husky objects to each and every request to the extent that the information called for, if any, was obtained and prepared in anticipation of litigation or for trial. Precision Husky further objects to each and every request to the extent that the information called for, if any, is privileged and is not discoverable under Rule 26(b)(1) of the South Carolina Rules of Civil Procedure.

EXHIBIT B

4. List the names and addresses of any expert witnesses whom the party proposes to use as a witness at the trial of the case.

RESPONSE: Precision Husky objects to this Interrogatory on the grounds that such disclosure is premature and seeks information that may be protected by the attorney-client privilege and/or work product doctrine. Precision Husky further states that no decision has been made at this time regarding experts who may testify at trial, but that it will supplement its response in accordance with the Rules of Civil Procedure and any Scheduling Order entered by the Court.

5. For each person known to the parties or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witness.

RESPONSE: See response to Interrogatory No. 1. Precision Husky objects to any further response as calling for information protected from disclosure by the attorney-client privilege and/or work product doctrine.

6. For each expert whom the party proposes to use as a witness at the trial of the case, set forth a summary of his anticipated testimony sufficient to advise the undersigned party of the evidence, information and documents utilized by such expert in his review of this matter, the opinion reached by such expert on the basis thereof and the theory which such opinion is based.

RESPONSE: Precision Husky objects to this Interrogatory on the grounds that such disclosure is premature and seeks information that may be protected by the attorney-client privilege and/or work product doctrine. Precision Husky further states that no decision has been made at this time regarding experts who may testify at trial, but that it will supplement its response in accordance with the Rules of Civil Procedure and any Scheduling Order entered by the Court.

7. Identify the date and explain how the machine was purchased and/or consigned to Precision Husky Corporation.

RESPONSE: The chipper at issue was received on or about August 24, 2005 as a trade-in from J. H. Chewning Lumber Company, Inc., 11252 Post Oak Road, Spotsylvania, Virginia.

8. Identify each and every inspection and/or modification of the machine that was performed by, or on behalf of, Precisions Husky Corporation while the machine was in the possession, or under the control of, Precision Husky Corporation.

RESPONSE: Precision Husky's only material modification was to add three warning decals to the hood of the chipper. Precision Husky reserves the right to supplement this response as additional information becomes available.

9. State the name and address of the seller or consigner of the machine to Precision Husky and the date of such event.

RESPONSE: See response to Interrogatory No. 7.

10. Identify the purchaser of the machine and the terms and date of sale by Precision Husky.

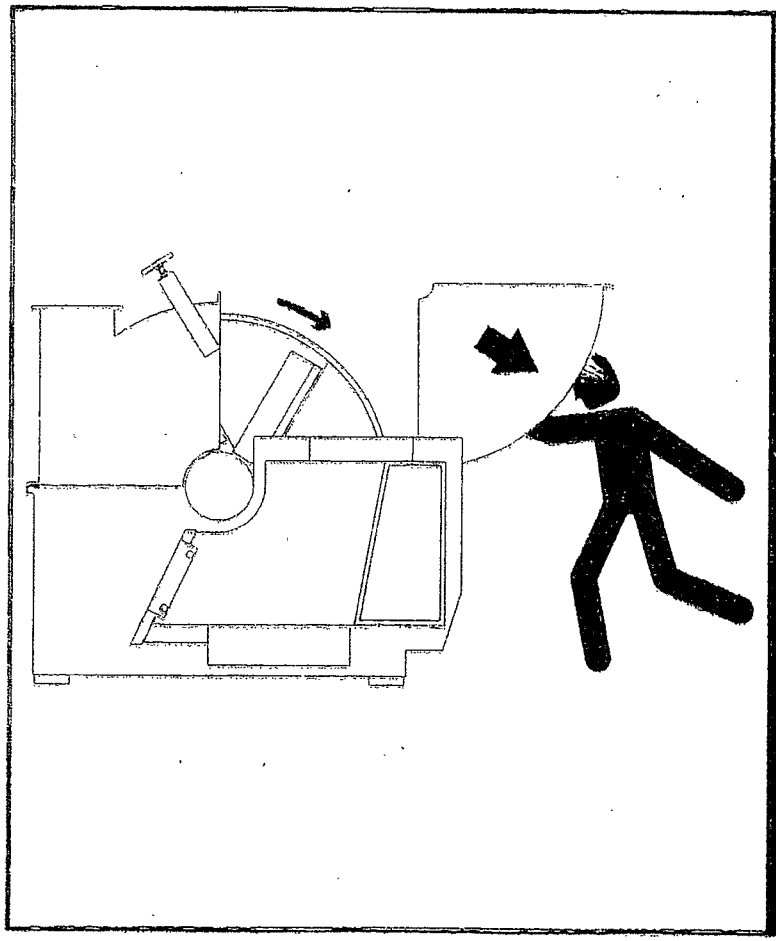
RESPONSE: The chipper at issue was sold on or about March 14, 2006 to J.C. Witherspoon, Jr., Inc., P.O. Box 289, Alderman County Road, Alcolu, South Carolina. Precision Husky refers Plaintiff to the documents produced in response to the Requests for Production served simultaneously with these Interrogatories for additional information on this sale.

11. Identify in detail all markings, warnings and operator instructions that were attached to, or incorporated in/on, the machine and/or machine components when the machine was first purchased or consigned to Precision Husky Corporation.

RESPONSE: None known. Precision Husky reserves the right to supplement this response as additional information becomes available.

12. Identify in detail all markings, warnings, operator instructions, parts manual(s), maintenance manual(s), notices, revisions, that accompanied the machine when it was first purchased or consigned to Precision Husky Corporation.

EXHIBIT C



⚠ DANGER

- Never operate chipper with missing hood bolts.
- Never operate chipper without hood lock secured.
- Never open hood while disc is turning.
- To confirm disc is stopped, visually check disc shaft or drive wheel.

97-4263

IN THE STATE OF SOUTH CAROLINA

COUNTY OF CLARENDON

CIVIL ACTION NO: CV 2008-CP-14-0461

ANDREAL HOLLAND, by his Guardian Ad Litem, PEGGY KNOX,

Plaintiff,

VS.

MORBARK, INC., et al.,

Defendant.

DEPOSITION

OF

BOBBY RAY SMITH

REPORTED BY: Kelly Jackson
Registered Professional
Reporter
and Notary Public

EXHIBIT D

DATE: November 18th, 2010

Q. Who are some of the competitors of Precision Husky?

A. Morbark, Fulghum, Peterson Pacific, bunches of them, CAE, just lots of competitors.

Q. And can you tell us what kind of products or machines that Precision Husky designs and manufactures? Give us sort of the spectrum.

A. We manufacture chippers, debarkers, chip screens, vibrating conveyors, mobile and stationary. We manufacture tub grinders, horizontal grinders.

Q. Mr. Smith, would you tell us how far you went in school and what you studied?

A. I finished high school. My father passed away between the eleventh and twelfth grade. So I had to go to work.

Q. Where did you start working?

A. I started with a little company here in town called Richardson Machine Company. It is a little machine shop. I was a machinist by trade and I started there in 1952.

stationary wood chippers?

A. My experience has been from building all of the parts. When I say all of them, I am speaking of any part that required machine work. I built those parts many, many times. And I worked in assembly, I worked in maintenance, I was a service man, I pretty much done all of it over the years.

Q. How many years then total, Mr. Smith, have you worked in the forestry industry in specific with wood chippers?

A. More than fifty years.

Q. Have you been involved with training operators of wood chipper machines?

A. Yes.

Q. Tell us about that.

A. In the early days -- we still send out service people to start up the chipper. And we train the operators how to change the anvils and change the knives and the safety aspects and generally stayed with the operator for a day, could be two or three days. But generally spend a day with them.

Q. Mr. Smith, I am going to get you to brag on yourself a little bit. But do you consider yourself as knowledgeable as anyone in the industry regarding the design and manufacture of wood chipper machines?

A. Do I have to answer that?

Q. You do have to answer that.

A. I have a lot of experience in manufacturing chippers, perhaps more than anybody that I know.

Q. At this time we proffer Mr. Smith as an expert in the areas of design and manufacture of wood chipper machines. Mr. Smith, this lawsuit concerns an accident --

MR. JONAS: Objection to the question. I would like to voir dire the witness at this point.

MR. OTT: Certainly.

VOIR DIRE EXAMINATION BY MR. JONAS:

Q. Mr. Smith, my name is Don Jonas. I represent Andreal Holland by his guardian ad litem Peggy Knox. You are familiar with that case since you were a party to it and having

in a break so as not to waste any time. Is that unusual for Precision Husky to take in and resell a chipper that was originally designed and built by another company such as Morbark?

A. No. We do that.

Q. And in the course of the work Precision Husky performed after taking that machine in, did Precision Husky at any time contact Morbark about this machine for any reason?

A. No. Not to my knowledge.

Q. Do you have any information that Morbark was aware that Precision Husky had resold this machine to A & K Mulch?

A. I have no knowledge of that, no, sir.

Q. Do you have any information that Morbark was even aware that Precision Husky had this machine in its possession?

A. No, sir.

Q. Did Precision Husky do any work on the chipper blades?

A. No, sir.

Q. The fan blades before they resold the

machine?

A. No, sir.

Q. I am going to represent to you that the facts have established that the blades on the machine at the time of Mr. Holland's accident were neither original equipment nor even built or designed or manufactured by Morbark.

MR. JONAS: Object to the question.

Q. With that understanding, do you know who manufactured the blades on the fifty-eight inch chipper when you resold it?

A. No, sir.

Q. Do you know when those blades that were on the machine at the time of the accident were added to it?

MR. JONAS: Object to the question.

A. No, sir.

Q. Can you describe generally the work that Precision Husky performed on the machine, if any, between the time that it took it in and the time that it resold it to Mr. Holland's employer?

A. The only thing that Precision Husky did

was to clean the chipper up and I believe repainted the machine and put decals on it, warning decals on it.

Q. Mr. Smith, I am going to hand you what has previously been marked as Exhibits 1 through 4 to your deposition. Have you had a chance to take a look at those exhibits?

A. Yes, sir.

Q. You mentioned Precision Husky added warning decals to the Morbark chipper before reselling it?

A. Yes, sir.

Q. Can you identify the warning label that was added to the machine?

A. Defendant's Exhibit Number 1 is the one that was on the hood itself.

Q. And would you read the written portion of the warning label shown in Exhibit Number 1?

A. It says danger, never operate chipper with missing hood bolts. Never operate chipper without hood lock secured. Never open a hood while disc is turning. To confirm disc

is stopped, visually check disc shaft or drive wheel.

Q. Looking at what is marked as Exhibits 2, 3 and 4, do you see the warning label shown in Exhibit 1 on the hood of the subject chipper?

A. Yes, sir.

Q. And do you understand that those photos were taken after Mr. Holland's accident?

A. Yes, sir.

Q. How many warning labels the same as Exhibit Number 1 are on that machine hood?

A. I believe there are three.

Q. Why did Precision Husky add those warning labels before reselling the chipper?

A. Well, the -- obviously there would not have been any legible warning decals on the machine when we traded it in. So if there -- either there are no decals on it or nothing legible, then we customarily put our decals on it for warning purposes.

Q. And does that happen with wood chippers in the field that sometimes they get beat up and the warning labels get scratched,

destroyed and what have you?

A. Yes, sir.

Q. Is it unusual to have to order new warning labels to put on a machine after it has been in use for some period of time?

A. No, sir. That is done.

Q. Who designed Exhibit Number 1, that warning label, that Precision Husky attached to this chipper?

A. I am not sure who designed it. I think it would have been in conjunction with the label supplier that we have used for so many years.

Q. Who was that label supplier?

A. I am sorry, but -- I am sure it is in the records, but I don't remember the name offhand.

Q. How long has Precision Husky been using that particular warning label?

A. I would say twenty years, fifteen or twenty years, maybe more.

Q. Mr. Smith, what is that warning label or decal designed to convey to the operator?

bolts and pins and/or hood lock attached, yes, sir, he would have been injured.

Q. When he opened those locks or took off the bolts or took off the pins before the drum had stopped moving, the drum could have struck the hood and pushed it forward as shown in that decal?

MR. JONAS: Object to the question.

A. Yes, sir.

Q. Back in 1996 did Precision Husky incorporate an inner lock on the hood of its stationary chippers?

A. No, sir.

Q. Back in 1996 did Precision Husky incorporate a motion detector on the hood of its stationary chippers?

A. No, sir.

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.

Q. Mr. Smith, do you have an opinion to a reasonable degree of scientific certainty whether Precision Husky's hood design for its stationary wood chippers back in 1996 was defective or not?

MR. JONAS: Object to the question.

A. I am sorry?

Q. Do you have an opinion to a reasonable degree of scientific certainty whether Precision Husky's hood design for its stationary wood chippers back in 1996 was

defective or not?

MR. JONAS: Object to the question.

A. I do have an opinion.

Q. What is your opinion?

A. Absolutely not defective.

Q. Do you have an opinion to a reasonable degree of scientific certainty whether Precision Husky's hood design for its stationary wood chippers back in 1996 was unreasonably dangerous or not?

MR. JONAS: Object to the question.

A. I do have an opinion.

Q. And what is your opinion?

A. Absolutely not.

Q. Mr. Smith, do you have an opinion to a reasonable degree of scientific certainty whether the hood design of the Morbark fifty-eight stationary wood chipper was defective?

A. I do.

Q. And what is your opinion?

A. It is not defective.

Q. Do you have an opinion to a reasonable degree of scientific certainty whether the

hood design of the subject Morbark fifty-eight inch wood chipper was unreasonably dangerous?

A. I do.

Q. And what is your opinion?

A. It is not.

Q. Last two questions from me, Mr. Smith. Do you have an opinion to a reasonable degree of scientific certainty whether a stationary wood chipper of the approximate size of the Morbark fifty-eight inch that does not have an interlock or motion detector for the hood is defective because of the absence of such a device?

A. Do I have an opinion?

Q. Yes, sir.

A. Yes, sir.

Q. And what is your opinion?

A. It is not.

Q. And, lastly, is the design unreasonably dangerous because of the absence of such a device?

A. No, sir.

Q. And do you hold that opinion to a

reasonable degree of scientific certainty?
A. Yes, sir.
MR. OTT: Please answer any more questions that Mr. Jonas has and I thank you for your time.
A. Yes, sir.
THE VIDEOGRAPHER: Going off the record. The time is nine forty-five a.m.
(Short recess.)
EXAMINATION BY MR. JONAS:
Q. Let me ask you a few more questions about your background. As a machinist, you learned your trade, I guess, by actually operating the equipment?
A. I did.
Q. Apprentice?
A. Yes, sir.
Q. And you can competently operate lathes, milling machines in mills and that sort of thing?
A. I can, yes, sir.
Q. Have you ever actually manufactured any of the equipment at Precision Husky; that is,

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS

COUNTY OF CLARENDON 08-CP-14-0461

Andreal Holland, by his
Guardian ad Litem, Peggy Knox,

Plaintiff,

vs.

Morbark, Inc., et al,

Defendants.

Deposition of JAMES C. WITHERSPOON, JR. taken on June 30, 2010, commencing at 1:10 p.m. at the Law Offices of Land, Parker and Welch in Manning, South Carolina.

Laura B. Landrum, Notary Public for South Carolina.

APPEARANCES

FOR PLAINTIFF:
Donald E. Jonas, Esquire
Columbia, South Carolina

FOR DEFENDANT MORBARK:
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Columbia, South Carolina

FOR DEFENDANT PRECISION HUSKY:
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FOR DEFENDANT A & K:
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FOR DEFENDANT WATFORD:
Saunders M. Bridges, Esquire
Florence, South Carolina

*Exhibit Index is located on pages 155-156 of transcript.

EXHIBIT E

Q. The operator -- at least Mr. Holland's job would have been to be back and forth between these two pieces?
A. Mr. Holland's job, as you're referring to it, would have been to do the chipper knife maintenance on it. He would not be considered a -- at A & K we had no specific chipper operator.
Q. At the time, though, that -- and I appreciate that, and I guess twice a day you changed the knives?
A. Normal maintenance requires twice a day.
Q. So Holland, when he wasn't changing knives, what would he do?
A. Most of the time he went back in the mill to operate the chop saw, and that is a different type piece of equipment. It does take physical work to operate it.
Q. So the idea is to get the pieces in such a size and fashion that they'll feed through this mill process?
A. It could be, yes, sir. Some of the product that he would chop would end up in the chipper, and some would not.
Q. All right. And there would have to be some selection going on at some point?
A. That's correct.
Q. If you had a piece that clearly was not suitable?
A. That's correct.
Q. What happens to the scrap that's not suitable?

you?
A. No, you change knives.
Q. Where do you go to get the new knives, or the sharpened knives?
A. The saw shop. We have our own knife grinder where we sharpen the knives.
Q. So there's always a new set ready to go when he's ready?
A. There's supposed to be.
Q. And to get this thing and, of course, the whole case is about whether that thing was turning when he opened that hood, I mean, that's what the case is about. You understand the allegation is that he didn't know it was turning.
A. I've been around chippers all my life and there's no doubt when one of these things is turning. This disk is 58 inches in diameter and three to four inches thick.
Q. What type of procedure do you train any chipper operator to follow in servicing a machine like this?
A. The first thing that you do -- are you talking about daily servicing or maintenance?
Q. Just as an operator, which I understand includes changing knives.
A. Okay. The first thing you do is go to the electrical

box and you lock it out and tag it out with your own lock that you're furnished. That's the first thing that you do. The second thing you do is you come over to the piece of equipment and you observe whether the disk is still turning.

Q. Where do you observe that?

A. There's a couple of different areas. You can look at the flywheel from the back side. You can see the belts or you can look visually right in this hole here and see whether the disk is turning. You can look in here and see whether the shaft is turning.

Q. Let's be very clear about what you're saying. When you refer to belts, you're talking about -- I'm looking at Nine-A here. This yellow guard over the top of what are apparently the belts.

A. Yeah. There's a big shiv here and a smaller shiv on the other side, and there's probably six big belts that wrap around those shivs.

Q. So if you were going to use that as a method of looking at the machine, you wouldn't -- you can't see through the guard. You'd have to look at this space between the guard and what is essentially the drive shaft for this?

A. Yes. You can look from here and see the shaft which is located here, or you can look here.

number, but when you tell people how to operate this machine, what do you warn them against? What do you tell them to do?

A. You wait until that disk has stopped.

Q. So you tell them to look down the in-feed chute?

A. Well, this is the first place you want to look.

Q. Okay.

A. That is the easiest location.

Q. And this would be under the belts through this space between the guard and the hood?

A. There's no guard between here on the inside. You only see the guard from the outside.

Q. All right. So in your training -- do you ever train anybody to operate that machine?

A. Oh, yes, sir.

Q. Did you train Mr. Holland?

A. I don't recall.

Q. Mr. Woods would have done it?

A. Possibly.

Q. Anybody else that would have been involved in that?

A. It's possible that some of the other -- another employee might have helped train him on that, but I'd make the assumption that Mr. Woods was involved in the training. Now, I want to inject this. Prior to Mr. Holland's injury, I observed him doing what

injured him myself.
Q. What was it that you observed?
A. What he did to get injured was to open that hood without it stopped, and we had quite a sermon.
Q. All right. When was that?
A. Prior to him being injured, but I did not document the date.
Q. What's your recollection, a day before or a month before?
A. A month. That's just a guess, though, because this piece of equipment had only been installed for a short period of time prior to the accident.
Q. Let's go back to that. When you had the occasion to -- I think you said that you'd had some contact somewhere that put you on to this piece of equipment. Is that --
A. Well, I made the phone call and initiated it myself.
Q. Had you bought other equipment from Precision Husky?
A. Maybe parts. I don't recall as far as -- we might have. I don't remember.
Q. In one of these photos it shows some other Precision Husky equipment there. Apparently, you've got other equipment.
A. Yes.
Q. What is that?

think that's consistent. Plaintiff's Exhibit Fourteen is a parts manual for the Morbark equipment.

A. That's what it appears to be, yes, sir.

Q. And this would apply to both the 48-inch and the 58-inch machines that you got?

A. It appears to be, yes, sir.

Q. Morbark apparently has got a decal kit.

A. I'm sure they do, yes, sir.

Q. I mean, that probably --

A. And it's probably in the parts book. I'm not sure of that but --

Q. All right. The parts manual has a variety of information and on the back of the exhibit here, it refers to a number of Morbark 066 through Morbark 075. These look like decals that Morbark ultimately provides for their chipping machine, the 48-inch and 58-inch models. Do you agree with that?

A. It appears to be, yes, sir.

Q. As a part of this exhibit, there also is attached a safety operator's manual, and that starts with Morbark 024 and it looks like it goes through Morbark 060. Is that safety manual something you were provided?

A. It could have been.

Q. Do you keep one near or around the machines anywhere?

A. We have them, yes.
Q. Where are they kept?
A. They could be in the office or in Woodrow's office. Some of the equipment has a place for that information to be kept on it.
Q. At some point was there training on this safety manual provided to Mr. Holland?
A. Whatever safety is referred to in there, he would have been trained on that. Whether he was trained specifically out of this manual, he could or could not have been.
Q. So Mr. Woods would have trained him based on his knowledge of this manual?
A. If he did the training for him, yes, sir.
Q. All right. But you don't have any idea that Mr. Holland ever saw that manual?
A. I don't have any idea.
Q. Okay. Do you know the history of the machine, where it was before you got it?
A. No, sir.
Q. Let's get this marked.
PLAINTIFF'S EXHIBIT FIFTEEN WAS MARKED.
Q. Plaintiff's Exhibit Fifteen starts with Morbark 001 and I'm not sure it's continuous but the last page is Morbark 096, and Exhibit Fifteen has been provided

Q. And all Mr. Bradham does is quarterly and year-ending returns?
A. Basically, yes, sir.
Q. All right. You've testified to a couple of things that I want to ask you a little more about. I want to make sure I understand your answer. You have had -- made the statement that you had some conversation with Andreal Holland. I don't know that you had a specific date, but I think you said something like a month or more before this accident happened, about how he was operating the chipper machine. Is that what you said?
A. Yes, sir. He was not following procedure.
Q. What time of the day was it?
A. In the afternoon.
Q. About what time, do you know?
A. It was after four o'clock or after knock-off time. I'm not sure what our hours were on that given date.
Q. So on that occasion were you in the area specifically for some reason that you can recall?
A. I might have been inspecting some lumber or getting ready to do something, but I noticed when he opened it, the disk was still turning slowly and we had a word of prayer because I know just how dangerous that is, and I don't -- I for sure don't remember

everything I said, but I went back over our safety procedure with him and just drilled him as hard as I knew how, you know, "You are not to ever, under any circumstances" --

Q. Do what?

A. Do what I had just seen him do.

Q. I know this is tedious, but what did you see him do?

A. He opened the hood before the machine had stopped, before the chipper disk had stopped turning.

Q. All right. Here's my question specifically. Did you see him knocking the pins out of the hood?

A. No, sir, I did not.

Q. So they were already out when you came on the scene?

A. Yes, sir.

Q. And you saw him opening the hood or was the hood already open?

A. The hood was already open and the disk was still turning.

Q. What was he doing?

A. He was standing there with it.

Q. Okay. How much does that hood weigh?

A. To physically pick it up, probably between 150 to 200 pounds, as far as the physical weight of the hood. On the hinge point, I don't know how much physical energy as far as foot pounds it would take to pull

fanblade might would be or a twig paddle might would be located as far as where they're located on the chipper disk, and where they're located at with the hood as far as whether they might contact it. Keep in mind, this is a hinge joint that a man physically moves, so you cannot -- it can't be fit precision tight like a roller bearing might would be.

Q. Here's where I'm going. I want to know if you know how this accident happened. I mean, have you got any special insight that no one else has had about how this happened?

A. The only thing I can tell you, sir, is that it's very -- you know, from the scene of the accident, as far as whatever was there when I got there, which was the same evidence that Woodrow Woods saw when he was called back there, is the same evidence of what I warned him about, and what he had done was the result of doing what he had been instructed not only in training but by me personally not to do. Other than -- and I'm going to extend this just a little bit, the way you're going about the three different testimonies. The fact is, it's what it is. It seems to me like you were saying these were fabricated stories. The fact is, he opened the hood with the disk turning. There's no way that hood could have

gotten damaged without the hood turning.
Q. I'm just asking you a question, and here's where it's going. What you warned him about, based on your meeting, seemed to be to be careful that he didn't get himself into the chipper. Isn't that what you were worried about?
MR. ECTON: Object to the form.
MR. OTT: Same objection.
A. That is one of many things that could happen by opening that disk -- the hood to that chipper. Going into the chipper disk, the hood hit a piece of wood there, as you saw stuck in the corner of the knife. There's multiple things that can happen. I mean, the hood is on there for a reason.
Q. If a man pulls the hood from the rear, it's not likely that he's going to get himself into the chipper. Would you agree with that?
A. No, sir. When you pull -- it takes some power but if a man stumbles and slips -- I mean, freak accidents happen.
Q. Well, that may be but here's what we've got. We know it was powered off and tagged out. There was some period of time for it to run down. There was some question about why he was looking at it, but I take your point that we've got Mr. Woods apparently making

look at to see how long he has worked or had worked for your company before the accident?
A. The payroll records should indicate that.
Q. All right. Can you put your hands on those, because I don't know exactly what numbers those are going to be?
A. We'll have the daily attendance record that we'll probably go by as far as payroll records that would indicate -- the application was on 11/18/03 is what it shows, and --
Q. Right. Jump ahead to AK 5, and maybe this will help us. There's an employee's master record, and it says date employed at the top "April 5, 2004."
A. Right.
Q. As far as you know, is that when Mr. Holland started working for --
A. To the best of my knowledge.
Q. -- A & K Mulch?
A. Yes, sir.
Q. Now, A & K Mulch was formed in 2003 or 2004?
A. '03, I think it was.
Q. So was Mr. Holland always employed by A & K Mulch from the time that he started with any company that you're an owner of up until his accident?
A. To the best of my knowledge, yes.

associated with the knife and fan blades. You know, it's just -- you basically just go through the whole scenario of what is part of his job as far as changing knives.

Q. And you don't recall between you and Mr. Woods who trained Mr. Holland?

A. No, sir, I don't.

Q. How long does it take to train somebody on changing out the knives?

A. Thirty minutes.

Q. Is the employee provided with --

A. Well, let me back up. It depends on if you're going to train him at dinnertime when the mill is still running, and stop, then it would take longer. But if the machine and everything is dead, thirty minutes to an hour.

Q. Is the employee given any written materials about how to go about changing the knives?

A. Not to my knowledge. Could or could not have, but --

Q. Is the employee shown the operator's manual that comes with this machine?

A. Not necessarily.

Q. Is he required to read it before he operates it?

A. Not per our requirements.

Q. Once the training goes through -- let me back up. Is

Q. Is it critical for the employee to make sure that the disk has stopped turning before he attempts to loosen those bolts holding down the hood?
A. It's critical to make sure the disk has stopped turning before they do anything to it.
Q. And is that stressed specifically to the employee during his training?
A. Most definitely.
Q. Do you advise the employee during his training that if you don't let the disk stop turning before you begin working on the machine, that you can get hurt?
A. By all means.
Q. Is that passed along verbally to the employee so that even if they have difficulty reading these warnings we're about to look at, that he or she would clearly understand, "Do not touch this machine until the disk has stopped"?
A. That is not only with the employee, it is also with the rest of the employees at the mill to -- with any piece of moving equipment -- a saw mill -- not only a chipper but any piece -- a saw mill. You have to be locked out, tagged out and stopped before you do any kind of maintenance on it.
Q. And even in a situation like this where the disk will continue turning after the machine is locked out and

tagged out, you have to go the additional step to make sure that the disk has stopped moving before you approach and touch the machine.

A. By all means.

Q. And that is clearly conveyed to every employee who is trained to work on this machine?

A. Yes, sir.

Q. And even if they can't read, they would certainly understand that based on your verbal training that you give or Mr. Woods gives?

A. Yes, sir.

Q. And that, on a month -- or within a month before this incident, is what drew your attention to Mr. Holland when you saw him working with the hood open and the disk still moving, correct?

A. Well, no, he had been trained not to do that with it still moving. I caught him doing it against company policy, against the way he was trained, and that's why it was such a very --

Q. But what drew your attention was -- you weren't specifically supervising Mr. Holland that day, were you? You were just passing through the yard?

A. That's correct.

Q. And you saw the disk still moving and the hood open?

A. That's correct.

Q. And you immediately recognized how dangerous that was, correct?
A. I knew what he had done.
Q. And recognizing that danger, you didn't go to Mr. Woods or anybody else. You went directly to Mr. Holland and confronted him with what he was doing, correct?
A. That's correct.
Q. And you read him the proverbial riot act about how dangerous it was and how he had been trained to do the exact opposite of what he was doing at that time, correct?
A. Yes.
Q. And did you stress to him that he personally could get hurt by doing what he was doing and working on that machine before that disk had stopped moving?
A. Yes, sir.
Q. And after you read him the riot act, so to speak, was there any doubt in your mind that Mr. Holland understood the requirement to make sure that disk stops moving before he physically touches that machine?
A. When I walked away, in my mind there was no doubt that he had understood what I told him.
Q. If you had any doubt in your mind, would you have

spent additional time with him to make sure he understood that important safety precaution?

A. He probably would not -- I probably would not have allowed -- if I felt like he didn't understand what I told him then, he probably would not have been allowed to perform that duty ever again.

Q. So you felt confident and satisfied that he understood going forward from that incident about a month before his accident -- that he understood and knew not to touch that machine while that disk was moving?

A. Yes, sir.

Q. And afer locking it out and tagging it out -- that's at a different location than the actual machine where it sits, correct?

A. That's correct.

Q. And any operator would know based on his training that it takes some amount of minutes from locking out and tagging out for that disk to coast to a stop, correct?

A. Yes, sir.

Q. And the employee is taught how to make sure that that disk is stopped before touching the machine, correct?

A. They know how to visually inspect whether it has stopped.

Q. And you showed us those three different points where the employee can look without having to touch the machine to determine if the disk is stopped or not, correct?

A. That's correct.

Q. In fact, you can hear the disk still turning as it coasts to a stop, can't you?

A. Yes, sir.

Q. And you can even feel vibrations on that guard without touching the actual disk area -- but on that yellow guard in the photographs, you can feel it, if you're the operator, that it's still moving.

A. Yes, sir, most of the time, you can.

Q. Now, once the operator -- I said operator -- it's not really the operator. Once the person doing the maintenance, in this case Mr. Holland, has satisfied himself that the disk has stopped moving, then what is he to do?

A. Then if he has already locked out and tagged out, he goes and moves the pins and pulls the hood back and does the maintenance.

Q. Now, these pins that you're talking about, these are the pins that the photographs shows Mr. Wood beating with a hammer, right?

A. Yeah.

Q. There's actually two of them, correct?
A. Correct.
Q. One on each side?
A. That's correct.
Q. Now, to do that -- to beat those pins, you would have to touch the machine, correct?
A. Yes.
Q. And if you touch the machine, you can feel whether the disk is still moving or not, because it would be vibrating?
A. You should, yes.
Q. So even if Mr. Holland had somehow forgotten to look to make sure that the disk had stopped turning, when he went to loosen those bolts on both sides, he would have felt and probably also heard the machine and its disk still turning?
A. He should have felt -- as far as there might have been something else going on around that -- you know, unless you were specifically listening for the belts still to turn, you might not have heard it, but as far as feeling, yes.
Q. And he would have heard it on the one side when he did that, and he would have heard it or felt it on the other side when he knocked out the other one?
A. Yes.

machine?
A. Not based off the training. That wouldn't hit on whether -- warning or no warnings.
Q. Did you ever draw the employee's attention to Exhibit Number One on the machine at issue?
A. Not specifically that I remember.
Q. Looking closely at Exhibit Number One and the actual wording, "Never open hood while disk is turning." Did you stress that to the employees who would work on this machine?
A. Oh, yes.
Q. The last one, "To confirm disk has stopped, visually check disk shaft or drive wheel." Did you stress that particular bullet point to the employees who would work on this machine?
A. Yes.
Q. Is there anything in your mind that's difficult to understand about "Do not open hood while disk is turning?"
A. No, sir.
Q. Is there anything difficult to understand about "To confirm disk is stopped, visually check disk shaft or drive wheel?"
A. No.
Q. And even if someone had problems reading that, is it

true that you stressed both of those bullet points to them to make sure that they understood it, even if they would have a problem reading?

A. Yes.

Q. Looking at the diagram, as opposed to the actual wording, what does that diagram show you?

A. It shows one of the consequences of opening the hood with the disk still turning, what could happen.

Q. And what does that picture show?

A. It shows the hood hitting the man in the head.

Q. And is that exactly what you understand happened with Mr. Holland?

A. Yes, sir.

Q. That the disk was moving, the hood was opened prematurely, and the hood came back and hit him exactly where this diagram shows?

A. It hit him in the head. I don't know what part of the hood hit him but, basically, yes.

Q. Is it true, Mr. Witherspoon, that if Mr. Holland had not opened the hood while the disk was turning, that this accident would never have happened?

A. There's no doubt in my mind.

Q. Is it true that if he had seen this diagram and read this warning in Exhibit Number One and adhered to it and paid attention to it, that this accident never

would have happened?
A. If he had acted upon the way he was trained along with what's on there, it would never have happened.
Q. And indeed, as to Mr. Holland, it was stressed by you to him in that incident about a month beforehand when he was doing exactly what he should not have done.
A. Yes.
Q. After this accident, did you change the training for persons who used this machine?
A. No.
Q. Did you continue to use this machine at A & K Mulch from the time of this accident up until it was sold in 2008?
A. Yes.
Q. During that entire time, did you ever alter the procedure for how to change the knife blades?
A. No.
Q. During OSHA's investigation, they found, I think, five violations and levied a fine against the company, correct?
A. I'm not sure, but I'm not aware of any. We have a copy --
Q. It's Exhibit Number Nineteen. If you need to put that in front of you to answer this question, that's fine, but we need to see if you can do it without it.

A. 1985.
Q. How long have you been a customer of Morbark?
A. Probably since 1985, I guess.
Q. Have you found them to be a reputable company?
A. Yes, sir.
Q. Have you found them to be attentive to requests of their customers?
A. For the most part. Sometimes you've got to twist their arm a little bit harder but, yes.
Q. If there were any decals or anything that you thought were needed for this machine, would you have requested them from Morbark?
A. Oh, yes, I think so.
Q. You actually purchased this Morbark 58-inch chipper through Precision Husky, correct?
A. Purchased it from Precision Husky.
Q. Was Morbark involved in any way, shape or form with your purchase of this machine from Precision Husky?
A. No.
Q. To your knowledge, was Morbark even aware that you had purchased this machine from Precision Husky?
A. The salesman might have been aware. I don't know. I don't recall.
Q. Are you talking about if a salesman came by your business and saw, "Hey, there's one of our Morbark

machines on the premises?"

A. Well, when I was in the market to buy one, I might have contacted -- I probably contacted Morbark and Precision both.

Q. Once you decided on a particular machine, do you have any reason to think Morbark was aware of that particular purchase?

A. Not unless they did a follow up.

Q. That's all the questions I have for you. I appreciate your time.

A. Yes, sir.

CROSS EXAMINATION BY MR. BAILEY:

Q. Mr. Witherspoon, my name is Chandler Bailey. We met what seems like a long time ago, I bet, right now. I represent Precision Husky in this lawsuit. Curtis has done pretty much a good job of covering everything I've got, so I won't be nearly as long as these other guys, but I wanted to ask you just a couple of questions about the purchase of this machine and just clear up a couple of things about what you did, okay?

A. Okay.

Q. As I understand it, you testified that you were in the market for a bigger chipper. You had the 48-inch, and you were looking for a little bigger

COPY

STATE OF SOUTH CAROLINA COUNTY OF CLARENDON	) IN THE COURT OF COMMON PLEAS
Andreal Holland by his Guardian Ad Litem Peggy Knox, Plaintiff, vs. Morbark, Inc., Precision Husky Corporation, A & K Mulch, LLC, and Watford Industry, Inc., Defendants..	) C/A NO. 2008-CP-14-00461

DEPOSITION OF

ANDREAL HOLLAND

****

Friday, January 14, 2011
10:03 a.m.-3:30 p.m.

The deposition of ANDREAL HOLLAND, taken on behalf of the Defendant at the offices of Turner Padget Graham & Laney, P.A., 1901 Main Street, 17th Floor, Bank of America Building, Columbia, South Carolina, on the 14th day of January, 2011, before Lyn Allen, Court Reporter and Notary Public in and for the State of South Carolina, pursuant to Notice of Deposition and/or agreement of counsel.

EXHIBIT F

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right there with him doing everything. Then he showed me how to change the chipper. And he asked Mr. Jimmy Witherspoon can I change the chipper, can he teach me to change the chipper. And that's what he did. He teach me.

Q: So your Uncle Dave, David Wright was the one who taught you and trained you how to change the chipper blades?

A: Yes, sir.

Q: And the way that happened was he was getting off work later than you because he had that last job responsibility?

A: Yes, sir.

Q: And so since you had to stay around to catch a ride it just made sense if you could get a little bit more time working each day?

A: Well, a little bit more money.

Q: Okay. And you said before you got hurt did you ever get hurt at A&K Mulch other than the accident in June?

A: Huh-uh (negative response).

Q: In 2006?

A: Huh-uh (negative response).

Q: Is that a no?

A: Oh, no, sir. No, sir.

Q: So am I right that you started as a cut off guy for the first three months working there. And then that would

take us to what, June or July of 2004?

A: Yes, sir.

Q: And then from that point on you started helping out changing the blades on the chippers?

A: Yes, sir.

Q: And from that point on did you work on the chipper machines every day?

A: Yes, sir.

Q: And did you do anything with the chipper machines other than change the cutting knives?

A: No, sir.

Q: Now I understand that there was a 48-inch machine and then a 58-inch machine?

A: Yes, sir.

Q: Okay. Do you remember that when you started changing knives on the chipper it would have been on the 48-inch machine?

A: Yes, sir.

Q: Okay. Do you remember when the 58-inch machine was brought in to replace the 48-inch machine?

A: I don't remember what year that was.

Q: Do you know how much longer before your accident?

A: Say that again.

Q: Do you know how long it was before your accident that the machines were switched?

you know, it's just different. I'll go up there and help him out.

Q: Okay. But he was responsible for the blades on his machine and you were responsible --

A: Yes, sir.

Q: -- for changing the blades on the chipper?

A: Yes, sir.

Q: Now, after the 58-inch was installed, you changed the blade on that machine; right?

A: Yes, sir.

Q: Did you change the blades on it every day?

A: Yes, sir.

Q: Did it have its blades changed twice a day?

A: Yes, sir.

Q: And did you do it both at lunch and then at quitting time?

A: Yes, sir.

Q: Every day?

A: Yes, sir.

Q: From the time it was installed up until your accident?

A: Yes, sir. See, some days Mr. Woodrow, the foreman, he will come and say, well, Dreal, since the chipper is cutting good at lunchtime, he said, no need to change the blades since it's cutting good. So I don't change them.

Q: But that was rare? Usually you would change them twice a day?

A: Yes, sir. I would say about three times out of the week I'm going to have to change them until time to go home.

Q: Okay.

A: If the blade was sharp right.

Q: So if at lunchtime Mr. Woods would come up, there were some times when you wouldn't change the blades at lunch but you would always change them before you went home?

A: Yes, sir.

Q: Now, from the time that you started changing blades on the 48-inch machine up until the 58-inch machine replaced the 48-inch machine, so that would have been what, from about July of 2004 up until May or April 2006?

A: Yes, sir.

Q: So almost two years?

A: (Nods head affirmatively.)

Q: Right?

A: Yes, sir.

Q: During that nearly two-year period of time, did you change the blades on the 48-inch machine every day?

A: Yes, sir.

Q: And was it always twice a day or sometimes once a day?

A: Yes, sir.
Q: Same sort of thing --
A: Yes, sir.
Q: -- where he might say we don't need it at lunchtime but we always need it at closing time?
A: Yes, sir.
Q: So is it fair to say, Mr. Holland, that you changed the blades on the 48-inch machine more than anybody else at A&K Mulch?
A: Yeah. Since I got, well, I don't know how long they was open before I got there. But as I was there, you know, I took the responsibility to change it since the time I was there.
Q: Okay. Once you started changing the blades in June or thereabouts in 2004, no one else changed them more frequently than you; correct?
A: Yes, sir. Unless if I, unless my line is broke down or something then Leroy, if I take the place will go change the blade while I fix on my line.
Q: Was the procedure for changing the blades on the 58-inch machine the same as the procedure for changing the blades on the 48-inch machine?
A: Yes, sir. That I remember.
Q: What did A&K Mulch use the 48-inch machine to do?
A: Whatever scrapped that. We don't use or whatever Uncle

A: Yeah. The line. Not the chipper. The line.
Q: Okay.
A: If the chipper gets clogged up, then he basically stops everybody.
Q: Okay. But who would go unclog it then?
A: Everybody. Like I said, me and Uncle Dave and Mr. Woodrow if Mr. Woodrow back there. Because see, he was running two mills. He was over two mills at the time, the small mill and the big mill.
Q: When you started at A&K Mulch who trained you to do your job at the cut off line?
A: The, I can't call him a young man. The man that was doing the job, had the job before I did. He taught me how to run the cut off saw.
Q: Why was that guy leaving?
A: Because of his age I guess.
Q: Did anyone besides Uncle David teach you how to change the blades on the chipper machine?
A: Leroy.
Q: Anyone besides Leroy and David Wright?
A: No, sir.
Q: Did you ever read the manuals for the chipper machines?
A: I never seen one.
Q: Do you know if they had manuals for the chipper machines?

A: I asked and Uncle Dave said it was somewhere. And I went looking but I didn't found it where he said it was at.

Q: So you never read the manual then?

A: No, sir.

Q: Did you ever read anything as far as how to operate the chipper or how to change the blades on the chipper?

A: I seen on the machine, on the chipper machine I seen some signs up there, you know, to beware of and stuff. And I was told by Mr. Jessie Brewer that, you know, how people can get hurt on the machine and stuff. And he came back there, he come back there sometimes to look at me to make sure I'm doing it right, to make sure I don't do nothing wrong.

Q: Who is Jessie Brewer?

A: That's the guy that sharpens the knives and Uncle Dave's saw, saw blade.

Q: So he worked in the --

A: Knife room.

Q: -- shop?

A: (Nods head affirmatively.)

Q: Okay. And he would every day go and then sharpen the knives that were taken out of those two machines and the blade?

A: Yes, sir. Well, the blades was my machine. And Uncle

this, you know. And I was like, well, I don't know what's what, man. I don't remember what took place. And somebody was trying to break it down to me that what actually happened to me. And then I still couldn't put it. Still couldn't put it. Only thing I know is that day when I remember that is that I went and told Mr. Woodrow and he told me to tell Leroy. Then I was like, wow, okay.

Q: All right. Well, we'll go over all the details that you do remember in a minute. Let's go over the procedure for changing the knives on the chipper machine. The first step was to go turn off the power supply; correct?

A: Yes, sir.

Q: The next step was to lock out the power supply; correct?

A: Yes, sir.

Q: Then you knew from that point when the power was off that it would take ten to 15 minutes for the chipper wheel to coast to a stop; correct?

A: Yes, sir.

Q: And during that time you would go back to your usual workstation, the cut-off station and clean up that area; right?

A: Yes, sir.

Q: And after you were done cleaning up there you would return to the chipper machine to see if the wheel had stopped turning yet; correct?

A: Yes, sir.

Q: And if it had stopped turning then you would proceed to open the hood; right?

A: Yes, sir.

Q: And if it had not stopped turning then you would have to wait for it to do so?

A: Yes. I start cleaning up areas around the, around my line. I got about a hundred feet line that run all the way down there. I got to pick up stuff that falls on, wood that falls on the side of the line and stuff.

Q: That line is in a different area of A&K Mulch then where the chipper is; right?

A: Well, the end of my line right there where the chipper at.

Q: Okay. How far is where you would stand in your cut-off job from where the chipper was sitting?

A: That's the main, between 75 to a hundred feet.

Q: Could you see the chipper from where you would stand to do your cut-off line duties?

A: I could see the wood going to the chipper but I can't see the chipper.

Q: And once the wheel had stopped turning you would remove

a bolt on either side of the hood; correct?

A: Yes, sir.

Q: There were two bolts; right?

A: Yes, sir.

Q: Did they have a cotter pin in the bottom of them?

A: Yes, sir.

Q: On both sides?

A: That I recollect. Yes, sir.

Q: So you would have to remove the cotter pin from the bolt on one side. And then how would you get the pin out? Or the bolt out? Excuse me.

A: How would I get it out?

Q: Right. Would it come out easily or would you have to use a hammer or something?

A: Well, sometimes, one side would be jammed and then the other side. One side come out easier than the other side. So it depends what side that, you know, get jammed. Whichever one you take out first, the other side was going to get kind of tight or whatever. You can put your man force to it to get it out. Shake it a lot. You can get a hammer and get it out. I never used nothing. I just take my force and got it out, shake it a little bit, you know, keep turning the pin. It will come out.

Q: And then once you got the bolt out on one side you

would go around to the other side of the chipper and you would do the same thing; right?

A: Yes, sir.

Q: You would remove that cotter pin and then get that bolt out as well?

A: Yes, sir.

Q: And at that point then the hood would open back and lay on a stop there at the bottom of the machine?

A: Yes, sir.

Q: And from there then you would put in a pin that would prevent the wheel from turning while you pulled out each of the blades; correct?

A: Say that again.

Q: When you put in a post down into a hole to prevent the wheel from moving while you were pulling out blades?

A: Oh, yes, sir. Either I would have somebody on the other side holding the wheel while I changed the blade.

Q: Okay. And that was the procedure you followed each and every time to change the chipper knives?

A: Yes, sir.

Q: When would Leroy if he was the one who usually helped you show up to help you in this process?

A: Well, he comes about a good five or ten minutes after I get started on it and finish helping me with it.

Q: Okay. Would you start to open the hood before Leroy

was present?
A: Yes, sir.
Q: Now, before you opened the hood, what were all the ways that you could tell whether the wheel inside the chipper was still moving or not?
A: The belt wasn't moving and the wheel was not moving. Well, the wheel, I mean, when the belt stopped I know the wheel done stop. So I get a long stick and make sure it doesn't jerk or whatever when I get ready to open the door open.
Q: When you were looking to see whether the wheel had stopped where would you look?
A: I look inside the hole.
Q: Okay. And if you looked inside the hole could you see whether the wheel was moving or not?
A: Yes, sir.
Q: And could you also look at the belts?
A: Yes, sir.
Q: Anyplace else that you could look to determine whether the wheel was moving or not?
A: No. Not that I know of.
Q: Could you put your hands on the chipper and feel it if it was still moving?
A: Yeah. You can hear it.
Q: You can hear it also?

A: Uh-huh (affirmative response).
Q: So if I went up there and was going to change the blades on this chipper, I could see whether the wheel was still moving or not?
A: Uh-huh (affirmative response).
Q: I could feel the machine to feel whether it was still moving or not and I could also listen to hear whether the wheel was still moving or not; correct?
A: Uh-huh (affirmative response).
Q: Is that a yes?
A: Yes, sir.
Q: And so if I didn't hear the wheel, didn't feel the wheel and didn't see the wheel moving, then I would know it was safe now to open the hood?
A: Yes, sir.
Q: And that procedure that I just described and we just went over was the same on the 48-inch machine and the 58-inch machine; correct?
A: Yes, sir.
Q: Now, before the date of your accident had you ever opened the hood on the 48-inch or the 58-inch machine while the disks or the wheel was still turning?
A: I did one time. And Mr. Jimmy Witherspoon caught me and he talked to me about it. And I did not receive, because he told me the next time I do that he was going

to discharge me or fire me from doing that. And I never did it again.

Q: When did that happen?

A: About a year before I got hurt.

Q: So that was on the 48-inch machine?

A: Yes, sir.

Q: Was it at lunch or at the end of the day?

A: I can't recall.

Q: Did he just happen to be walking by?

A: Sometimes he will drive up and you don't know he drive up unless you look behind you and see his truck right there. And then that's how he did it. He drove up and he seen I was in the process of opening it. And that's when he came in and talked to me about that.

Q: You were in the process of opening the hood when the wheel was still moving?

A: It was moving. It wasn't moving like that but it was moving. And he seen it. Well, actually he came when the hood was done and he seen it moving and it was turning because I always turn the wheel myself and make sure it's not jammed so if I do get started it won't get clogged up where the knife can drop in there. So I told him about that. He said, well, that's another, you know, good thing you can do to check to see whether, you know, ain't nothing inside the wheel. You

know how you, that brought, you know how the tree get cut up in there and stuff can drop back down. And he was like, okay, you know, but I don't want to see that no more. And since he talked to me that day I haven't did it since.

Q: Haven't did what?

A: Mr. Jimmy said that he seen me open the machine up. Do you know what I'm saying? And he talked to me that day and I haven't did it since that day he seen that.

Q: And when he said for you not to do something what he was telling you is never ever open that hood while that wheel is moving; right?

A: Right. Yes, sir.

Q: And he read you the riot act, didn't he?

A: Yes, sir.

Q: And he threatened to fire you if he ever saw you do that again; right?

A: Yes, sir.

Q: So you knew how important it was not to open that hood before the wheel had stopped moving, correct, Mr. Holland?

A: Yes, sir.

Q: Do you remember a time when your Uncle David Wright caught you opening the hood before the wheel had stopped moving?

mentioned something about that, you know, not to open the door when the wheels still turning. But him fussing at me on the job, I ain't never knew he fussed at me. But I know we go ride together or going home he mentioned to me never do that because you can get hurt by doing that. But I don't think he never caught me opening it.

Q: And did you know that you could get hurt, that the way that you would get hurt would be that that hood could come down and hit you?

A: Yes, sir.

Q: And could hit you in the head?

A: Yes, sir.

Q: Just like it did on the day of this accident?

A: Yes, sir.

Q: What warnings do you remember being on the machine?

A: Huh?

Q: What warnings do you remember being on the machine?

A: Like a dude was opening the chipper up. That was the only one I seen on there. And then I forgot how that machine actually looked.

(Defendant's Exhibit Number One was marked for identification purposes.)

Q: I'm going to hand you what's been marked as Exhibit One and ask you if you recognize what's shown on Exhibit

A: No. I seen one on the hood and that was it. And the other one was on, writing was somewhere else.
Q: Okay. Do you ever remember reading this warning before your --
A: Yeah. I read this a couple of times on the machine. Sometimes I sit there while the machine trying to stop, I sit there and looked at it.
Q: Had you read this warning before your accident?
A: Yes, sir.
Q: And did you know never to operate the chipper with missing hood bolts?
A: I guess they must have fallen off or something.
Q: I'm just reading from each of these.
A: Yeah. I see.
Q: Did you know never to operate the chipper without hood locks secured?
A: Hood locks secured as in the cover over it?
Q: Right.
A: I ain't had one of those.
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.
Q: There was no way for you to get hit by the hood as you did unless the wheel was still moving; right?
A: That day I seen that wheel wasn't moving that day.
Q: Well, then how did you get hit?
A: I need a break, man.
Q: Answer my question and then we'll take a break. How did you get hit?
A: I guess I got hit by the hood.
Q: And how did the hood move other than if the wheel was

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State of South Carolina County of Clarendon	In the Court of Common Pleas
Andreal Holland by his Guardian Ad Litem Peggy Knox, Plaintiff, vs. Morbark, Inc., Precision Husky Corporation, A & K Mulch, LLC, and Watford Industry, Inc., Defendants.	C.A. No. 2008-CP-14-00461 Deposition of ROGER E. DAVIS, P.E., C.F.E.I August 31, 2010

Deposition on oral examination of ROGER E. DAVIS, P.E., C.F.E.I., reported by Mary W. Hoskins, RPR and Notary Public in and for the State of South Carolina; said deposition taken pursuant to notice of deposition, by agreement and in accordance with South Carolina Rules of Civil Procedure, at the law offices of Turner, Padget, Graham & Laney, P.A., 1901 Main Street, 17th Floor, Columbia, South Carolina, on the 31st day of August, 2010, commencing at the hour of 10:05 a.m.

EXHIBIT G

written or not, for A & K Mulch employees that was established by A & K Mulch for them to follow when changing the chipping knives?

A. I'm aware they had some limited procedure. I'm not -- I don't know if there is anything more to it than what I know, but I'm aware that their procedure was to turn off the power, lock it out, tag it out, allow the vibratory feeders continue to run during a period of time when the chipper is running down. And they also, of course -- their procedure was not to open the hood until such time as the disc coasted to a stop.

Q. And are you aware that Mr. Holland was trained on that procedure to change the chipping knives?

A. I'm aware that he was trained on a chipper.

Q. Okay. And will you agree with me that Mr. Holland violated the procedures we've just talked about on the day of the accident?

MR. JONAS: Object to the form of the question.

A. Yes. He did attempt to -- well, he began to open and, in fact, opened the hood

before the chipper coasted to a stop.

MR. OTT CONTINUING:

Q. Are you aware that he had been caught doing that on occasions before his accident?

A. I am.

Q. Are you aware that his employer, Mr. Witherspoon, read him the proverbial riot act when he caught him, Mr. Holland, doing that --

MR. JONAS: Object to the form of the question.

MR. OTT CONTINUING:

Q. -- before the accident?

A. My understanding is there was a point where Mr. Witherspoon did talk to Mr. Holland about that practice when he caught him doing it. I'm not sure of the timing of that discussion.

Q. So can we agree that on the day of the accident, Mr. Holland knew the procedures A & K Mulch had established for changing the chipping knives?

A. With respect to the coasting down issue, yes, he knew that.

Q. And can we also agree that he had

Q. -- if you want to clarify that or confirm that from your file.

A. That's fine. I'll take that at face value.

Q. So you didn't know that back at the time you prepared your report, anything that Mr. Witherspoon said; correct?

A. That's correct.

Q. Because you never interviewed him?

A. That's correct.

Q. So all the information at the time of your report would have come from Ms. Dyches, Mr. Woods, or any material that was provided to you?

A. That's correct.

Q. Who told you that he stuck a branch into the machine to determine if the disc was still moving?

A. I believe Mr. Jonas told me that because I don't think I knew that at the time that I wrote my report. And that may be in some of these summary depositions. I can't recall for sure.

Q. Mr. Davis, will you agree that this machine as designed is stationary, or you

called it fixed?

A. Yes.

Q. Will you agree that this machine as designed does not require an operator to feed material into the machine?

A. Yes.

Q. Will you agree that it was attached to a conveyer that automatically fed the material into the chipper to be cut up?

A. Yes.

Q. Will you agree that the actual process of grinding the material once it is fed into the machine also does not require the involvement of an operator?

A. Yes.

Q. Will you agree that the machine does all the work and even discharges the product after it's cut up?

A. Yes.

Q. Have you seen exit photographs of the chipper when it left Morbark's hands?

A. Yes.

Q. Will you agree that it had many safety decals and instructions affixed to it when Morbark originally distributed it to the

Q. Will you agree, Mr. Davis, that if Mr. Holland had, in fact, followed A & K Mulch's procedures for changing the knives on this chipper that it would be impossible for the accident to happen as Mr. Holland alleges it did?

MR. JONAS: Object to the form.

A. If he followed the procedure -- the verbal, as far as I can tell, verbal procedure that he was given, the training that he was given, and he complied with that procedure and did not make any attempt to open the hood until he somehow verified that the equipment had stopped rotating, it would not have happened.

MR. OTT CONTINUING:

Q. Been impossible to happen?

A. Yes.

Q. And would you also agree that if Mr. Holland had followed the chipper's procedures for changing the knives on the machine as it came from the manufacturer and as spelled out in the operator's manual that it would be impossible for the accident to happen as Mr. Holland alleges it did?

A. Yes. Had he complied with the

requirement to keep the hood closed until the rotation stopped, it would have not happened.

Q. And similarly, if he had abided by the warning decal that was on the machine, both the visual and the written portions, then it would have been impossible for this accident to have happened the way Mr. Holland alleges it did?

A. I would agree.

MR. JONAS: Object to the form.

MR. OTT CONTINUING:

Q. What was the procedure an operator would follow to change the blades on the chipper as it was originally designed and left Morbark's hands?

A. What was the procedure?

Q. Yes, sir.

A. Well, of course, the procedure was to lock out/tag out the machine, to verify that the machine had come to a stop, open the hood, and remove and replace the blades.

Q. As the machine was originally designed and left Morbark's hands, what would an operator have to do to open the hood?

A. He would have to remove the spring

clip from the pin -- the two pins, remove the pins, and rotate the hood open.

Q. Are you aware that as originally designed there were four horizontal bolts and two vertical bolts that had to be removed to open the hood?

A. I saw bolt holes in the hood, but I did not see any bolts during my inspection, nor did I see -- do I see any bolts on the exploded parts diagram provided by Morbark for the hood.

Q. That doesn't answer my question.

A. Or the parts list.

Q. That doesn't answer my question.

A. Well, maybe you could restate it.

Q. I'll repeat it and see if you can pay attention and answer it.

Will you agree with me that to open the hood of the chipper as originally designed, you would have to undo four horizontal bolts and two vertical bolts?

A. I believe that's the case. The photographs seem to show that there were bolts in the hood when it left the factory.

Q. You're referring to the exit

photographs?

A. Yes.

Q. But at the time you inspected the machine, all six of those bolts were gone?

A. I did not see any bolts, correct.

Q. And you've never heard anyone from A & K Mulch talk about having to remove six bolts to access the hood?

A. No.

Q. Meaning I'm correct?

A. Correct.

Q. Do you know where those bolts are?

A. I do not.

Q. Or where they were at the time of the accident?

A. I do not.

Q. So the procedure in that respect for how to access opening the hood on the day of the accident is different than what it was with the machine as it left Morbark's hands; correct?

MR. JONAS: Object to the form.

A. So you're saying the procedure was different than it was at the time it left their hands; is that what you're saying?

MR. OTT CONTINUING:

Q. Comparing the accident date --

A. Right.

Q. -- to when it left our hands.

A. Well, in that the bolts apparently were not installed on the hood, that would not be a step that he would need to take to open the hood.

Q. And apparently those bolts had been missing for some period of time?

MR. JONAS: Object to the form.

A. I don't know.

MR. OTT CONTINUING:

Q. Do you know if those bolts were ever removed by A & K Mulch employees?

A. I do not know.

Q. But you have no evidence or reason to disagree that when this machine left Morbark's facility in 1996 that to access the hood, you had to undo those six bolts?

A. That appears to be the case from the photographs. There were bolts that were evident in the photograph. There are no bolts mentioned in the manual that I could find.

Q. That you could find?

A. Correct.
Q. So if Morbark found them and pointed them out, you don't have any reason to disagree with that?
MR. JONAS: Object to form.
A. If they can point it out to me, I'd be glad to look at it.
MR. OTT CONTINUING:
Q. Do you know how long it takes to undo those six bolts?
A. It doesn't take very long to undo six bolts. Probably a minute or two.
Q. Have you ever done it?
A. Have I ever loosened six bolts?
Q. On a Morbark chipper.
A. No.
Q. Do you know how long it takes to loosen those six bolts?
A. I've never done it, so I can't -- and had I done it, I wouldn't have timed it.
Q. What size fan blades were on the chipper at the time of the accident?
A. I don't know.
Q. Who manufactured those blades?
A. I don't know, but I know that Morbark

had a preferred vendor for that, that they mentioned in their manual. I don't know whether these particular fan blades were from that vendor or not.

Q. How much clearance between the fan blades on the chipper at the time of the accident was there between the blades and the hood?

A. I measured about a half-inch or less.

Q. So you cannot dispute that the fan blades attached with the chipper are different than the ones that were on the machine at the time it left Morbark's hands?

A. I have no reason to believe that they were different.

Q. And you also don't have any reason to believe that they're the same?

A. Well, I have a drawing dated 1992, which predates the manufacture of this machine, showing a box fan blade. I also have the purchase documentation from when the machine was originally sold to the firm in Goldsboro indicating that it was equipped with box-type blades. I don't know whether it's the same

blade or not, but --

Q. And you don't know who manufactured the blades that were on the machine at the time of the accident?

A. Correct.

Q. What size were the fan blades on the chipper when it left Morbark's hands?

A. I don't know.

Q. How much clearance --

A. Well, I'm sorry. I do have a drawing, but I didn't see the machine when it left Morbark's hands, so I can't verify whether it was built to that standard or the specifications in that drawing or not.

Q. Do you have any reason to believe that they weren't built to the specifications and drawings?

A. I would assume that they were.

Q. Okay. Do you know how much clearance there was between the original fan blades and the hood at the time it left Morbark's facility?

A. I have no way of knowing that.

Q. Are you aware, in fact, that the fan blades on the machine at the time of the

accident were larger than the fan blades attached when the chipper left Morbark's hands?

A. No.

Q. Are you aware that the clearance between the fan blades on the machine at the time of the accident was smaller than the clearance with the fan blades on the machine at the time it left Morbark's hands?

A. I don't know that.

Q. Would you agree that if those facts are indeed true that the potential for a fan blade to strike the hood was greater for the machine at the time of the accident than when it left Morbark's hands?

A. Well, of course, the smaller the clearance, the more likelihood that it's going to occur, but my understanding is that this machine was built with a wider disc than they normally provide. Unless they made some accommodation for increasing that clearance, I believe that the clearance on this machine and one other that they built would have been smaller than what they routinely built.

Q. But you don't know because you never investigated that?

A. I don't know that. That's my --
Q. Speculation and conjecture?
A. Okay.
Q. Agreed?
A. Based on my review of the technical documents, yes.
Q. Because you're learning for the first time today that Morbark didn't even manufacture the blades that were on the machine --
MR. JONAS: Object to the form of the question.
MR. OTT CONTINUING:
Q. -- at the time of the accident; correct?
A. I believe they farm that out to a vendor, yes. They have a company --
Q. They're not Morbark's blades, Mr. Davis.
A. Okay.
Q. Did you know that before I just told you?
MR. JONAS: Object to the form of the question.
A. Well, the drawing indicates that they have a vendor, I believe, that makes those for

them.

MR. OTT CONTINUING:

Q. Mr. Davis, this is just a real simple question. Are you learning for the first time today that the blades on the machine at the time of the accident were not manufactured by Morbark or one of its vendors?

A. I believe I knew that before today.

Q. When did you learn that?

A. I think I had that discussion with Mr. Jonas in the past few days.

Q. Okay. Do you think that has any bearing upon your opinions in this case?

A. No.

Q. What if it greatly diminishes the likelihood that this hood would ever come into contact with the fan blades as originally designed, doesn't that directly bear upon your opinions in this case?

A. Well, of course, if you have a smaller clearance, you have more likelihood that there's going to be interference between a rotating member and the hood. Of course, that is true. However, for this machine to function, there has to be a fairly tight

clearance to provide the airflow that you're looking to generate with the fan, so there had to have been a fairly tight clearance as originally constructed for it to function properly.

Q. Is it your understanding that this machine operates to discharge the material chopped up by airflow?

A. Well, certainly airflow is one component of it. The blades throw the material, and the fan blades generate a pneumatic airflow through the discharge duct.

Q. Are you aware of any other accidents on a stationary chipper machine manufactured by any company in the world where someone attempting to change the cutting knives was injured when he or she opened the hood before the disc had stopped moving?

A. I believe some of my research indicates that has occurred in the past, yes.

Q. Okay. On stationary wood chippers?

A. Let me look at it and see what it says specifically.

Q. Do what you need to do. I want to make sure you understand my question.

A. I understand what you're saying.

Q. I'll repeat it after you take a look at your file.

A. Stationary. I understand the distinction.

(Discussion held off the record.)

A. The document that I referred to --

MR. OTT CONTINUING:

Q. Well, let me go back and ask the question. I want to clear the record on this.

A. Sure.

Q. Are you aware of any other accident on a stationary chipper machine manufactured by any company in the world where someone was attempting to change the cutting knives and was injured when he or she opened the door before the disc had stopped moving? What is the answer to my question?

A. No. But I have some research information that discusses the hazard of that occurring.

Q. Before I get to that, I just want to make sure that it is true, isn't it, Mr. Davis, that as you sit here today as the expert on behalf of Mr. Holland that you are not aware of

any other accident on a stationary chipper machine manufactured by any company where someone attempting to change the cutting knives was injured when he or she opened the door before the disc had stopped moving; is that indeed true?

A. That is true to the extent that I do not have a specific injured person's name or date. I do have some research material indicating that those types of events do occur. This is statistical information gathered by the government that indicate those types of incidents do indeed occur.

Q. The information provided by the government in those statistics isn't specific to the scenario I gave you, is it, where someone's trying to open up the hood before the disc had stopped moving?

A. No. It's a broader category than that.

Q. It's all injuries having to do with the wood chipper?

A. It's a broader category than that, yes, sir.

Q. So those statistics don't answer my

question.

A. I don't have a date for an incident.

Q. You don't even know that an incident has ever occurred, do you?

A. I cannot point to one, that's correct.

Q. Regardless of what manufacturer we're talking about; Morbark, Precision Husky, anybody else?

A. I don't have a date.

Q. You don't have -- not only do you not have a date, you don't even know of an occurrence, do you?

A. I can't point to an occurrence, no.

Q. Have you ever been employed by a company that manufactures industrial equipment?

A. Components of equipment, but not specifically equipment.

Q. What company did you work for that manufactured components of industrial equipment?

A. The Torrington Company.

Q. What is The Torrington Company?

A. Well, at that time it was a bearings

Q. Mr. Davis, are you aware of any engineering standards that were applicable to the machine at the time of manufacture?

A. There are no specific ANSI standards or other nationally recognized safety standards for this kind of machine that I could find.

Q. I want to make sure we're talking in the right time frame. So are you aware of any engineering standards or any standards at all that were applicable to the chipper at the time of manufacture and distribution in 1996?

A. No.

Q. Are you aware of any particular engineering standards or the like that are directly applicable to a stationary wood chipper even today?

A. No, I'm not.

Q. The OSHA standard that you referenced as being in your file materials, can you put your hands on that regulation or standard?

A. I can. I have it.

Q. What's the name of it?

A. It's CFR 29.1910 -- I'm sorry. 29 CFR 1910.212(a)(2) is the section that I referred to.

A. Correct.

Q. In your research, have you come up with any other standards, regulations, or the like that you believe Morbark's stationary chipper is required to adhere to?

A. No.

Q. Did Morbark's chipper, stationary chipper in 1996 comply with industry custom?

A. I believe their chipper was similar in design and construction to other chippers on the market at that time and, in fact, still on the market today.

Q. So will you agree that the chipper in 1996 as designed was compliant with industry custom?

A. I agree that it was similar to industry custom. There's no compliance body that, you know, regulates that, but it is similar to what other manufacturers built at that time and today.

Q. So you will agree that you don't have any opinion that Morbark failed to comply with industry custom at the time of manufacture?

A. No.

Q. You would agree with that statement?

A. I agree they complied with what was commonly done in the industry at that time, yes. Having said that, there are other manufacturers that use different means of attachment of the hood, but even so, it's not sufficient in my opinion to comply with a standard of safety that should be used.

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.

Q. Is there anything else about the photographs or information you have in your file about other competitors' designs of stationary wood chippers that are applicable to your opinions today?

A. The Precision Husky chipper uses a different mechanism to latch the hood. Had that design been employed in this case, there's a chance -- I can't know for sure because I don't know at what point in the opening of the hood that it struck the rotating member, but

photograph you have of other competitors' machines, but I'm just trying to narrow this down. Is there anything else relevant about the materials that you've gathered in your file concerning other designs as it bears particularly on your opinion in this case?

A. With respect to stationary machines, that's your question?

Q. Yes.

A. No. I do have other material related to brush chippers, mowing machines that that design could have been employed that would have minimized the risk of this injury.

Q. But that's a different machine?

A. A different machine, correct. A different machine, but the same hazard.

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.

Q. Mr. Jonas?

A. No.

Q. Who?

A. He doesn't get to give you his professional opinion, I don't think.

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.

Q. You're not aware of anyone who has ever done a feasibility study regarding a potential design of a stationary wood chipper with an interlock, are you?

A. No, I'm not.

Q. You personally have not prepared a design of a chipper with an interlock, have you?

A. No. I have not done any detailed design work for that.

Q. And you have not ever done a feasibility study of a stationary wood chipper with an interlock, have you?

A. No.

Q. You prepared a report in this matter; did you not?

A. I did.

Q. I'm going to hand you what's about to be marked as Exhibit No. 4 and ask you to

quite a long coast-down time.

Q. Do you have an opinion that this machine is improperly designed because it doesn't have a brake?

A. No. I didn't say that. That brake is only one means of accomplishing the goal of protecting the operator. I think there are other methods that could have likewise been used, including the two that I mention, the mechanical interlock and the electric interlock.

Q. Are you aware of any person or company that has performed a feasibility analysis for incorporating an interlock into a stationary wood chipper?

A. Well, the patent that we referred to earlier is not specific to mobile wood chippers, so apparently that designer has made such an investigation.

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.

MR. OTT: That was the word I was looking for. Thank you. That's all the questions I have.

MR. JONAS: All right.

Further deponent sayeth not.

(Whereupon, the taking of this deposition was concluded at 4:00 p.m.)

09:12:05

STATE OF SOUTH CAROLINA)
)
COUNTY OF CLARENDON)

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT

2008 CP 14-0461

ANDREAL HOLLAND by his Guardian Ad Litem PEGGY KNOX,

Plaintiff,

- vs -

MORBARK, INC., PRECISION HUSKY CORPORATION, A&K MULCH, LLC, WATFORD INDUSTRY, INC.,

Defendants.

VIDEOTAPE DEPOSITION OF JAMES STRONG

Taken by the Plaintiff on Tuesday, the 24th day of August, 2010, at 1985 Ashland Drive, Suite C, Mt. Pleasant, Michigan at 1:36 p.m.

APPEARANCES:

For the Plaintiff: MR. DONALD E. JONAS, Esq.
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EXHIBIT H

28

14:01:07 A. Yes.
14:01:07 Q. All right. I was looking at the original equipment list, and
14:01:14 I think that's Deposition Exhibit 3. I believe it's in here.
14:01:40 All right. It says the options that went out the
14:01:44 door, this Serial Number 914 machine included 58" Chipper,
14:01:52 six-knife, horizontal feed, top discharge, three-quarter-inch
14:01:58 chips, four-inch fronts, five-eighths-inch clamps, and six
14:02:03 each heavy-duty fan blades with T-1 inserts and T-1 hood
14:02:08 liner, T-1 belly bands, and a five-inch chipper disc and knife
14:02:14 gauge kit.
14:02:15 Do you know what those heavy-duty fan blades with
14:02:19 T-1 inserts and T -- with T-1 inserts are -- look like?
14:02:23 A. **Yes, I do.**
14:02:24 Q. All right. Did you look at the parts manual of this thing?
14:02:30 A. **Yes, I did.**
14:02:31 Q. All right. Looking back at Deposition Exhibit 7, when we look
14:02:42 at these blades here, these fan blades, are these T-1 inserts?
14:02:59 A. **No, sir.**
14:03:02 Q. What do T-1 inserts look like?
14:03:04 A. **They look like in that pile there.**
14:03:09 Q. Okay. Is this what you're looking for?
14:03:12 A. Yes.
14:03:12 Q. It's Deposition Exhibit 2?
14:03:14 A. **Yes. This part.**
14:03:23 Q. All right. So looking at two, there's a sheet, assembly

29

14:03:26 number at the bottom here, 40293-580?
14:03:31 A. Yes.
14:03:32 Q. All right. How are these different than the fan blades in the
14:03:38 parts manual that are illustrated in the Deposition Exhibit
14:03:45 Number 7?
14:03:45 A. **How are they different?**
14:03:46 Q. Yes.
14:04:07 A. **The fan blade that's listed in the parts catalog?**
14:04:11 Q. Yes.
14:04:11 A. **It's listed as 30160-580. Fan blade box type.**
14:04:11 Q. Yes.
14:04:16 A. **Which is a drawing attached to the back of this sheet. This**
14:04:20 **one here, which is not a part of the parts catalog.**
14:04:24 Q. All right.
14:04:25 A. **That is the part that's listed in the parts catalog.**
14:04:27 Q. All right. So what we've got is a blade that is this T-1
14:04:33 blade does something different than the parts -- the fan blade
14:04:39 that's pictured in the parts manual, is that --
14:04:42 A. **Could you say that again, sir?**
14:04:43 Q. This T-1 heavy-duty fan blades with T-1 inserts --
14:04:51 A. Yes.
14:04:51 Q. -- is an alteration of what essentially is shown in the parts
14:04:56 manual?
14:04:57 A. **It's a variation of what's shown in there.**
14:05:00 Q. All right. Better word. How is it different in performance

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14:05:05 or function?
14:05:09 A. **Well, on the sales order, when you're reading the options**
14:05:14 **section, it says -- I just noticed or experienced that a**
14:05:17 **five-inch chipper disc, but this fan blade will not fit on**
14:05:21 **that unit. This is designed for a four-inch thick disc.**
14:05:24 Q. All right. So when you say five-inch chipper disc, you know,
14:05:32 we're talking about the --
14:05:39 MR. JONAS: Let's get this one marked.
14:05:40 (Deposition Exhibit Number 23 marked.)
14:05:50 BY MR. JONAS:
14:05:53 Q. Let me show you Defendant's 23, which I purport to you is a
14:06:01 photograph of this Morbark Serial Number 914. It was taken
14:06:09 some time a few weeks after the accident we're involved with.
14:06:14 The four-inch and five-inch dimension you mentioned, would you
14:06:18 indicate where on that --
14:06:21 A. **Five-inch references the thickness of the disc.**
14:06:24 Q. All right.
14:06:27 A. **You want me to write on this?**
14:06:29 Q. That would be fine if you just illustrate your testimony.
14:06:32 A. **And this five inches is a raw sheet. It's not the finish**
14:06:39 **size.**
14:06:39 Q. All right. So the Morbark chipper as it is shown in the parts
14:06:42 manual has a four-inch disc. This one is bigger?
14:06:46 A. **Yes. For clarification -- we've got too many things here.**
14:06:56 Q. Yes. Always do.

31

14:06:58 A. **In the shipping documents --**
14:07:00 Q. Yes.
14:07:01 A. **-- you should have a sheet called a chipper checksheet.**
14:07:04 Q. Okay. I think I've seen -- this thing here.
14:07:24 A. **This page. During the era that this unit was built, we used**
14:07:31 **to make what they called a chipper checksheet. This was**
14:07:34 **specific to this build of this piece of equipment. The parts**
14:07:37 **catalog is general to the product.**
14:07:39 Q. I see.
14:07:39 A. **So when you look at this catalog, the parts catalog that went**
14:07:43 **with it, that's only kind of a generic build. It probably fit**
14:07:47 **most of the units, but it may not fit all of them, but this**
14:07:50 **machine had so many options, all the features that are**
14:07:52 **different or the primary ones are stated on this list.**
14:07:56 Q. Yes.
14:07:56 A. **It tells the size of the chipper, it tells the feed types, it**
14:08:00 **tells the parts that were actually assembled on the machine.**
14:08:03 Q. All right. Now, looking back at Deposition Exhibit Number 23,
14:08:11 the type of fan blade that's installed there, do you know
14:08:14 anything about it?
14:08:15 A. **Do I know anything about that particular one? It's not a**
14:08:18 **Morbark manufacture. Morbark does not make one that style for**
14:08:22 **a 48 or a 58 machine.**
14:08:25 Q. All right. So that fan blade in terms of design, I mean, it
14:08:30 does essentially the same thing, I take it?

32

14:08:31 MR. OTT: Objection to form.
14:08:34 THE WITNESS: I would say not.
14:08:35 BY MR. JONAS:
14:08:35 **Q.** Okay. Well, what is your -- the basis of your answer?
14:08:39 **A.** **Based on experience and Bark Bulletins that we published and**
14:08:44 **we provided.**
14:08:45 **Q.** So in terms of a fan blade that has some function,
14:08:54 particularly this five-inch disc, the T-1 insert that you're
14:09:00 talking about was designed with how much clearance to the hood
14:09:04 with a five-inch disc?
14:09:07 **A.** **You're asking how much clearance there would be on the**
14:09:10 **originally installed fan blade to the back of the base or the**
14:09:14 **back of the hood?**
14:08:15 **Q.** Yes.
14:09:15 **A.** **Yes. It would be approximately seven-eighths to five-eighths.**
14:09:19 **Depending on manufacturing tolerances, there's a little bit of**
14:09:23 **variance in the disc finish.**
14:09:24 **Q.** Okay. Seven-eighths to five-eighths?
14:09:26 **A.** **Yes. I mean, without putting a layout together, I would**
14:09:29 **estimate in that area.**
14:09:30 **Q.** So with the T-1 inserts, which have to go apparently with this
14:09:40 five-inch disc -- let me ask another question. Strike that.
14:09:45 And just --
14:09:45 With the five-inch disc, is there anything but T-1
14:09:51 inserts that are typically installed by Morbark on a

33

14:09:55 disc-style chipper, 58-inch disc-style chipper?
14:10:00 **A.** **Yes. We make a paddle blade, but it's not of this nature.**
14:10:04 **It's similar, but not of that nature.**
14:10:06 **Q.** And what is the functional difference with the paddle blade?
14:10:11 **A.** **The Bark Bulletin explains the reasoning behind it, but in**
14:10:16 **these top discharge type machines, they're normally conveying**
14:10:21 **those chips a greater distance than just up to a cyclone**
14:10:24 **that's attached to the machine like on a Chip-Pac.**
14:10:24 **Q.** Yes.
14:10:27 **A.** **So the box type blades offer more throwing capacity. It**
14:10:30 **doesn't work so much by air. It works more by discharging**
14:10:33 **them in this encased box that's attached to the back of the**
14:10:36 **discharge where the chips are.**
14:10:39 **Q.** If you had -- do the dimensions on the paddle blades change
14:10:44 the clearance between -- to the disc -- or to the hood?
14:10:51 **A.** **They're nearly identical. We make adjustments when we install**
14:10:56 **them. We make adjustments to where we position the disc when**
14:10:59 **we install them so we end up with a similar clearance at all**
14:11:02 **times.**
14:11:03 **Q.** Okay. All right. The paddle blades are purchased from
14:11:08 Morbark?
14:11:08 **A.** **Pardon?**
14:11:09 **Q.** Are the paddle blades purchased by Morbark or from Morbark or
14:11:14 do they manufacture them here in Winn?
14:11:16 MR. OTT: Objection to form.

34

14:11:17 THE WITNESS: Which fan blades are you referring to?
14:11:19 BY MR. JONAS:
14:11:19 **Q.** The paddle blades.
14:11:20 **A.** **The paddle blades I just stated?**
14:11:22 **Q.** Yes.
14:11:22 **A.** **Just recently? We manufacture paddle fan blades, yes.**
14:11:27 **Q.** Okay. Here in Michigan?
14:11:28 **A.** **Yes. At Winn.**
14:11:29 **Q.** Okay. So it's not a subcontractor, it's a Morbark item?
14:11:33 **A.** **Not that I'm aware of.**
14:11:34 **Q.** Okay. And the T-1 blades, those are also manufactured in
14:11:39 Winn, Michigan?
14:11:40 **A.** **Yes.**
14:11:40 **Q.** And the standard blade that is featured in the parts manual,
14:11:47 that's also manufactured here in Winn?
14:11:49 **A.** **You're talking about this item?**
14:11:51 **Q.** Yes.
14:11:51 **A.** **Yes.**
14:11:52 **Q.** So in terms of the standard blade that would typically go with
14:12:00 the four-inch disc, is it larger in dimension than the T-1
14:12:07 blade?
14:12:07 **A.** **Could you state that again, sir.**
14:12:09 **Q.** Let's be specific. The blade, the fan blade that is featured
14:12:18 in the Morbark catalog.
14:12:24 **A.** **Which is this one, 30160.**

35

14:12:25 **Q.** As I understood your answer, it's typically installed on the
14:12:30 four-inch disc?
14:12:30 **A.** **Yes.**
14:12:30 **Q.** Are the dimensions of this greater than the T-1 blades? I
14:12:40 could look at 22 and a half inches here at some point.
14:12:43 **A.** **They attach to the same attachment points. The biggest**
14:12:46 **difference is this here, the height of it. And it's made a**
14:12:50 **little bit deeper on the short -- on its narrower disc.**
14:12:53 **Q.** Okay. So --
14:12:59 **A.** **To still give us that clearance at the back side.**
14:13:01 **Q.** All right. If you installed the standard blade, fan blade
14:13:07 that's called 30160-580 on a five-inch disc, would it function
14:13:17 properly?
14:13:17 **A.** **I don't know if it would fit inside the housing.**
14:13:20 **Q.** So it's a little greater in terms of its overall dimensions?
14:13:27 **A.** **Yes, it is.**
14:13:28 **Q.** You don't know what the dimensions of this particular fan
14:13:33 blade were and the clearance to the hood that's shown in this
14:13:36 photograph --
14:13:37 **A.** **Do I know -- go ahead.**
14:13:38 **Q.** -- 23?
14:13:39 **A.** **Go ahead. Your question again.**
14:13:40 **Q.** You don't know the dimensions or the clearance between the
14:13:45 outer edge of this and the hood that's shown there?
14:13:49 **A.** **Per the documents supplied, it shows it to be probably close**

14:13:54 **to a quarter of an inch.**
14:13:56 Q. Where did you get that?
14:13:57 A. **From materials that I got from Larry Noch to review.**
14:14:00 Q. Okay. What were those?
14:14:06 A. **I don't know as I remember the exact. They were supplied from**
14:14:12 **your office, I assume.**
14:14:13 Q. Do you recall -- I mean how --
14:14:15 A. **It was --**
14:14:16 Q. Probably have them.
14:14:17 A. **I seen them also in you have an expert witness --**
14:14:23 Q. Roger Davis?
14:14:24 A. **Yes. He had some photos attached in there, and that had the**
14:14:27 **pictures with the clearance.**
14:14:28 Q. Okay. So that would have been in the report that Mr. Davis
14:14:33 did?
14:14:33 A. **Pardon?**
14:14:34 Q. The report by Roger Davis?
14:14:36 A. **Yes. He was a member of a group. I don't remember the name.**
14:14:40 Q. Warren Group. So you're taking his number, whatever it was,
14:14:57 to make that conclusion?
14:14:59 A. **I'm taking his photograph that he took --**
14:15:03 Q. Right.
14:15:03 A. **-- with a tape measure between that clearance.**
14:15:05 Q. Okay. Good.
14:15:08 A. **I'm basing it on that.**

14:15:08 Q. All right. Well, we've got lots of ground to cover, so let me
14:15:13 move on.
14:15:14 We've got a number of labels on this machine that
14:15:26 have -- that Larry has talked about, the Morbark labels. Do
14:15:30 you have anything to do with placing labels on the machine?
14:15:33 A. **No, sir.**
14:15:33 Q. Do you know anything about the design of those labels?
14:15:37 A. **Of those particular labels?**
14:15:38 Q. Yes.
14:15:41 A. **Can you be more specific?**
14:15:42 Q. Well, I mean, what is the origin of those? Do you have
14:15:45 somebody that is a safety engineer at Morbark that has
14:15:49 designed those labels?
14:15:51 A. **We have people that make labels or design them.**
14:15:54 Q. All right. And who would those people be?
14:15:56 A. **Well, I'm not sure of the exact. It's a function of our**
14:15:59 **drafting department with other groups. I'm not sure what the**
14:16:04 **exact process is.**
14:16:04 Q. All right. And do you know if that's remained constant? You
14:16:10 know, have the labels on this machine changed?
14:16:13 A. **Have they changed?**
14:16:14 Q. Yes.
14:16:14 MR. OTT: Objection to form.
14:16:14 BY MR. JONAS:
14:16:22 Q. Over time. We've done --

14:16:24 A. **I would say probably over time. But I don't know that for an**
14:16:26 **exact fact, no.**
14:16:27 Q. All right. Well, we looked at earlier now a photograph of the
14:16:35 machine, apparently two machines that were produced in 1996,
14:16:42 including this Serial Number 914. And from one view you can
14:16:49 see a number of labels on it, and they seem to be similar to
14:16:53 the labels that Larry reviewed with me. Also look at Morbark
14:17:08 88. Now, do you know whether those two photographs, he's
14:17:16 calling these exit photographs, accurately represent where the
14:17:20 labels are placed on this machine at least from those -- those
14:17:24 perspective?
14:17:25 MR. OTT: Objection. Form.
14:17:26 THE WITNESS: What are you asking me now?
14:17:26 BY MR. JONAS:
14:17:28 Q. I'm asking you, have you ever participated in putting labels
14:17:32 on the machine or identifying where the labels are at on this
14:17:36 machine, this 58" Chipper?
14:17:41 A. **No. I've never directed anyone in how to put labels on nor**
14:17:45 **done it myself.**
14:17:46 Q. All right. Do you know what labels are supposed to be placed
14:17:49 on the machine?
14:17:50 A. **All I know is what is produced on them, and those are supplied**
14:17:53 **in our -- for 913 and 914, there's a listing of the labels**
14:17:58 **that was installed on each unit.**
14:17:59 Q. All right. So as far as these photographs, you haven't seen

14:18:04 these before?
14:18:04 A. **I have seen them before.**
14:18:05 Q. All right. Fair. The -- so someone at Morbark actually is a
14:18:17 safety engineer?
14:18:20 A. **I don't know if that's the proper term or not.**
14:18:23 Q. All right. And just to be clear about your own role in this,
14:18:28 in terms of complying with any kind of engineering standards
14:18:32 or industry standards or safety standards, do you have any
14:18:37 role in determining whether this machine complies with these
14:18:42 various standards?
14:18:43 MR. OTT: Objection to form.
14:18:44 THE WITNESS: On this particular machine?
14:18:44 BY MR. JONAS:
14:18:46 Q. On this style machine, yes.
14:18:48 A. **On this style machine. And your question one more time?**
14:18:54 Q. Do you have any role or responsibility for determining whether
14:18:57 this 58" Stationary Horizontal Feed, Top Discharge Morbark
14:19:05 Machine complies with industry or safety standards, whatever
14:19:14 they might be? You authored this one memo or at least your
14:19:18 originated it?
14:19:19 A. **I authored this memo, yes.**
14:19:20 MR. OTT: Objection to form.
14:19:21 THE WITNESS: Yes. In this case here, like I said,
14:19:24 I was -- it was after a meeting. I was instructed to write
14:19:28 this up, and that's what I did.

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14:39:44 anything on these pins.
14:39:45 Q. All right. So in terms of binding in those pins, have you had
14:39:50 to force those pins out? Force meaning use some kind of
14:39:55 come-a-long or hammer even?
14:39:57 A. **These -- this particular hood style is usually pretty much**
14:40:03 **pull the clip out, lift it out.**
14:40:03 Q. So --
14:40:05 A. **It's not pounded in or out.**
14:40:08 Q. So your experience has been that you can -- the pins are
14:40:13 somewhat loose fitting?
14:40:15 MR. OTT: Objection to form.
14:40:16 THE WITNESS: They're not -- they're not hammer
14:40:19 tight.
14:40:19 BY MR. JONAS:
14:40:20 Q. Well, the question is since we don't have the dimensions, what
14:40:23 are they tight?
14:40:23 A. **I'm sorry. I can't answer that.**
14:40:25 Q. Well, they've got an L shape handle on them. I mean, can you
14:40:29 easily pull them out with your --
14:40:31 A. **Yes. If they're fit properly, you can lift them out by your**
14:40:34 **hand.**
14:40:34 Q. The other thing I wanted to ask you about was the pin that
14:40:38 secures the hood, the hinge to the back of the machine, on the
14:40:40 rotating -- or the -- that section of the hood that is pulled
14:40:47 back.

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14:40:48 Looking at your drawing, it seems to be clearly
14:40:52 indicated back in this area here. There seems to almost be a
14:40:57 part number to it. Is there a part number to that?
14:41:01 A. **Yes. It's stated right here. 30359-700.**
14:41:05 Q. All right. So in terms of forming this, is that part number
14:41:14 then welded to the back of the hood?
14:41:16 A. **Yes, it's welded.**
14:41:16 Q. All right.
14:41:19 A. **Excuse me. I mean, could you restate your question? Make**
14:41:21 **sure I understood right.**
14:41:22 Q. How is that part number, which is part of the hinge of the
14:41:27 hood, attached to the hood?
14:41:28 A. **It is welded to the back of the hood.**
14:41:31 Q. All right. What goes through it?
14:41:35 A. **Hinge pin.**
14:41:35 Q. What is the size of that hinge pin?
14:41:41 A. **One inch diameter hot rolled by 18 inches.**
14:41:45 Q. Now, is that secured in place?
14:41:52 A. **Yes.**
14:41:53 Q. How is it secured?
14:42:08 A. **There's two collars welded affixed to the base on each end of**
14:42:13 **the tube, but the pin installs through and there's a set screw**
14:42:17 **in each collar.**
14:42:18 Q. All right. So the collars have the set screw, but they're
14:42:23 also welded?

54

14:42:25 A. **The collar is welded to the base on each side of the tube**
14:42:29 **that's attached to the hood by weld.**
14:42:31 Q. Okay. So the set screw is what holds it in place?
14:42:34 A. **Yes.**
14:42:35 Q. All right. And this pin is the only way to secure, means of
14:42:42 securing the hood to the machine when the machine hood is
14:42:50 open? I mean, it supports the hood as it's pulled back?
14:42:54 A. **Yes. It's supported here and rests on this brace.**
14:42:57 Q. All right. And has it been your experience that there
14:43:02 develops some wobble in the hood side to side as -- over that
14:43:08 shaft?
14:43:11 A. **I don't recall any -- you're talking about if it gets really**
14:43:17 **sloppy or something.**
14:43:17 Q. Well, what I'm saying is -- I'm asking, not saying anything.
14:43:21 You've got a part which looks like 30359-700, and a pin goes
14:43:33 through it, and a hood that has some substantial weight to it,
14:43:37 that rotates on it, and if that's the only wear that it
14:43:45 receives, it's pulling straight back and forth, it looks like
14:43:48 it would remain fairly tight, but if it would wobble side to
14:43:52 side, it looks like you might develop some excessive clearance
14:43:56 in that. Do you agree or not?
14:44:00 MR. OTT: Objection to form.
14:44:00 BY MR. JONAS:
14:44:01 Q. Do you know?
14:44:02 A. **Well, there shouldn't be much wear on it. It's only used to**

55

14:44:05 **open it up once, twice a day, whenever they need to maintain**
14:44:08 **the machine. The rest of the time it's secured with pins or**
14:44:11 **with bolts so it holds it in a tight position.**
14:44:14 Q. All right. Let's go to the bolts. What type of bolts hold
14:44:18 the hood in place?
14:44:19 A. **Grade A hex head cap screw.**
14:44:22 Q. Okay. Where are those featured?
14:44:24 A. **There's two on each side of the flange on the bottom of the**
14:44:28 **base -- or excuse me. Between -- on the bottom flange of the**
14:44:32 **swing hood on each side.**
14:44:33 Q. Right.
14:44:33 A. **And one on each side just below the collars.**
14:44:36 Q. All right.
14:44:37 A. **On the side of the hood.**
14:44:38 Q. How are those secured? What type of nut?
14:44:41 A. **How are the bolts secured?**
14:44:43 Q. Yes. I mean, do they have lock washers, are they castellated
14:44:47 nuts, whatever?
14:44:50 A. **Typically in those we would install the bolt with a flat**
14:44:54 **washer down here, and I don't know as I could say for exact,**
14:45:00 **but we use Nyloc type nuts, probably put a washer on each side**
14:45:05 **of the flange with the bolt inserted through it.**
14:45:08 Q. All right. So on each occasion that you're changing the
14:45:13 chipper blades, I take it that the process would be to remove
14:45:16 the bolts and the pins?

14:45:19 A. **To change the chipper knives?**
14:45:22 Q. Yes.
14:45:22 A. **Yes. They would have to be removed in this case.**
14:45:25 Q. What would be the reason to have the pins there if the bolts were in place?
14:45:28
14:45:29 A. **The pins on top?**
14:45:31 Q. Yes.
14:45:33 A. **Just extra security on it.**
14:45:34 Q. In your experience, does anybody use those bolts?
14:45:40 MR. OTT: Objection to form.
14:45:43 THE WITNESS: From the machines I've been on, it's been applied.
14:45:45
14:45:45 BY MR. JONAS:
14:45:48 Q. So the pins are just there for a little extra security, is that what you're saying?
14:45:51
14:45:52 MR. OTT: Objection. Form.
14:45:55 THE WITNESS: Well, they add another layer of security on it.
14:45:57
14:45:57 BY MR. JONAS:
14:45:58 Q. All right. Have you studied other similar equipment?
14:46:04 MR. OTT: Objection to form.
14:46:06 THE WITNESS: I have not studied any.
14:46:06
14:46:06 BY MR. JONAS:
14:46:08 Q. Have you worked on other chipper designs?
14:46:11 A. **Yes.**

14:46:12 Q. All right. And have you seen a similar style securing the hood with these pins?
14:46:20
14:46:22 A. **With the pins on them?**
14:46:24 Q. Yes.
14:46:25 A. **You're asking me about the ones that I worked on?**
14:46:27 Q. Yes.
14:46:30 A. **I'm not familiar with that.**
14:46:31 Q. So in your experience you haven't seen other hoods with pins in them?
14:46:41
14:46:42 MR. OTT: Objection. Form.
14:46:46 THE WITNESS: Not that I recall.
14:46:46
14:46:46 BY MR. JONAS:
14:46:50 Q. Handing you --
14:46:51 A. **You're talking about on machines that I've personally worked on?**
14:46:53
14:46:54 Q. Yes.
14:46:54 A. **Okay.**
14:46:55 Q. Looking at Deposition Exhibit 11, have you ever worked on a machine similar to that?
14:47:01
14:47:02 A. **No, sir.**
14:47:03 Q. All right. Do you know about Precision Husky equipment?
14:47:06 A. **I know of them.**
14:47:07 Q. All right. Have you worked on Precision Husky equipment?
14:47:10 A. **No, sir.**
14:47:11 Q. All right. What do you detect to be the unusual or at least

14:47:22 different features of this, including the labelling, as
14:47:22 compared to the Morbark machine that you're looking at --
14:47:31 well, let's get things -- Exhibit 22.
14:47:39 A. **You're asking me -- your question is now?**
14:47:41 Q. Yes. The obvious differences between them.
14:47:53 A. **Different bearing pedestal style than we use. Looks like it's**
14:47:56 **been cut just short of the bearing on one side where ours is**
14:48:00 **full all the way across the back. The bearing housing style**
14:48:06 **is a little different. They have little different design**
14:48:18 **around the pin area, the hinging area.**
14:48:18 Q. All right.
14:48:22 A. **And the -- looks like there's some type of lifting lug on the**
14:48:26 **hood itself. And this device here is different.**
14:48:32 Q. The device you're looking at is the hood lock, isn't it?
14:48:38 A. **Well, I'm not exactly sure. It looks like it could be. It's**
14:48:41 **on the spring hood.**
14:48:43 Q. So the hood lock is -- this doesn't incorporate the pins that
14:48:49 we're talking about?
14:48:52 A. **It does have bolts on it.**
14:48:57 Q. It does have bolts?
14:49:00 A. **Yes.**
14:49:00 Q. This doesn't have the pins?
14:49:02 A. **This has bolts, two on this side and looks like it has one or**
14:49:06 **two up on this side.**
14:49:07 Q. There's also an opening here that seems to be different than

14:49:13 the Morbark hood?
14:49:14 A. **I don't know what their application is on them. It's a**
14:49:18 **ventilation hood.**
14:49:19 Q. Yes. And so other than that, I mean, these two machines look
14:49:28 very similar?
14:49:28 MR. OTT: Objection to form.
14:49:35 THE WITNESS: I think they're intended to produce
14:49:37 wood chips. I don't know that I can --
14:49:37 BY MR. JONAS:
14:49:40 Q. The hood lock mechanism, can you -- I mean, you're familiar
14:49:44 with these devices, mechanical devices anyway. It looks like
14:49:48 it has screws that run down against the lip to hold that hood
14:49:53 in place?
14:49:54 MR. OTT: Objection to form.
14:49:56 THE WITNESS: That's something, sir, I can't from
14:49:58 this view tell what they're doing with that.
14:49:58 BY MR. JONAS:
14:50:01 Q. All right. So the Precision Husky equipment you've actually
14:50:08 seen, would it include this style?
14:50:10 MR. OTT: Objection to form.
14:50:11 THE WITNESS: That I have seen?
14:50:11 BY MR. JONAS:
14:50:13 Q. Yes.
14:50:13 A. **I don't think I've ever seen one like that.**
14:50:16 Q. All right. Have you seen chipper designs that don't have the

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SOUTH CAROLINA
THE WARREN GROUP
No. C01519
CERTIFICATE OF AUTHORIZATION

DATE: August 3, 2006

REPORT TO: Southeastern Claims Service, Inc.
Attn: Ms. Paula Dyches
Post Office Box 212128
Columbia, South Carolina 29221

Chipper Access Door Injury
Insured: J.C. Witherspoon
D.o.L.: 6/1/2006
L.o.L.: Alcolu, SC
Claim No.: WC071306
The Warren Group File Number: 60236

FILE

SOUTH CAROLINA
REGISTERED PROFESSIONAL ENGINEER
No. 04958
ROGER E. DAVIS

PREPARED BY: Roger E. Davis, P.E. — August 3, 2006 (Date)

EXHIBIT I

dissipated enough that contact of the hood by the blades will present no serious risk. The designer of equipment must anticipate hazards in the equipment whether present during use or foreseeable misuse. The manufacturer was well aware of the hazard that was involved in the injury to Mr. Holland, but failed to provide a safeguard to protect the operator from the hazard.

The manufacturer affixed a warning label on the chipper that addresses the hazard that caused the injury to Mr. Holland. The warning, however, fails to convey that serious injury or death could result from the hazard.

The chipper should have been equipped with an interlock to prevent the hood from opening until the disc has stopped turning. One such interlock is a heavy-duty solenoid-latching safety interlock switch. A commercially available interlock of this type is described in the literature included in Appendix II. The interlock could be controlled by a time delay or a motion detector. The time delay would be set for a time period longer than the coasting period of the disc after the power has been shut off. The motion detector could be mounted in a location that would not be affected by the chips and flying debris inside the hood, such as at a location to detect shaft rotation, rather than disc rotation.

A solenoid-latching safety switch would not have allowed Mr. Holland to open the hood of the chipper until the disc had fully stopped. Therefore, the inclusion of a safety switch on the chipper at the time it was manufactured would have prevented the injury to Mr. Holland.

A machine that contains an uncontrolled hazard when it is economically and technologically feasible a safeguard to protect the operator is a machine that contains a defect. The defect in the incident chipper was a cause of the injury to Mr. Holland.

CONCLUSIONS

1. The incident chipper contains a hazard created by a heavy rotating member that continues to rotate long after the electrical power has been shut off.

2. The manufacturer of the chipper warned of the hazard, but the warning does not convey the serious nature of the injury or death that could result from the hazard.

3. The manufacturer did not provide a safeguard to protect the operator from a foreseeable misuse of the equipment.

4. It is economically and technologically feasible to provide a safeguard that would have prevented the injury to Mr. Holland.

5. A machine that contains an uncontrolled hazard when it is economically and technologically feasible to reduce the risk of the hazard to a tolerable level is defective.

6. The defect in the incident chipper was a cause of the injury to Mr. Holland.

COPY

State of South Carolina) In the Court of Common Pleas
)
County of Clarendon) C.A. No.: 2008-CP-14-00461

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

Plaintiff,

Vs.

Morbark, Inc., Precision Husky Corporation, A & K Mulch, LLC, and Watford Industry, Inc.,

Defendants.

Deposition of
DAVID E. CLEMENT, Ph.D.

September 13, 2010

Deposition on oral examination of

DAVID E. CLEMENT, Ph.D.,

reported by Ilene K. Schreiner, certified court reporter, and notary public in and for the state of South Carolina; said deposition taken pursuant to Notice and in accordance with the South Carolina Rules of Civil Procedure, at the law firm of Turner, Padget, Graham & Laney, P.A., 1901 Main Street, Plaza 17th Floor, Bank of America, Columbia, South Carolina, on Monday, September 13, 2010, commencing at the hour of 9:00 a.m.

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Columbia, South Carolina

what I had to say in terms of the deposition.

Q. Tell me what those two sentences are.

A. I'm not sure it's a sentence, but two things. One is that the design of this particular piece of equipment was flawed from a human factors psychology point of view in terms of there being a hazard that an operator might inadvertently contact, and that, of course, is the continued operation, turning of the shafts and so forth in the equipment so that the accident could have physically occurred. And I'm taking it under people's word that the sequence that I've read is the description of what actually happened.

The flaw from a human factors point of view is the person had to -- or was supposed to not take off the hood on the machine until all of the motion, the drive shaft and so forth and so on and the like, there was no -- let's put it this way. There's no positive input that changed or maintained the motion, but when the equipment was tagged out and locked out, from that point onward, even if everything is turned off, there is a period of time, which isn't terribly specific in the depositions, but somewhere between five and 15 or 20 minutes that the machine has to run down. It's just the inertial effects. So the chopper/cutter still is rotating so that materials could still be coming down

the belt that leaves there and so forth. And what the person --

Q. Go on.

A. Okay. And what the person operating this was supposed to do is wait until there was no longer any of that motion, the inertial effects were totally finished. And at that point, and only at that point my understanding is, was it safe to be able to begin to take that hood off that covers up the area of where the cutters are. That's one. It's a little longer than a sentence.

Q. What is two?

A. Two is that there was no potentially effective warning on the equipment available to an operator at the time that the operator should have been recalling that nothing gets done until this whole system is stopped.

Q. Are you criticizing a warning that was actually on the machine at the time of the accident?

A. That's a good question. I only have photographs, and I don't know if any of those were taken immediately following the accident. I am criticizing warnings that were in the photographs, and I have no independent knowledge about whether or not those were there at the time of the accident. If they weren't,

there still was no warning. But even if they were, that warning was not sufficient.

Q. Which warning are you talking about?

A. I'm talking about the -- let's see if I can find it. There, I think, are colored versions of it which is in -- the things that are currently or at the time of the photographs the things that were on the machine were in color, black, white and red predominantly. This one, which is Bates numbered PH 0003.

Q. Your second opinion is critical of PH 0003?

A. Yes.

Q. You are assuming that was on the machine at the time of the accident?

A. Hypothetically. I mean, I'm assuming that it was on the machine, but I have no independent information about that. I mean, I wasn't there. I didn't see it.

Q. Well, don't you think it's important for you to understand what warnings were on the machine at the time of the accident if you're going to offer opinions on this?

A. I can offer opinions on what the impact would have been even if they weren't on the machine or if they were on the machine.

A. The slight amount was that at least one, maybe a couple, presumably these are on a website from the manufacturer, the manufacturer touted that there were safety features that they had, and I inferred from the way it was stated that these were things that they think they had and other people didn't have. But simply I saw nothing in there that said here is something that's bad and we need to take care of it or there's nothing that's bad about this. Generally just positive kinds of statements about the company's involvement.

Q. Are you aware of any manufacturer of a stationary wood chipper that has a system that makes it impossible to remove the hood of the chipper until the rotor has come to rest?

A. I'm not aware of anyone that has done that to this point. I am aware that there's a patented design that purportedly would come up with that effect, but that's beyond my expert abilities to judge.

Q. So then, if I understand your first opinion, that the design of the chipper is flawed because there might be inadvertent contact because of this time duration between lock-out/tag-out and the rotor actually coming to rest, it would be your opinion that the entire industry has a defective or flawed design?

A. No.

Q. Why not?

A. Because I haven't looked at things for the entire industry.

Q. Are you aware of anyone, any manufacturer in the stationary chipper industry, who has a design that you would say is proper from a human factors standpoint?

A. Not completely proper. I would say that some wouldn't have this as a potential problem because of the way in which it's designed. The operator would be directly aware of whether there was still motion going on in the chipper or any other part of the equipment. But these are smaller ones in general. I'm thinking of the kinds of things that you see more in private neighborhoods where somebody has come in to cut tree limbs and things like that and they've wheeled up something that's certainly not much larger than a subcompact car that they're using to do all of the threshing and chopping of the detritus.

Q. You understand we're not talking about that kind of machine in this case, you understand that?

A. You didn't ask me that question. You asked me if I've ever seen any that were -- although maybe we're not on the same plane here or the same track. I'm talking about anyone that manufactures equipment that's supposed to take and chop up wood.

A. Okay. Sorry.

Q. I'm going to take away all your outs.

MR. JONAS: Object to the form of the question.

A. You're not taking away the outs. You're honing it down to something that will be easier for me to answer.

Q. Okay. Are you aware of any manufacturer who has created a safe, nondefective, or proper design from a human factors psychology standpoint concerning the duration between lock-out and tag-out and when the rotor comes to a stop?

A. No. Thank you. I'm sorry, that's a separate sentence. No. Thank you.

Q. So it would be your opinion, then, that every manufacturer's stationary wood chipper has a defective design from a human factors standpoint as relates to the duration between lock-out and tag-out and the drum coming to rest?

A. No, that's not my opinion.

Q. Because you haven't looked at others?

A. I haven't looked at others and therefore I can't say whether there's none, many.

Q. When were you first contacted about Mr. Holland?

somewhere in that binder, are a couple of big blocks that say something to the effect of during this period of time this many serious injuries or during this period of time this many fatalities occurred. And I don't remember whether it's stationary wood chippers or wood chippers.

Q. Okay. Let me try my question again. That was a long answer. This is just a yes/no question. Are you aware of any other accident on a stationary chipper machine manufactured by any company where someone attempting to change the cutting knives was injured when he or she opened the hood before the disk had stopped moving? Yes or no.

A. I'm not aware of the data supporting that allegation.

Q. Are you aware of any such accidents I just described?

A. I am not, no, sir.

Q. Have you prepared a written report?

A. No, sir.

Q. Are your opinions final?

A. Unless I receive a -- given that I receive no more information that's relevant to the case.

Q. Have you completed all the work that you feel you need to do to arrive at the opinions you've

the chipper? Yes or no.

A. Yes or no? I don't know.

Q. So you can't dispute that Mr. Holland violated those procedures on the day of the accident, can you?

A. I can't dispute that there were procedures in effect. I was focussing on my -- I'm not going to attribute those to either A & K Mulch or Morbark, except I did not see a separate set of instructions, warnings, et cetera, et cetera, from A & K Mulch.

Q. Were you aware that A & K Mulch trained Mr. Holland on the procedure to follow when changing the cutting knives on the chipper?

A. Yes.

Q. And the training included the actual procedure for him to follow when changing those blades?

A. I assume it did. What I got from things was that he was instructed. I don't know whether the instruction extended to demonstrating and then having him show himself. I don't know how the training went about, but there was a set of things of which he would have been aware.

Q. And will you agree that Mr. Holland on the day of the accident violated the procedures for changing the chipping knives as he was trained by A & K Mulch?

A. I will agree that he violated them technically. I have been assuming that he had a general understanding of it. The reason I make that distinction is that either way, what he did was a foreseeable kind of error on the part of the operator.

Q. Will you agree that Mr. Holland had been warned prior to the day of the accident not to do what he did on the day of the accident?

MR. JONAS: Object to the form of the question.

A. At least two other workers, and I can't remember which two now, but at least two other workers and perhaps the mill manager, I don't know what his title was, but the chap whose deposition I read -- oh, that's Woods. Wait a minute. Well, phooey. Sorry. My recollection is that there were two other employees, whether anyone was supervising him or not, who stated that they were aware that he had been warned.

The chap Mr. Woods, who identified himself as the foreman at the time, and was at the front end of the machine, said that he was unaware of any such violations, any such warnings. And in fact if he had been aware of those actions before, he would have written up the plaintiff for violation of them. He said he wasn't aware of somebody that -- he also pointed out

MODEL 48" AND 58"

STATIONARY R.H. CHIPPER

SAFETY, OPERATORS MANUAL

S/N_____

SOLD AND SERVICED BY:

_____

EXHIBIT K

Morbark-000024
Holland v. Morbark, et al.

nufactured By:
parvestors, Inc.

U1359

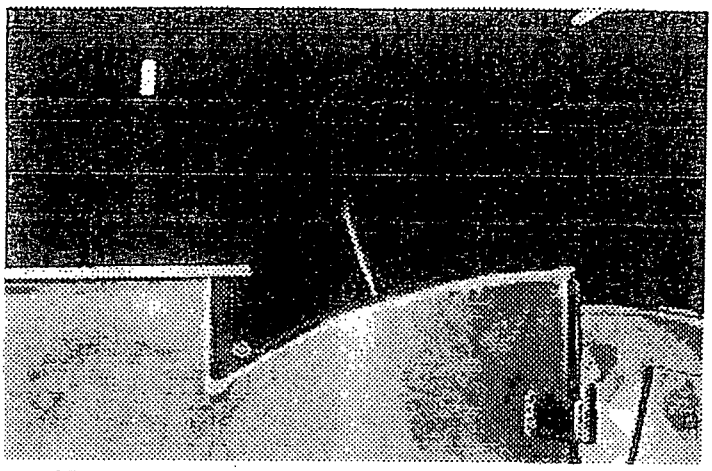
76347-103
5/93; 1

HANGING CHIPPER KNIVES

WARNING: Read maintenance safety procedures carefully before beginning.

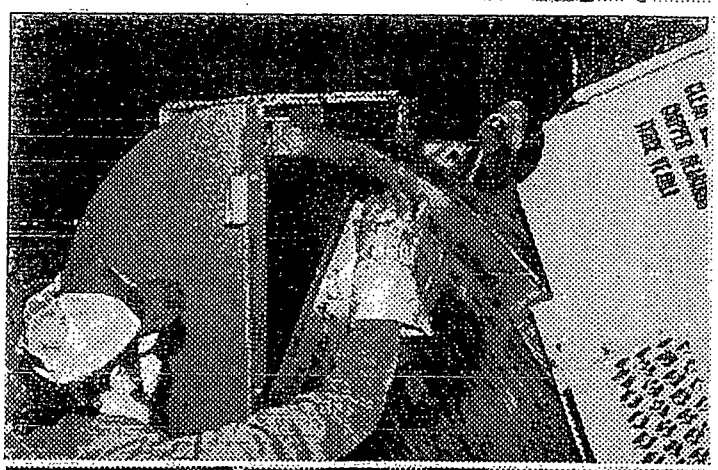
DANGER: Always use Disc Lock when changing knives.

After power is disengaged chipper will coast (rotate) for several minutes until it completely stops. Check the chipper sheave to verify it has stopped before opening the hood.



DANGER: Shut power unit off before any maintenance is performed.

Place hood pin into disk lock tube. Rotate chipper disc clockwise until the pin drops into the notch on the rim of the disc.



CAUTION: Two (2) people are required at all times when changing chipper knives.

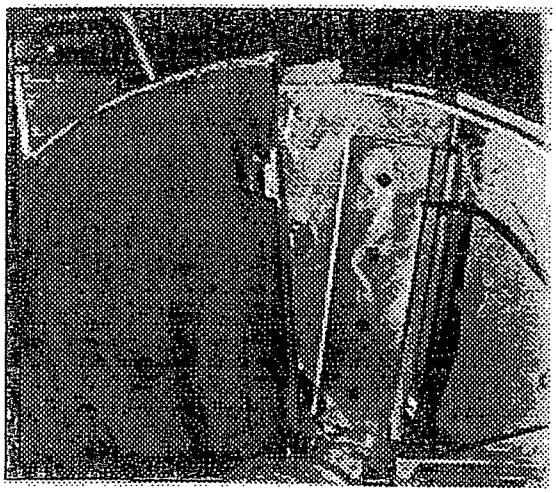
Loosen the nuts on the knife clamps. It is not necessary to remove them at this time.

DANGER: Never get inside base or climb up on disc or hood while changing knives.



DANGER: Never stand or jump on chipper wrench to break nuts loose. Two (2) people are required at all times when changing chipper knives.

4. Remove knife - Always wear leather gloves.

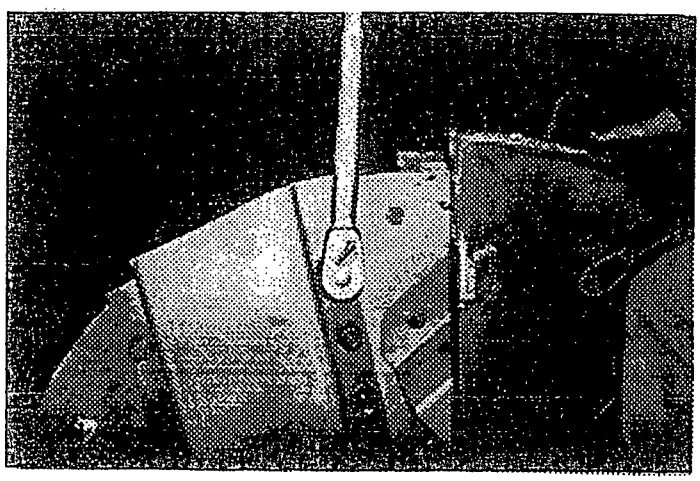


5. Blow dirt and debris out of the knife pocket with compressed air.



6. Inspect counter knife wear. Replace if worn excessively or if any sign of wear appears on the holder (see Inspecting Counter Knife).

7. Place newly sharpened knife into the knife pocket. Keep knives in sets at all times. With a screwdriver, pry the knife to the outer diameter of the disc. Place a small wedge at the bottom of the knife pocket to hold the knife into position.



8. Tighten the knife clamp by tightening the center nut or nuts on each clamp first

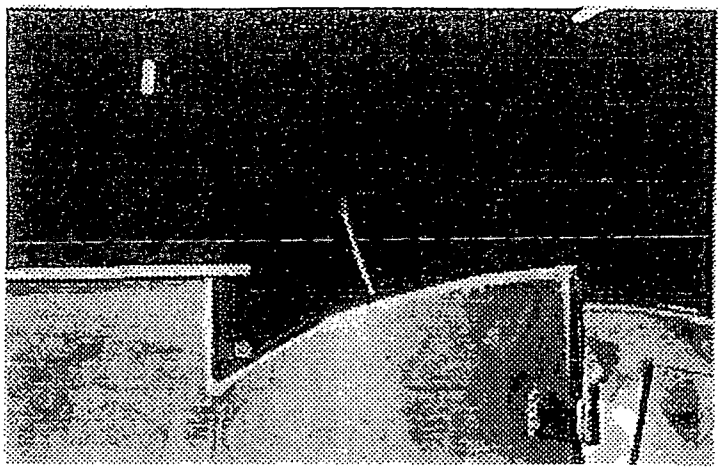
IMPORTANT: Torque clamp nuts between 500-800 ft./lbs.

00361

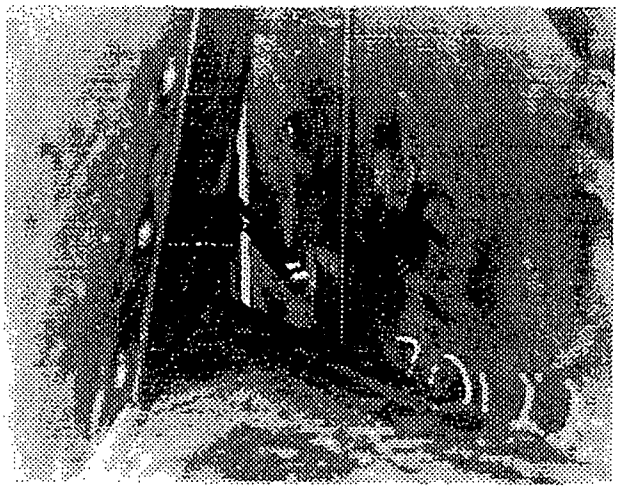
Morbark-000041
Holland v. Morbark, et al.

9. Pull disc lock pin and slowly rotate disc clockwise until the pin drops into the next notch.

Note: Chippers with rim blades will interfere with disk lock pin between notches. Be sure pin is in disk lock watch and not against rim blade.

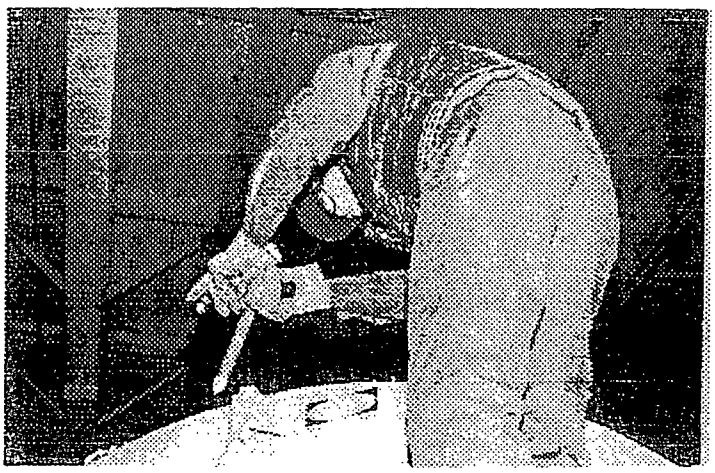


10. Repeat Steps 5-11 for each pocket.

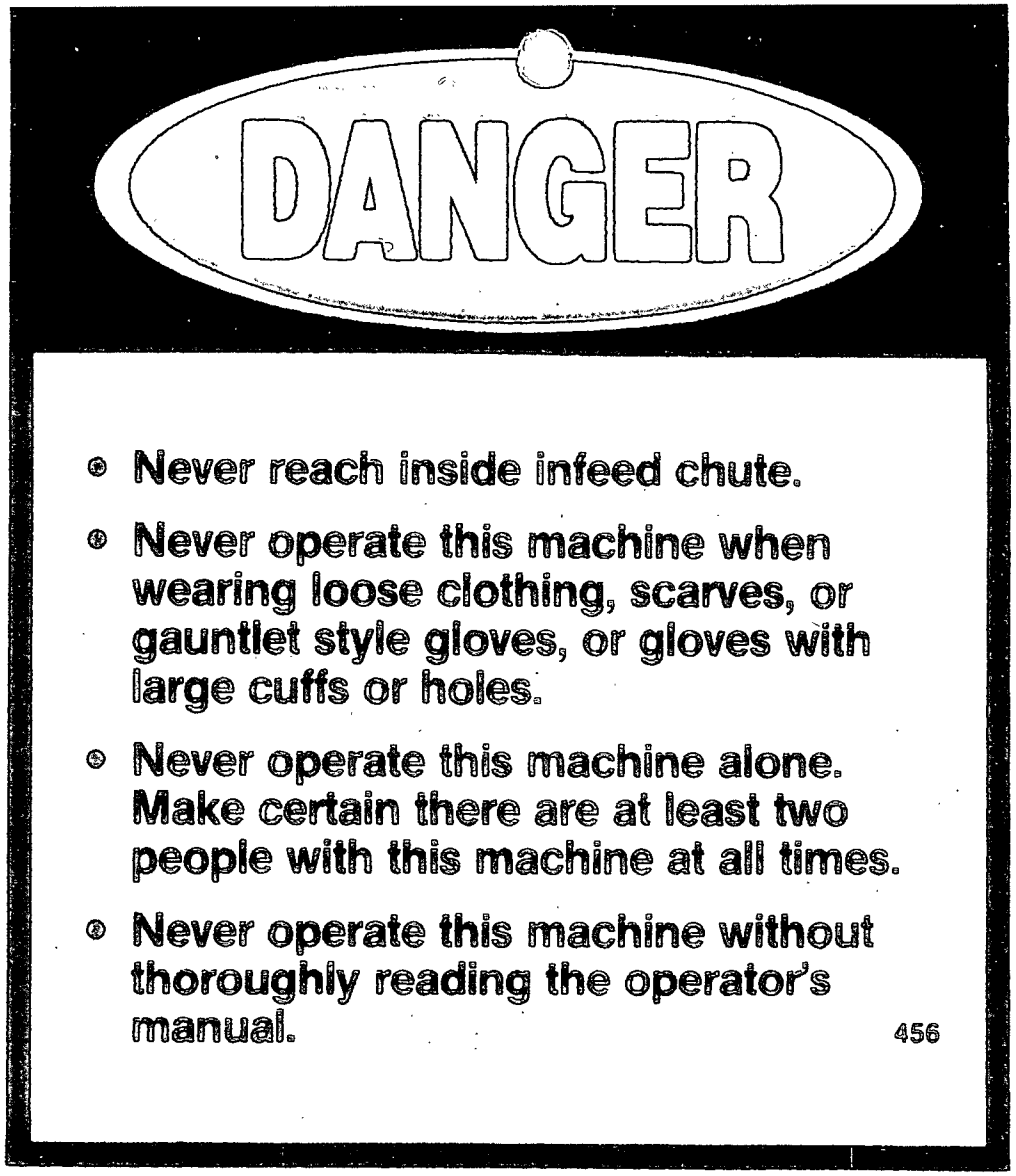


11. Once all knives have been changed rotate disc clockwise or backwards to check for clearance.

12. Inspect Feedplate clearance (see Inspecting Feedplate Clearance).



13. Close and pin hood before start-up.


DANGER
• Never reach inside infeed chute.
• Never operate this machine when wearing loose clothing, scarves, or gauntlet style gloves, or gloves with large cuffs or holes.
• Never operate this machine alone. Make certain there are at least two people with this machine at all times.
• Never operate this machine without thoroughly reading the operator's manual.
456

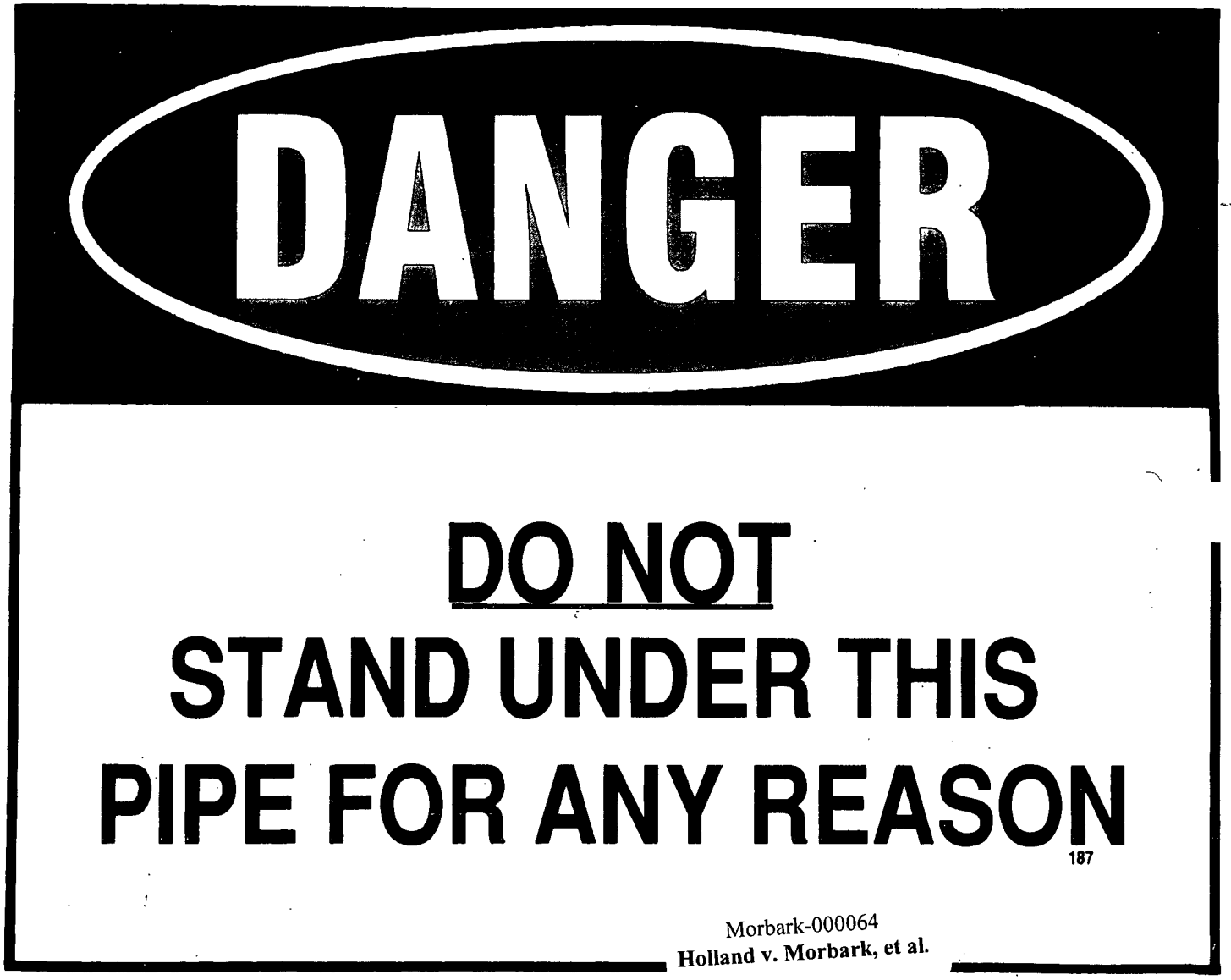
003363

0364

ALL SHIELDS AND BELT GUARDS MUST BE IN PLACE AT ALL TIMES!

39512-572

MOBARK 063



Morbark-000064
Holland v. Morbark, et al.

MOBARK 064

RECYCLED PAPER MADE FROM 20% POST CONSUMER CONTENT
AVERY™

IMPORTANT!

THIS CONTAINER CONTAINS THE OPERATOR'S MANUAL, PARTS MANUAL, AND CHECK SHEETS. CAUTION! READ ALL INFORMATION COMPLETELY BEFORE OPERATING THIS MACHINE. IF THESE DOCUMENTS ARE LOST, CONTACT YOUR MORBARK DEALER FOR REPLACEMENTS.

39512-631

MOBARK 065

AVERY



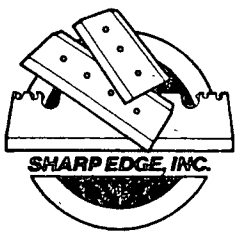
MOBARK 066

RECYCLED PAPER MADE FROM 20% POST CONSUMER CONTENT

AVERY™

Notice!

For the best quality knives available and to insure top performance from your chipper, Chiparvestors, Inc. recommends replacement knives and sharpening service by:



SHARP EDGE, INC.

8431 S. WINN RD.
WINN, MI 48896
TELEPHONE (517) 866-2381

A55

4/9

Morbark-000067
Holland v. Morbark, et al.

MOBARK 067

00366

DANGER

Always Use Chipper Disk Lock When Changing Chipper Knives

Morbark-000068
Holland v. Morbark, et al.

33

MOBARK 068

RECYCLED PAPER MADE FROM 20% POST CONSU
AVERY™

CHIPPER DISK LOCK 337

MOBARK 069

For the Safety of Your Self and Others

DO NOT REMOVE THE DECALS FROM THIS MACHINE

They were Installed to Prevent Injuries

308

MOBARK 070

RECYCLED PAPER MADE FROM 20% POST CONSUMER CONTENT

AVERY™

Knife Clamps Must Be Torqued To A Minimum of 500 Ft. Lbs. Do Not Exceed 800 Ft. Lbs.

258

MOBARK 071

MOBARK 072

SAFETY FIRST!

READ OPERATOR'S MANUAL BEFORE ATTEMPTING TO OPERATE THIS MACHINE

205

00373

AVERY ™ RECYCLED PAPER MADE FROM 20% POST CONSUMER CONTENT


DANGER
DO NOT
Attempt To Make Any Adjustments Or Repairs While Engine Is Running Or Chipper Is Turning.
39512-201

MOBARK 073



MOBARK 074

RECYCLED PAPER MADE FROM 20% POST CONSUMER CONTENT
AVERY™



MOBARK 075

RECYCLED PAPER • ELECTRONIC POST CONSUMER WASTE

AVERY™ RECYCLED PAPER MADE FROM 20% POST CONSUMER CONTENT

SAFETY PRECAUTION

READ BEFORE OPERATING THIS MACHINE

It is the owner's responsibility to instruct all equipment operators and support personnel in the operation of this equipment. All owners have been supplied with an operators manual containing instructions and safety precautions on the operation of this equipment. It is extremely important that anyone working on or around this equipment be completely familiar with the operators manual to ensure their safety in working with this equipment. If the operators manual for this equipment is not available, the manufacturer will be pleased to supply a new manual.

39512-219

00377

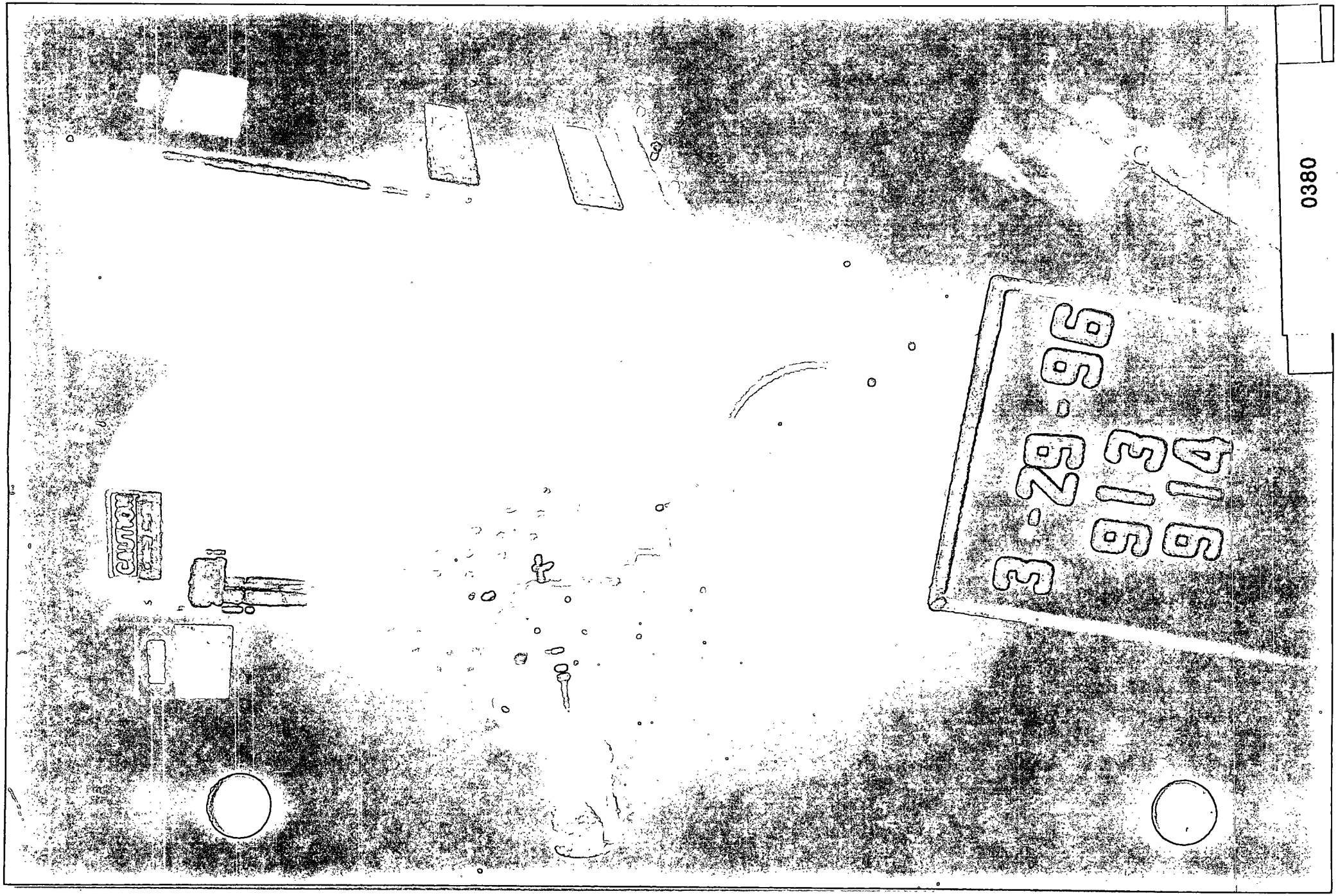
MOBARK 076



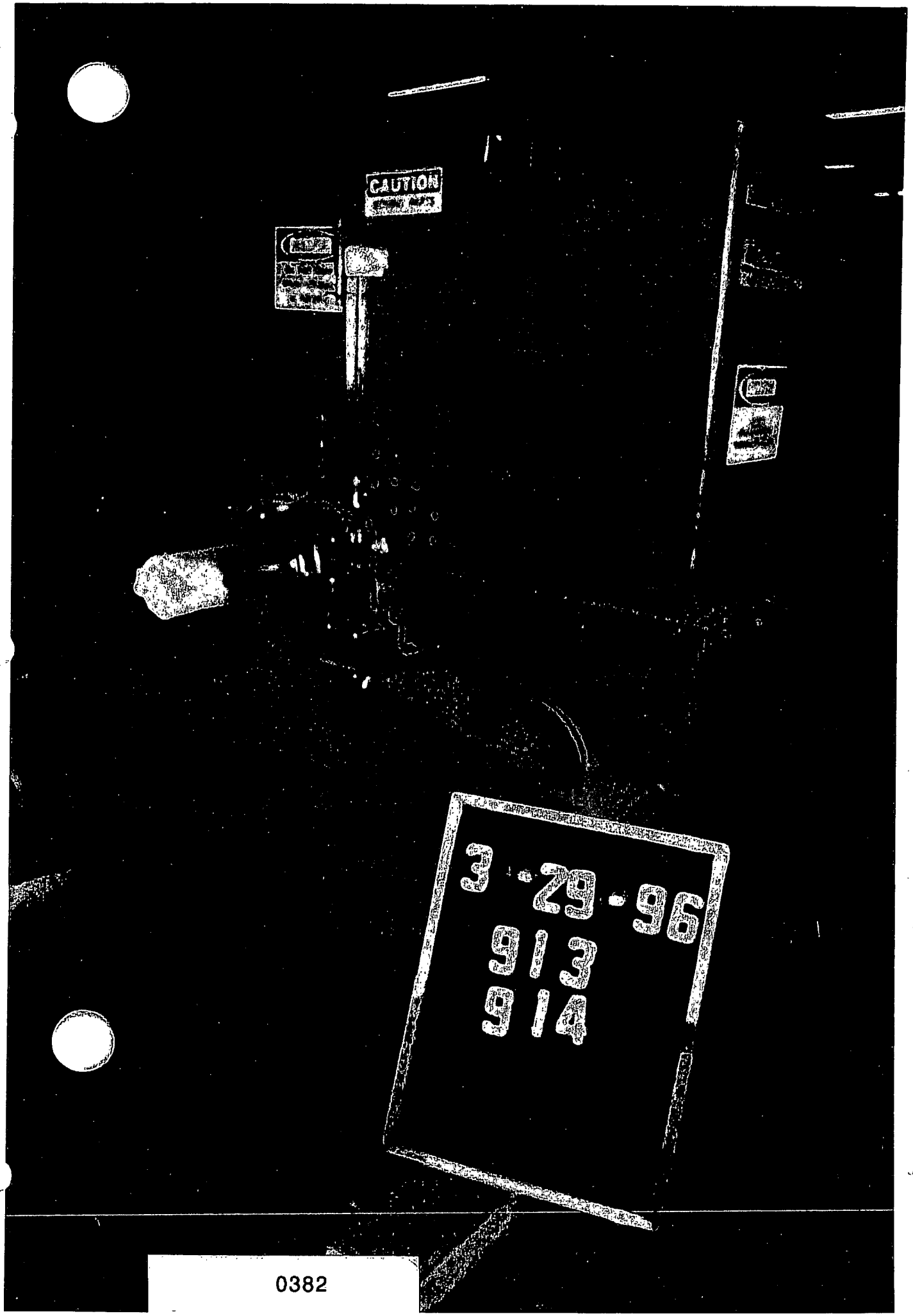
0378

0379

Morbark-0038
Holland v. Morbark, et al.


0380


3-29-96
913
914
0381


CAUTION
3-29-96
913
914

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THIRD JUDICIAL CIRCUIT
COUNTY OF CLARENDON	)	
	)	2008 CP 14-0461
Andreal Holland by his Guardian Ad Litem Peggy Knox	)	
	)	Memorandum In Support Of
Plaintiff,	)	Plaintiff's Motion To Amend and
vs.	)	Supplement Complaint and
	)	In Opposition To Motion For
Morbark Inc, Precision Husky Corporation, A & K Mulch, LLC, Watford Industry, Inc.	)	Summary Judgment
	)	
Defendants,	)	
	)	

Procedural History

The amended summons and complaint were first served on the Defendant Morbark, Inc., on March 16, 2009. On or about April 6, 2009, the Defendant removed the case to federal district court. On October 13, 2009 the Judge Michael Duffy remanded the case to Clarendon County Circuit Court. Initially the case included additional party defendants A&K Mulch, LLC, finally determined to be entitled to the exclusive remedy provision of the workers' compensation act despite the fact that J.C. Witherspoon, Inc. initially claimed itself to be the statutory employer, Watford Industry, Inc., the machine installer, and Precision Husky, Inc., an Alabama manufacturer of similar wood chipper equipment and the reseller of the Morbark 58" horizontal feed, top discharge wood chipper machine here involved. On July 30, 2010, following extensive discovery, Plaintiff moved to amend and supplement the complaint to delete the allegations of negligence and to proceed on the remaining causes of action for strict liability and implied warranty. On about August 23, 2010 the Plaintiff moved to voluntarily dismiss all of the Defendants except Morbark. Following additional discovery and particularly the deposition of Defendant's expert Bobby Ray Smith (11/18/10), the owner of a former defendant in this case, Precision Husky, the recent responses (12/29/10) to Plaintiff's Request For Production #29-36 served on 11/19/10, and the very recent delivery of the machine parts # 40293-580 and #30302-580 on Jan. 12, 2011, the Plaintiff filed a motion to amend and supplement the complaint and allegations against Morbark to include additional matters learned during discovery. The Plaintiff also filed a motion for an order of protection addressing the conditions for deposing the Plaintiff with the assistance of his GAL. The matters learned during discovery proposed to be incorporated as additional allegations of the complaint include the matters revealed by Plaintiff's expert witness that various wood chipper designs do exist to control and prevent the hood guarding the rotating cutting wheel of the wood chipper machine to be kicked back if it were mistakenly attempted to be opened while the cutting wheel/disc was still turning and a device to brake and stop the wheel/disc without the 10-15 minute run down time, avoiding the possibility of the operator making a mistake in judging when the wheel/disc was stopped.

**Materials Submitted By Plaintiff In Support Of Plaintiff's Motion To Amend and Supplement Complaint and In Opposition To Defendant's Motion For Summary Judgment

Depositions and Exhibits:

06/30/10	Original depositions of James Witherspoon (6/30/10);
08/04/10	Copy of deposition of Woodrow Woods and Exhibits 1-11 (8/04/10);
08/04/10	Copy of deposition of Robert Roseboom and Exhibits 1-3 (8/04/10);
08/24/10	Original 30(b)(6) depositions of Defendant Morbark, Inc, including depositions of 30(b)(6) witnesses Larry Noch (8/24/10) and 30(b)(6) witness James Strong (8/24/10);
08/31/10	Copy of deposition of Roger E. Davis, PE, and Exhibits #1-14, (08/31/10);
09/13/10	Copy of deposition of David E. Clement, PE, and Exhibits 1-9, (09/13/10);
11/18/10	Copy of deposition of Defendant's expert witness Bobby Ray Smith and Exhibits # 1-14 (11/18/10);
01/14/11	Copy of deposition of Andreal Holland and Exhibit 1 (1/14/11);
01/28/10	Copy of deposition of Peggy Knox (1/28/11).

Discovery and Responses

Defendant Morbark's Responses To Plaintiff's Request For Production # 1-11 (3/26/09), #12-28 (7/27/10), #29-36 (11/19/10);
Defendant Morbark's Answers To Plaintiff's Interrogatories #1-20 (3/27/09), #21-32 (7/27/10)
Defendant Morbark's Responses To Plaintiff's Request To Admit # 1-16 (7/27/10), 17-19 (9/9/10), #20 (11/19/10).

Accident and Injury

The saw mill operation at Alcolu where Mr. Holland worked was apparently started with the formation of A&K in 2003 by J.C. Witherspoon, Jr., as one of his various business entities under the core company, J C Witherspoon Jr., Inc. Despite the fact that Mr. Holland was paid by J.C. Witherspoon, Jr., Inc., it appears now that Mr. Holland and all saw mill employees working on the sawmill yard at Alcolu were A&K employees.

At approximately 4:15 p.m. on June 1, 2006, Andreal Holland, a "cut-ff man" working at J.C. Witherspoon, Inc./ A & K Mulch, LLC lumber yard in North Alcolu was investigating a noise coming from a 150 H.P. Mobark # 58" chipper. The machine was powered off and "locked out and tagged out". According to a statement, apparently made by plant manager Woodrow Wilson, included in the SC OSHA report of investigation, the chipper wheel continues to turn approximately 10 minutes after it is powered off. Mr. Woods speculated that Mr. Holland was struck by the chipper hood when removed the remaining pin on the side of the hood and the hood came in contact with the fan blades which were still moving causing the chipper hood to kick back and strike him in the face." Mr. Holland was discovered next to the machine in an unconscious condition.

He was transported by EMS to Clarendon Cty. Hospital and air evacuated to Richland Memorial Hospital with injuries first reported as crushed eye socket, broken nose and broken jaw. Mr. Holland was immediately placed on a ventrilator and underwent facial surgery

performed by Dr. Daren Cross. The surgery included open/closed reduction of severe comminuted fracture mandible and left zygomaticomaxillary complex and orbital fracture with allogeneic grafting and implants (Stryker fracture plate, compression plate, angle fracture plate, six hole angle eye plate, six hole locking straight plate, ten hole curred plate, twenty-four hole straight plate-mid face, multiple cross-pin bone screws), removal of teeth (molar and 2 incisors) and bone fragments. Mr. Holland was eventually weaned from the ventrilator and on June 14, 2006, was transferred to Carolinas Rehabilitation Hospital in Charlotte. There he received medical care and rehabilitation services including physical, occupational and speech therapy while being maintained on a Bolus feeding tube in a neurobehavioral unit and maintained on Elavil and Trazodone. Therapy included treatment of infection proximate to PEG tube and urinary tract and monitoing of tracheostomy site. He experienced an episode of Syncope without repetition. Mr. Holland was discharged from Carolinas Rehabilitation on June 27, 2006. On discharge he was noted to require supervision for auditory reception and maximum to moderate assistance for attention, problem solving and memory. Discharge medication included Metroprol, Trazadone, Procrit and Elavil. He was referred back to Dr. Cross-Oral Maxillofacial Surgery, Dr. Lenwood Smith, Neurosurgery, Palmetto Health Richland, Dr, Bynoe, Trauma, Palmetto Health Richland Dr. Hammond, Dr. McFadden and USC Ophthalmology.

Prior to the accident Mr. Holland (dob 2/10/75) had a lifelong problem with dyslexia and reading comprehension but worked regularly and was described as a good worker. As a result of the accident Mr. Holland suffered traumatic brain injury and has been determined to be permanently disabled by the SS Administration. Since the accident Mr. Holland has been examined and tested on three occasions by neuro-psychologist Dr. Robert Deysachs. On April 9, 2009 Dr. Deysach again tested Mr. Holland and reported that the results were consistent with previous testing and that Mr. Holland had a verbal IQ of 64 (1st percentile) and a Full IQ score of 76. Mr. Holland continues to suffer from anxiety, depression and difficulty sleeping. His Mother, and appointed GAL, describes his personality change as dramatic.

Accident Investigation

An investigation of the accident was conducted by SCOSHA on 6/5/06. The OSHA report indicates that that investigators B. Leeper/John Eleazer travelled to the accident scene on June 5 and expanded the accident investigation to a general investigation. According to the report, Karl Maddox, SCDOLLR, conducted an informal conference on 7/24/06 and reduced the amount of the fine imposed from $2,250 to $900. The fine was paid on Aug 22, 2006. On Aug 22, 2006, J.C. Witherspoon, Jr., wrote Karl Maddox with copy of a report indicating that a required safety meeting was conducted on July 5, 2006 for all mill employees.

On July 27, 2006, Roger E. Davis, PE, The Warren Group, conducted an investigation and examined the machine. Depo. Roger Warren and attached exhibits including the report of Mr. Davis, pp. 1-61)

Summary Of Legal Issues

SC Code Sect. 15-73-30 incorporates by reference section 402A of the Restatement (Second) of Torts (1965). The strict liability rule applies if the chipper machine was in a defective condition not contemplated by the ultimate consumer and was unreasonably dangerous

to the user, Mr. Holland. Obviously Holland has the burden of proving causation in fact and legal cause, i.e., the injury would not have occurred but for the defendant(s) negligence. The test is whether Holland's injury was the natural, probable and foreseeable consequence of the alleged acts/delicts. 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. Anderson v. Green Bull, Inc., 322 S.C. 268, 273, 471 S.E.2d 708, 712 (Ct.App.1996) (Cureton, J., concurring) (citing Marchant v. Lorain Div. of Koehring, 272 S.C. 243, 247, 251 S.E.2d 189, 192 (1979)). However, a product is not defective for failure to warn of an open and obvious danger. Id. (Cureton, J., concurring) (citing Dema v. Shore Enters., 312 S.C. 528, 530, 435 S.E.2d 875, 876 (Ct.App.1993)). A seller is not required to warn of dangers or potential dangers that are generally known if a danger associated with the product is one that the product's users generally recognize. Anderson v Green Bull, Inc., 322 SC 268, 471 S.E.2d 708 (SC App. 1996) The issues for trial in this case will involve both the design and warning.

Morbark, Inc. is a sophisticated manufacturer.

Morbark is a manufacturer of wood processing equipment distributed throughout the United States, Canada and Europe. Morbark's advertising literature advises that claims that its founder Norvel Morey, developed the business, beginning in 1957, from a simple blacksmith shop to a 1.1 million square foot manufacturing complex. From two workers to over 500 employees. From one product to hundreds of heavy equipment designs with world-wide markets and a reputation for designing and building durable, high performance, heavy equipment. Specifically Morbark distributes its equipment through authorized dealers throughout the US and Canada. Morbark's manufacturing facility is located in Winn, MI.

Morbark Model 58" Chipper Machine

The chipper machine involved here was a Model 58 Morbark Wood Chipper Serial # 914 manufactured in Winn Michigan in March 1996 pursuant to a design by Novel Morey dating back to the late 1960's. It was originally sold to the Johnson-Sherman Co. in Goldsboro, NC. The machine was eventually purchased by J.C. Witherspoon, Jr., Inc. in a used condition from Precision Husky in Leedz, Al., in approximately Feb. 2006. The machine was installed at the Witherspoon lumber yard at Alcolu by employees of Watford Industry, Inc. and was placed in operation in approximately mid April, 2006.

During discovery of the case it was revealed that J.C. Witherspoon was a known customer of Morbark, Inc., having done business and even visited the Winn, MI plant. (Depo. Larry Knox, p.___) See Morbark Invoice # 396867 RI to J.C. Witherspoon (customer # 15624) order # 715061 SO, 7/24/06. for a decal kit for the Morbark chipper (Item # 39513-112). (Ex. # 13 to Deposition J.C. Witherspoon) Note that despite repeated specific production requests to Morbark for all invoices, parts and equipment shipments, correspondence, record of ownership, etc., to Witherspoon, Morbark answered it had no such material. (See Morbark Response to Production # 24, #33, #34)

Despite specific requests for production and a 30(b)(6) deposition of Morbark in Winn, MI., Morbark has no machine design information or witness to address the issues relating to engineering compliance with traditional machine design criteria, i.e. hierarchy of design

principles or OSHA and other code compliance issues. The problem is demonstrated by Morbark's responses to Request to Admit.

Admissions and Stipulations:

7. The Mobark Model 48" and 58" chipper machine series was designed by Mobark employee, now deceased, Norval Morey, prior to 1969.

Response:

Morbark admits that Norvel Morey, deceased, was the original designer of the Morbark Model 58" Chipper, and that it was originally designed and began as a production unit around 1969.

9. The Defendant Mobark has no notes, files or other documentation of design information or considerations that were made by Mobark employee Norval Morey in designing the Mobark Model 48" and 58" chipper machine series.

Response:

Morbark admits only that it is not in possession of any notes, files or other documentation of design information or considerations that were originally prepared or considered by Norvel Morey in originally designing the Morbark Model 5" chipper in or around 1969.

11. The Defendant Mobark did consider Michigan OSHA General Industry Standard R408.15231 (Part 52 Sawmills) in the design and manufacture of the Mobark 58" Chipper Machine, Serial # 914.

Response:

Morbark lacks sufficient information or knowledge to admit or deny- - -.

12. The Defendant Mobark did not provide a specific warning, either by decal warnings attached to the chipper machine, or in the applicable Chipper Safety and Operators Manual, regarding the risk of operator head injury while the operator was removing the pins securing the moveable hood section on the two part hood of the Mobark 58" Chipper Machine, Serial # 914.

Response:

Denied, Morbark provided a warning decal - - - Although these warnings do not specifically warn against the risk of operator head injury - - - they warn against the extereme danger of attempting to open the hood or to make adjustments or reairs while the chipper is turning- - -.

13. The Mobark 58" Chipper Machine, Serial # 914, did not incorporate a motion detector, warning signal system or other sensing device in the machine design to indicate when the rotating disc wheel had stopped turning after the machine was powered off.

Response:

Morbark is unable to admit this request, and thus denies the same because there is a method for detecting motion inside the machine. As explained in the Chipper Safety and Operators Manual, "After power is disengaged, chipper will coast (rotate) for several miutes until it completely stops. Check the chipper sheave to verify it has stopped before opening the hood."

14. The Mobark 58" Chipper Machine, Serial # 914, did not incorporate a mechanical hood lock device to prevent the hood kicking back if the machine operator mistakenly attempted to open the hood before the chipper disc had totally stopped.

Response:

Morbark is unable to admit this request. Morbark warns against opening the hood while the chipper is turning in both the Chipper Safety and Operators Manual and the decals affixed to the machine. "After power is disengaged, chipper will coast (rotate) for several miutes until it completely stops. Check the chipper sheave to verify it has stopped before opening the hood."

15. That Defendant Mobark has never incorporated a safety interlock device in any machine it designed or produced.

Response:

Denied.

18. The documents produced by Defendant Morbark on August 24, 2010, including engineering changes #42 (8/10/72), 43 (8/9/72), 68 (10/9/72), 70 (10/9/72), 144 (10/3/73), 174 (1/28/74), 197 (4/5/74), 235 7/18/74), 250 (8/21/74), 302 (12/8/75), 306 (1/9/76), 307 (1/14/76), 309 (1/26/76), 318 (1/27/76), unnumbered (3/31/76), 329 (8/6/76), 346 (1/31/77), 00069 (4/15/86), 00123 (undated), 00206 (5/29/86), 00300 (7/28/86), unnumbered (7/11/89), unnumbered 3/30/90, unnumbered (3/28/90), #1999 (5/13/97), 2124 (7/2/90), 2126 (7/13/99), 2136R (9/15/99), 2137 (9/15/99), 2784 (4/25/08), 2860 (9/4/08), identified as Exhibit #20 of the deposition of Defendant Morbark by witness Larry Noch, are the only known engineering changes made to the original design of the Morbark Model 58 horizontal feed, top discharge wood chipper machine.

Answer:

Morbark admits only that the documents produced by Morbark and identified in this request are the only known engineering change notices created by Morbark that reflect engineering changes made in the originally designed Morbark Model 58" stationary chipper.

Patent and Design Issues

Although Morbark chose not to produce a design engineer in response to Plaintiff's 30(b)(6) deposition requests, in fact it has a long history of patented wood processing devices and is well aware of the state of industry developments, including chipper safety issues. The actual machine here involved had a label with a list of patents that Morbark presumably believed applied to this machine. The patents identified and others by Morbark or referred to in their patents generally identify a range of machines and design considerations that Morbark apparently now has little knowledge or awareness of. In further response to Plaintiff's Request To Admit Morbark responded:

17. The attached copies (pages 1-169) are accurate copies of each patent referred to in Morbark document 000077.

Answer:

Morbark admits only that the patents labeled Morbark 00007 appear to be represented in pages 1-169 of Plaintiff's attachments.

19. That the attached Plaintiff's Amended Notice of Deposition, dated August 9, 2010 of Defendant Morbark, Inc., identified as Morbark Deposition Exhibit # 1 on August 24, 2010, is a true and accurate copy of the Notice of Deposition of Defendant Morbark taken pursuant to SCRCP 30(b)(6).

Answer:

Admitted-Qualified denial

20. The attached page Morbark -000077 and included list of patent numbers referred to is an accurate copy of a label attached to the Model 58" chipper, Serial # 914, when Morbark sold the machine on or about March 29, 1996.

Answer:

Admitted at Chipper Safety" including an interview with Morbark Rep. Rob Faber and an interview with Jerry Morey, resident of Bandit Industries describing a mechanical spring lock to prevent the hood being opened while the disc is turning. (See patents by Michael Boyd Morey, # 6,036,125; 6,016,855 attached as Exhibits #8, #9 Deposition Roger Davis.)

Current Allegations by Plaintiff against Morbark

12. At all times mentioned, the Defendant Morbark undertook a duty to design, manufacture, inspect, sell and distribute the wood chipper machine here involved with operational and maintenance features complying with industry standards and practices adequate to assure the machine was safe to use and suitable for the expected and intended use by operators with a wide range of training, industrial experience, reading and comprehension ability, and alertness.

13. The duty to design and manufacture the wood chipper machine included a duty to prevent and warn of known and forseeable dangers inherent to the operation of the wood chipper, including the danger related to the extended "run down" or "coast" time of the chipper disc.

14. Plaintiff is informed and believes that the wood chipper machine here involved was defective; and that Defendant Mobark breached its duty to manufacture, design and inspect the wood chipper machine to assure the operational and maintenance features of the machine were adequate to assure the machine was safe to use and suitable for the expected and intended use, and perform those duties with due care to prevent the known and forseeable dangers of the design and use of the wood chipper machine in one or more of the following particulars:

a. In designing and manufacturing the wood chipper machine without a motion detector and signal system to determine when the rotating wheel had stopped turning;

b. In designing and manufacturing the wood chipper machine without a securely fitted hood/cutter access door with positively secured and fitted hinge assembly upon which to rotate;

c. In designing and manufacturing the wood chipper machine without an interlock device to prevent the hood from opening until the rotating wheel had stopped turning;

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

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

h. In designing and manufacturing and thereafter promoting, selling and distributing the chipper machine without prominently displayed cleaning, maintenance and operating instructions and warnings conveying the serious nature of injury or death that would result in the event the pins securing the hood/cutter disc section were removed while the rotating chipper disc was still turning, even slowly tuning;

i. In failing to inspect the chipper machine here involved to assure it was equipped with operational and maintenance features of the machine were adequate to assure the machine was safe to use, and suitable for the expected and intended use;

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

Basis Of Additional Allegations proposed by Plaintiff

The Defendant's expert witness, Bob Smith testified on November 18, 2010 to the following:

1. That he had no knowledge of the ANSI Z535 machine warning design requirements or presumably whether the Morbark labeling system complied. (Depo. Smith, p. 97)

2. That chipper equipment produced by Precision Husky was sold across the US and in British Columbia. (Depo. Smith, p. 97)

3. **That both customers and dealers expected and depended on the manufacturer to produce equipment that would satisfy OSHA standards.** (Depo. Smith p. 98)

4. That he had no knowledge of the OSHA Standard from the British Columbia Government (part 27.41) referring to a requirement that mill chippers with a hood must have an effective brake. (Depo. Smith pp. 98-99)

5. **That it was common knowledge within the industry that Precision Husky manufactured chipper equipment (all sizes) with a brake that would stop the rotation of the disc within one minute.** (Depo. Smith pp. 99-100) **I believe all manufacturers offer that.** (Depo. Smith, p. 101)

6. That Mr. Smiths knowledge of the accident was based on his conversation with J.C. Witherspoon. (Depo. Smith p. 88)

7. That Precision Husky produced a chipper with a two piece hood with a hood lock that rotates back against the two part hood as a locking device and a visual port and screen on the side of the hood where the disc can be seen. (Depo. pp. 82, 83, 84, 85)

8. That if the rotating hood lock was in position and there was an internal malfunction of the machine that kicked the some force against the hood, the hood lock would keep it from opening. (Depo. p. 111)

8. On April 13, 2006 Precision Husky sent a set of shaft bearings to J.C. Witherspoon because of complaints that the machine was making noise. (Depo. Smith, p. 73-74)

9. That Mr. Smith had no knowledge or information regarding the decals that were on the Morbark machine when it was received by Precision Husky and that Precision Husky did no maintenance on the machine but did apply warning labels they used on Precison Husky equipment that actually had a hood lock that was not part of the Morbark design. (Depo. Smith pp.76- 77)

10. That operating a chipper machine being automatically fed by a vibrating conveyor could "plug" and stall the chipper if the conveyor was allowed to continue to feed the machine after the chipper was shut off. (Depo. Smith, pp. 90) Other reasons the machine might plug include an excessive amount of oversized chips, worn out fan blades, holes in the lower casing band or the hood, holes in the blow pipe, blow pipe to narrow, holes in the blow pipe transition. (Depo. Smith, p. 118)

Additional Allegations proposed based on the testimony of Mr. Smith and further responses by the Defendnat Morbark

In failing to equip the chipper machine with an effective brake mechanism;

In failing to design, manufacture, inspect and distribute a chipper machine that complied with OSHA General Duty Standard 29 CFR 1910.212, General Requirements For All Machines.

ISSUES ADDRESSED BY PLAINTIFF'S EXPERTS

Summary of Relevant Testimony:David Clements, Ph.D.
Dr. David Clement has a B.S. in engineering and doctorate in psychology. He is recently retired, from the faculty of the University of South Carolina. He has decades of experience in teaching and assessing human factors planning and analysis and particularly in factors related to warnings, instructions, operator capabilities, perception and awareness. On deposition he offered his opinion regarding the dangers presented by the lengthy run down time of the machine after it is powered off, the effectiveness of the various warnings and "safety" mechanisms incorporated in

the machine, alternative safety and warning designs and features and the requirements of ANSI Z535.

1. The design of the chipper is flawed because the hood could be inadvertently opened before the disc had stopped turning. (Depo. Clement, pp. 62-63)

2. It is likely that a person will come to rely on insufficient cues that the disc has stopped turning. This can be avoided with effective warnings complying with Ansi Z535 at the point of action as a step in the so called Heirarchy of Safety, ASTM WK28145 (Depo. Clement, pp. 64-65, 67, 76-77, 89-92)

3. An effective warning would include signaling at the location where the person is going to remove the hood/guard. Something for example as simple as simple as a go/no go light. (Depo. Clement pp. 66-67)

4. The Precision Husky warning that was added to the Morbark machine was not an effective warning and was designed fior a different machine. (Depo. Clement, pp. 69-72)

5. The Morbark warnings that were incorporated with the machine design did not comply with ANSI because they have no description of the hazarad or outcome.(Depo. Clement., pp. 85-86)

Summary of Relevant Testimony: Roger Davis, PE, Warren Group.
Mr. Davis is the only professional witness appearing that investigated this accident shortly after the event. He was first licensed as a PE in 1973. On deposition he offered his opinion regarding the dangers presented by the lengthy run down time of the machine after it is powered off, the effectiveness of the various warnings and "safety" mechanisms incorporated in the machine, alternative safety and warning designs and features and the requirements of OSHA 29 CFR1910.212 General Requirements for all machines.

1. The design of the chipper is flawed because the chipper hood itself, acting as a guard of the rotating disc is a danger and in violation of 29 CFR 1910.212 (2) **"The guard shall be such that it does not offer an accident hazard in itself".** (Depo. Davis, pp. 22, 82-85, 105-106).

2. Even if the industry custom regarding the attachment of the hood was similar to the Morbark design in 1996, the it is not sufficient to comply with a standard of safety that should be used. (Depo. Davis, p. 89)

3. There are mobile wood chippers with interlock designs that prevent the hood from opening while the disc is turning. (Depo. Davis p. 89)

4. Mr. Davis identified an interlock timing device that he considered appropriate which he referred to in the report of his investigation. (Depo. Davis p. 103)

5. Mr. Davis addressed the British Columbia OSHA Standard (part 27.41) referring to a requirement that mill chippers with a hood must have an effective brake. (Depo. Davis pp. 159-160)

Summary of Deposition Testimony of A&K Mulch Employee-Woodrow Woods

Mr. Woods was deposed by Morbark counsel on Aug. 4, 2010.
Mr. Woods testified as to various matters including:

Woodrow Woods (WW) is an A&K employee and the mill foreman of the "large mill" where Mr. Holland worked. WW started working at A&K Mulch in August 2004 to supervise the large mill operation. (WW Depo. p. 6) Mr. Woods had extensive saw mill experience from his previous employment at Georgia Pacific and other operations going back to 1970. (WW Depo. pp.80-83) He was referred for employment at A&K Mulch by David Wright. When he arrived he was the third former Georgia Pacific employee along with David Wright and Leroy Frierson. He recalled that when he arrived AH was the chop saw (slabber) trimming the the slab coming from the head saw and was also involved in changing the knives on the chipper and that he did not train AH but did work with him on occasion. (WW Depo. pp. 30-31, 36, 37, 76) He stated that the machine currently in place behind the large mill had a one piece hood and side plate access to the knives and that employees Levain Brown and David Wright were currently responsible for changing the knives. (WW Depo. pp. 50, 51)

As a foreman WW had the responsibility to "write up employees" for violation of procedures including absenteeism, tardiness and safety issues. (WW Depo. pp.87-92) He would obtain the forms to document the write up from the main office and submit the forms to be filed there and likely reviewed by J.C. Witherspoon, Jr. (WW Depo. p. 92) He testified that the only written reports addressing Andreal Holland was for absenteeism. (WW Depo. pp 90-92) He stated that he was not aware of any prior incidents in which AH had opened the hood while the disc was turning and that he would have written him up for a safety violation if he had. (WW Depo. p. 51)

WW did not see the accident and recalled he was first aware of the incident while he was in the "front" of the big mill, working in the saw cab, about 200' from the opposite end of the mill where the chipper was located outside the mill when Leroy Frierson came to him. (WW Depo. pp. 16, 133) He did not recall AH talking about the chipper earlier. He first went to the chipper area to determine AH's condition and then went to the office to call 911. (WW Depo. p. 17) He stated that AH was found face down, behind and more or less parallel with the machine, feet closest to the machine. (WW Depo. pp. 103-104) He stayed with AH until EMS arrived. (WW Depo. p. 19) He noted that AH was wearing a hard hat at the time of the accident. (WW Depo. p. 19) WW recalled that the original 48" Morbark chipper photographed by Roger Davis at the small mill location is the same chipper that was at the large mill location when he was hired and which remained at the large mill until it was replaced by the 58" chipper in April 2006, before the injury to AH on June 1, 2006. (WW Depo. p. 38) He also testified that the 48" Morbark chipper that was moved to the small mill is still there and in the same general condition it was when it was moved. (WW Depo. p. 38)

WW stated that following the accident he inspected the damage to the hood and also stated the pins were not damaged but that a fan blade was damaged. (WW Depo. pp. 53-54, 116, 119) He surmised that the accident happened because AH lifted the hood of the machine while the disc was still turning and some portion of the fan must have come in contact with the hood. (WW Depo. pp. 19, 54) He stated that the hood was normally secured in the closed position with two pins secured in place with cotter keys. (WW Depo. pp. 20-21, 119) Mr. Woods participated in the OSHA inspection. (WW Depo. p. 58) He testified that the machine had been powered off at the time of the accident. He also determined that Leroy Frierson had not seen the accident. (WW Depo. p. 105) He also stated that he did not have any witness information as to the amount of time that had elapsed between the time AH powered off the machine and the time of the accident. (WW Depo. p. 105-106)

WW explained his understanding of the Morbark stationary chipper machines shut down procedure. He estimated the time for the disc to stop after the chipper power was shut off, was 10-15 minutes. (WW Depo. p. 20) He stated that the procedure was to first shut off the power to the separately controlled chipper machine and then the vibrating feeder, both controls located at the same location at the rear of the mill. (WW Depo. pp. 107, 109) He stated that the chipper slowed progressively after switching off the chipper power, with the disc first moving very fast and slowing as the momentum, dissipates. He also stated that if the chipper had material being fed to it by the separately controlled vibrating conveyor that it would slow down more quickly. (WW. Depo. p. 106-108) He stated that he was aware that there were occasions that the feeder either did not operate properly or was not shut off and material continued to be fed to the chipper. (WW Depo. pp. 107, 138-139) He testified that if the vibrator was not turned off and continued to feed the chipper it would choke it and stop it. (WW Depo. p. 108) He testified that even if the disc was turning very slowly that it "can do a lot of damage". (WW Depo. pp. 40, 109, 110, 120, 141) He stated that if the chipper was moving very slowly you could not hear it moving. He also stated that it was not possible to see whether the disc is turning while in the position to remove the cotter keys. (WW Depo. pp. 43-44)

Regarding the moveable hood of the chipper, he stated that there was a wobble between the hood and hood hinge pin that could have allowed the hood to strike the fan if the hoods securing the hood were removed. (WW Depo. pp. 115-116, 121, 122)

He stated that there was no formal procedure to change the chipper knives but that he knew the procedure from his 35 years of saw mill experience. (WW Depo. pp. 24-25, 63) WW stated that he had the operator's manual for the Morbark chipper in his office but did not require the person changing the blades to read it but would expect persons performing maintenance on the chipper to read it. (WW Depo. pp. 44-47) He stated that it took only one person to change the chipper blades on the 48" chipper and that there was no pin used to secure the disc while changing the knives. (WW Depo. pp. 24, 27, 28, 114, 115) He also stated that the procedure to change the knives on the 58" chipper required two people to change the knives after the chipper had stopped. (WW Depo. pp. 56,57) He stated that it was necessary to remove the pins by using a hammer. (WW Depo. pp. 28, 118)

Regarding the decals that were on the machine, WW recalled that there were numerous decals on the 58" machine when it was installed but that they (he and Jimmy Witherspoon) put more

decals, showing someone getting hit in the head, sometime after it was installed. (WW Depo. pp. 38-40, 63, 135) WW stated that based on his many years of sawmill experience he recognized the risks of opening the hood and relied on the "procedures" to avoid the hazards associated with the disc turning after it was powered off. (WW. Depo. pp. 41-42)

WW stated that he had changed bearings on various chippers and may have changed them on the 58"chipper but could not remember. (WW Depo. p. 128-131)

Summary of Deposition Testimony of A&K Mulch Employee-Robert Roseboom

Mr. Roseboom was deposed by Morbark counsel on Aug. 4, 2010.
Mr. Roseboom responded to various matters including:

Rob Roseboom (RR) is an A&K employee and the supervisor of the "small mill" also known as the "scrag mill" or "fence mill". RR started working at A&K Mulch beginning in July 2004, initially hired to do machine maintenance and work in shipping and receiving when he was asked to supervise the small mill operation. (RR Depo. p. 60) Although he had no prior saw mill experience he had a general mechanical background. On occasion he worked with J.C. Witherspoon, Jr. to replace parts, bearings, etc., on various stationary and brush chipper equipment. (RR Depo. pp. 48, 79-80) He also helps J.C. Witherspoon, Jr. with certain personal farming activities not associated with A&K Mulch. (RR Depo. pp. 42-43) He recalled discussing the case with J.C. Witherspoon "three or four different times" before his deposition. (RR Depo. p. 44) As a foreman he had responsibility to "write up employees" for violation of procedures including absenteeism, tardiness and safety issues. (RR. Depo. p.62) He stated he would obtain the forms to document the write up from the main office and submit the forms to be filed there. (RR Depo. pp. 63-64) He testified that the procedure was to give a verbal warning for a non-serious violation followed by a written warning for a second offense. (RR. Depo. pp 63-64) He testified that serious violations would result in a written warning. (RR Depo. pp.64-66) RR did not see the accident and thought it may have occurred at lunch time. He recalled he was first aware of the incident when he saw Woodrow Woods, the big mill supervisor, running to the office. RR went to the chipper where he saw AH. He stayed with him until EMS arrived and helped put him in the ambulance. (RR Depo. p. 9-11)

RR recalled that the 48" Morbark Chipper was replaced with the 58" Morbark chipper that was replaced by a green (probably Precision Husky) chipper with a two piece hood and lift cylinder, after the accident. He also recalled the Precision Husky chipper was replaced sometime in 2007 with a Morbark hog grinder which was replaced in approximately the Fall of 2009 by a Precision Husky chipper with a one piece hood and side plate access to the knives. (RR. Depo. pp. 49-54) He also stated that the original 48" Morbark chipper photographed by Roger Davis at the small mill location is the same chipper that was at the large mill location when he was hired and which remained at the large mill until it was replaced by the 58" chipper in mid April 2006, before the injury to AH on June 1, 2006. (RR. Depo. 15, 56) He also testified that the 48" Morbark chipper that was moved to the small mill (where it was photographed by Roger Davis) is still there and in the same general condition it was when it was moved. (RR Depo. pp. 56, 66) He stated that the chipper that is there now has side plate access to the chipper knives and not the swinging hood guard design. (RR Depo. p. 50)

RR stated that beginning when the 48 chipper was moved to his small mill location that Woodrow Woods showed him how to change the chipper knives and he began helping change the knives in the 48" chipper and thereafter might give a little hands on instruction to his employees but did not go through any written procedure to train the small mill employees as to changing the chipper knives. (RR Depo. pp. 14, 16, 17, 67-69) RR explained his understanding of the Morbark stationary chipper machines shut down procedure. He stated that the chipper slowed progressively after switching off the power, with the disc first moving very fast and slowing as the momentum, dissipated. (RR Depo p. 75) He estimated that the disc normally turned more than 1,000 rpm when it was powered up. Although he stated he had never read the Operator's Manual for either the 48" and 58" Morbark chipper, when shown the Manual at the deposition, he agreed that the Manual referred to a disc speed of 2,150 r.p.m. (RR Depo. pp. 20, 75-76) He agreed that the accident could have happened if the disc was barely moving and the pins were removed without having to pull back the hood. (RR Depo. p. 73) He estimated the time for the disc to stop after the power was shut off, assuming it did not have anything being fed into it, was 3-4 or 5-10 minutes. (RR Depo. pp. 18, 76) He stated that if the chipper had material being fed to it would slow down more quickly. (RR Depo. p. 76) He stated that the procedure at the small mill was to first shut off the power to the separately controlled vibrating feeder and then turn off the power to the chipper machine and main breaker and lock out and tag out and wait for the disc to stop. (RR Depo. p. 77) He testified that if the vibrator was not tuned off first and material continued to be fed into the machine it would jam the machine, plug it up and stop it or make it run erratically. (RR Depo. pp. 77-78, 83) He also stated that even though the vibrating chipper was designed to feed the chipper without operator assistance that sometimes an unusual size or shape piece of wood would hang up and possibly clog up the machine. (RR Depo. pp. 82-83) He also agreed that the pieces being fed to the chipper at the big mill could be up to 16' long. (RR Depo. p. 78) He also stated that in the event the chip separator (cyclone) clogged up that it would back up the chipper which would continue to try to chip until it stopped. (RR Depo. pp. 83-84) Regarding the moveable hood of the chipper, he stated that the fit between the hood and hood hinge pin might allow a little play ("a tad") allowing it to move left or right some small amount. (RR Depo. pp. 71-72) He recalled that after the damaged hood was removed from the machine that he took it to Watford Enterprises to see if it could be repaired. (RR Depo. pp. 16, 57) When shown the various pictures of the damaged hood he offered that he thought he remembered the damage was greater than what was shown. (RR Depo. pp. 57, 58)

Regarding the decals that were on the machine, RR recalled that there were numerous decals on the machine and but prior to the accident did not recall seeing the decal on the chipper depicting the diagram of the hood striking the operator. (RR Depo. p. 26)

Summary of Deposition Testimony of A&K Mulch Employee-Levain Brown

Mr. Brown was deposed by Morbark counsel on Aug. 4, 2010.
Mr. Brown testified to various matters including:.
Levain Brown (LB) knew Andreal Holland (AH) prior to working at A&K Mulch. He started working at A&K mulch in March 2005, referred by a relative (Zingle Epps) who worked at the mill and for J.C. Witherspoon, Jr., personally around his house. LB had no prior saw mill or industrial experience. (LB Depo., p.23, ll. 19-21) He was hired to operate the resaw and

continues in that job. He diagramed the rectangular shape of the big mill (LB Depo. pp. 41-43; ex. 3) and demonstrated the relative positions his work station and AH's work station farther back from the back entrance to the big mill. (LB Depo., pp. 47-48) LB testified that his work station inside the mill was 40-50' away from the chipper located outside the mill but that he could see a portion of the guard of the machine 10-15' away from his work station if he looked around the side of the resaw, through an opening in the end of the mill. (LB Depo. pp. 10-11, 52) He circled (as a target) that portion of the machine (back side of the yellow guard) he could see of the chipper if he looked around his machine. (LB Depo. pp. 47-48, ex. 1). LB did not see the accident and was first aware of the incident when A&K employee Leroy Frierson came by hollering and looking for the mill foreman Woodrow Woods, who was apparently at the front area of the mill. (LB Depo. p. 11) LB saw AH on the ground face down and unconscious beside the conveyor belt feeding into the chipper. (LB Depo. p. 12) Although LB looked at the chipper disc after the accident, he only recalled the damage to the hood. (LB Depo. p. 62) He did not recall whether there was any material on the vibrating conveyor feeding the chipper. (LB Depo. p. 66) His opinion was that he believed one of the fins caught the side of the hood. (LB Depo. p. 34) He recalled the damage to the hood was "pretty bad" but did not recall looking at the pins from the hood. (LB Depo. pp. 33-34)

LB explained that the normal processing is that the lumber comes in the front of the mill, that David Wright cuts the lumber into boards, that AH cuts the boards into lengths, that if its timber it goes to a small belt out back but if its not timber, it goes to LB at the resaw to be cut into boards. The scrap from that operation goes to "Pete", James Lee Thompson, who pulls it off and puts it on the conveyor going to the chipper. The scraps could be chunk sections of nearly any size up to 16 ft. (LB Depo. pp. 44-45) LB recalled "Pete" was injured in an incident involving the chipper when he was attempting to clear chunks of material that had hung up in the infeed chute of the machines while being fed from the vibrating conveyor. (LB Depo. pp. 65-66)

LB stated that sometime after he began work at A&K in March 2005, he was occasionally asked to help change the chipper blades on the 48" Morbark machine, that was then behind the big mill, and the 58" machine that replaced it in mid April 2006, a few weeks before the accident on June 1, 2006. (LB Depo. pp. 14, 19, 20) He recalled that he was never trained on the procedure nor ever read the operator's manual but did observe the process performed by others. He did recall that two people were required to change the chipper blades. (LB Depo. pp. 14, 22, 23, 57, 58, 62) LB estimated that the disc would take 10-15 minutes to coast to a stop after the power was cut off. (LB Depo. p.27) He also stated that his only recollection of warning decals on the machine was a warning about "lock out tag out". (LB Depo. pp. 27-28)

LB stated that over the course of time he learned about sawmill equipment and safety and had a better appreciation of safety and how to do things without getting hurt than when he began working at A&K Mulch. One incident he recalled was getting hurt on the job by not tagging out and locking out his resaw when one of the belts/chain stopped turning. He explained that he thought it had tripped the breaker, but when he pulled on it the machine started turning and caught his hand, resulting in only a minor injury and few days lost time. He stated that although he knew about the lock out tag out procedure he had not comprehendedthe risk involved. (LB Depo. p. 61)

Testimony of J.C. Witherspoon

The testimony of the Mr. Witherspoon addressed the following matters:

a. Mr. Witherspoon testified he called someone at Precision Husky and discussed the purchase of this chipper. He testified the he was advised that although the machine had not been rebuilt, that it was in good condition.

b. Mr. Witherspoon also testified that he had another smaller 48" Mobark chipper installed in the same location when he purchased this 58" Mobark chipper machine from Precision Husky in April 2006, less than two months before the accident. He claims that he personally removed the 48" chipper from the original location and placed it in another area in the mill and had Watford Industry (Mark Williamson and possibly his cousin Bruce Williamson) install the "new" 58" chipper at the location where the 48" chipper had operated.

c. At some point after the machine was installed, Mr. Witherspoon called PH and advised that the machine was making a noise. He testified PH advised that it would provide new bearings if necessary. In response to the call, P.Husky sent Withersppon a set of main shaft bearings.

d. The Mobark operators manual was apparently kept in the Witherspoon office but according to Mr. Witherspoon was not used to train chipper operators. The manual has scant information regarding any hazard related to the process of allowing the chipper to power down and stop before changing cutter knives. The manual itself says it is to be kept with the machine and generally describes various hazards. At page 1-4 it states "After power is disengaged chipper will coast (rotate) for several minutes until it completely stops. Check the chipper sheave to verify it has stopped before opening the hood". The Mobark warning label #456 advises "Never operate this machine without thoroughly reading the operator's manual". Mobark Label # 39512-219 (Mobark doc # 076) attempts to transfer the responsibility to instruct the operator to read the manual, to the owner of the machine. It is foreseeable that a manual may not be consulted by an operator. Horn v Fadal Machining Ctr., 972 So. 2d 63.

e. Mr. Witherspoon indicated that he believed Holland had been instructed to look for the movement of the shaft turning the cutter to see if the machine had stopped turning. The areas he indicated required looking between the pulley guard and the hood, etc. The area he indicated is not addressed in the Morbark manual nor are any machine labels placed in any area indicating where to look for movement.

March 10, 2011

Respectfully submitted,

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STATE OF SOUTH CAROLINA COUNTY OF CLARENDON Andreal Holland by his Guardian Ad Litem Peggy Knox Plaintiff, vs. Morbark Inc, Precision Husky Corporation, A & K Mulch, LLC, Watford Industry, Inc. Defendants,	IN THE COURT OF COMMON PLEAS THIRD JUDICIAL CIRCUIT 2008 CP 14-0461 Supplemental Memorandum In Opposition To Motion For Summary Judgment

Defendant's motion addresses three primary matters:

1. The Morbark Chipper was not in a defective condition, unreasonably dangerous to the user because it was not in essentially the same condition at the time of the accident as when it was produced and whatever danger existed that Morbark had no duty to warn either because the danger was open and obvious, or that there was no duty to warn either under the sophisticated user or learned intermediary doctrine. (Grounds #1, 2, 5, 6, 7)

2. That Plaintiff misused the wood chipper. (Grounds #3, #8)

3. The alleged design defect fails because the Plaintiff failed to prove an alternative feasible design. (Grounds # 3)

SUMMARY OF FACTS

Plaintiff was injured at approximately 4:15 p.m. on June 1, 2006 when he was struck in the head with the hood portion of a Morbark 58" horizontal feed, top discharge wood chipper machine. Plaintiff suffered massive facial fractures and traumatic brain injury.

Plaintiff previously detailed the relevant facts regarding the history and details of the manufacture, sale and resale of the machine leading to its installation at J.C. Witherspoon Inc./A&K Mulch at Alcolu S.C.(Pl. Memo 3/11/11, pp. 4-6) In summary, Morbark is a manufacturer of wood processing equipment distributed throughout the United States, Canada and Europe and designed and produced the Model 58 Morbark Wood Chipper Serial # 914, initially designed in the early 1960's, in March 1996. The machine was eventually purchased by J.C. Witherspoon, Jr., Inc. in a used condition from Precision Husky in Leedz, Al.,and was installed at the Witherspoon lumber yard in mid April, 2006. During discovery of the case it was revealed that J.C. Witherspoon was a known customer of Morbark, Inc., having done business

and visited the Winn, MI plant. (Depo. Larry Knox, p. ___) See Morbark Invoice # 396867 RI to J.C. Witherspoon (customer # 15624) order # 715061 SO, 7/24/06. for a decal kit for the Morbark chipper (Item # 39513-112). (Ex. # 13 to Deposition J.C. Witherspoon) Despite repeated specific production requests to Morbark for all invoices, parts and equipment shipments, correspondence, record of ownership, etc., to Witherspoon, Morbark answered it had no such material. (See Morbark Response to Production # 24, #33, #34) Despite other specific requests for production and a 30(b)(6) deposition of Morbark in Winn, MI., Morbark testified it had no machine design information or witness to address the issues relating to engineering compliance with traditional machine design criteria, i.e. hierarchy of design principles or OSHA and other code compliance issues.

Plaintiff's Reading and Comprehension Problems

Prior to the accident Mr. Holland (dob 2/10/75) had a lifelong problem with dyslexia and reading comprehension but worked regularly and was described as a good worker. As a result of the accident he suffered traumatic brain injury and has been determined to be permanently disabled by the SS Administration. Since the accident Mr. Holland has been examined and tested on three occasions by neuro-psychologist Dr. Robert Deysachs. On April 9, 2009 Dr. Deysach again tested Mr. Holland and reported that the results were consistent with previous testing and that Mr. Holland had a verbal IQ of 64 (1st percentile) and a Full IQ score of 76.

Accident

There were no witnesses to the accident and the only facts that are actually known about how the Plaintiff was injured came directly from the Plaintiff. Although significantly intellectually handicapped, Mr. Holland was deposed. He testified that near the end of his work day that he turned off the power to the machine and allowed the vibrating feeder to continue to feed the machine and dispose of the material that was still coming down the line as he had been shown. He stated that this was the first time that day he had turned off the machine because his foreman had advised him at lunch that the machine was cutting well and that blades did not need changing. The shut off and power disconnect were located at the back of the building, away from the outside machine location. After shutting off the power Mr. Holland returned to his regular work station at the cut-off saw some distance away and continued to clean up around his work station. (Depo. Holland, pp. 117, ll. 5-14; 118, ll. 1-18) He stated that he worked at the cut-off saw location for about 5-7 minutes when another worker told him that they heard a tapping noise coming from the machine. He stated that he waited a few more minutes and then went to investigate. Depo. Holland, pp. 118, ll. 19-25; 119, ll. 4-8; 120, ll. 9-15) He stated that when he arrived at the machine that it appeared to be stopped. Mr. Holland also stated that he didn't hear anything and threw a board into the feed of the machine and determined the cutting wheel had stopped. (Depo. Holland, pp. 119, ll. 9-16; 120, ll. 9-20; 121, ll. 1-11, 20-25) He then went to find the Woodrow Woods, the foreman. (Depo. Holland , pp. 120, 6-25; 122, ll. 1-11) Mr. Holland further stated that Mr. Woods told him to find "Mr. Leroy", another saw mill employee to look at the chipper. Mr. Hollad then found "Mr. Leroy" who was busy apparently selling snack items from his private "canteen" (Depo. Holland, p. 122, ll. 17-25; 136, ll. 21-24) Mr. Holland stated that he then went back to the chipper and began cleaning up. When "Mr. Leroy" didn't arrive he went to look for him again but didn't find him. He then went back to the

chipper and discovered one of the pins securing the hood was missing on the left side as he faced the machine from the feed location. (Depo. Holland p. 137, ll. 6-20) He then removed the cotter pin from the remaining hood pin and as he worked the pin out the hood flew back and hit him in the face and knocked him unconscious. (Depo. Holland pp. 123, ll. 10-15; 124, ll. 3-8; 128, ll. 1-11; 129, ll. 21-24; 138, ll. 22-25; 139, ll. 1-10)

The only other person with any relevant information regarding the accident was Woodrow Woods who came on the scene after another employee notified him. Mr. Woods stated that following the accident he inspected the damage to the hood and also stated the pins were not damaged but that a fan blade was damaged. (WW Depo. pp. 53-54, 116, 119) He stated that the hood was normally secured in the closed position with two pins secured in place with cotter keys. (WW Depo. pp. 20-21, 119) He stated that he did not have any information as to the amount of time that had elapsed between the time Mr. Holland had powered off the machine and the time of the accident. (WW Depo. p. 105-106) He estimated the time for the disc to stop after the chipper power was shut off was 10-15 minutes. (WW Depo. p. 20)

Summary of Expert Testimony

David Clements-Human Factors Expert

David Clements, Ph.D. , was offered as a human factors expert. He has decades of experience in teaching and assessing human factors planning and analysis and particularly in factors related to warnings, instructions, operator capabilities, perception and awareness. On deposition he offered his opinion regarding the dangers presented by the lengthy run down time of the machine after it is powered off, the effectiveness of the various warnings and "safety" mechanisms incorporated in the machine, alternative safety and warning designs and features and the requirements of ANSI Z535.

1. The design of the chipper is flawed because the hood could be inadvertently opened before the disc had stopped turning. (Depo. Clement, pp. 62-63)

2. It is likely that a person will come to rely on insufficient cues that the disc has stopped turning. This can be avoided with effective warnings complying with Ansi Z535 at the point of action as a step in the so called Heirarchy of Safety, ASTM WK28145 (Depo. Clement, pp. 64-65, 67, 76-77, 89-92)

3. An effective warning would include signaling at the location where the person is going to remove the hood/guard. Something for example as simple as simple as a go/no go light. (Depo. Clement pp. 66-67)

4. The bootleg Precision Husky warning that was added to the Morbark machine was not an effective warning and was designed for a different machine. (Depo. Clement, pp. 69-72)

5. The designed Morbark warnings that were applied at the Morbark factory before it was initially sold did not comply with ANSI because they have no description of the hazard or outcome.(Depo. Clement., pp. 85-86)

6. He testified to what an adequate warning and warning system that addressed the hazards of the chipper would require.

Roger Davis, PE, Warren Group.

Mr. Davis is the only professional witness appearing that investigated this accident shortly after the event. He offered his opinion regarding the dangers presented by the lengthy run down time of the machine after it is powered off, the effectiveness of the various warnings and "safety" mechanisms incorporated in the machine, alternative safety and warning designs and features and the requirements of OSHA 29 CFR1910.212 General Requirements for all machines requiring that "**The guard shall be such that it does not offer an accident hazard in itself".** Specifically he testified:

1. The design of the chipper is flawed because the chipper hood itself, acting as a guard of the rotating disc is a danger and in violation of 29 CFR 1910.212 (2) " (Depo. Davis, pp. 22, 82-85, 105-106)

2. Even if the industry custom regarding the attachment of the hood was similar to the Morbark design in 1996, it is not sufficient to comply with a standard of safety that should be used. (Depo. Davis, p. 89)

3. There are mobile wood chippers with interlock designs that prevent the hood from opening while the disc is turning. (Depo. Davis p. 89)

4. Mr. Davis identified an interlock timing device that he considered appropriate which he referred to in the report of his investigation. (Depo. Davis p. 103)

5. Mr. Davis addressed the British Columbia OSHA Standard (part 27.41) referring to a requirement that mill chippers with a hood must have an effective brake. (Depo. Davis pp. 159-160)

Bob Smith-Defendant's Expert

Bob Smith, the owner pf Precision Husky, the company that sold the chipper to J.C. Witherspoon, testified as an expert witness for Morbark on November 18, 2010. He testified:

1. That he had no knowledge of the ANSI Z535 machine warning design requirements or presumably whether the Morbark labeling system complied with ANSI Z235. (Depo. Smith, p. 97)

2. That chipper equipment produced by Precision Husky and Morbark was sold across the US and in British Columbia. (Depo. Smith, p. 97)

3. That both customers and dealers expected and depended on the manufacturer to produce equipment that would satisfy OSHA standards. (Depo. Smith p. 98)

4. That he had no knowledge of the OSHA Standard from the British Columbia Government (part 27.41) referring to a requirement that mill chippers with a hood must have an effective brake. (Depo. Smith pp. 98-99)

5. That it was common knowledge within the industry that Precision Husky manufactured chipper equipment (all sizes) with a brake that would stop the rotation of the disc within one minute. (Depo. Smith pp. 99-100) "I believe all manufacturers offer that." (Depo. Smith, p. 101)

6. That Mr. Smiths knowledge of the accident was based on his conversation with J.C. Witherspoon. (Depo. Smith p. 88)

7. That Precision Husky produced a chipper with a two piece hood with a hood lock that rotates back against the two part hood as a locking device and a visual port and screen on the side of the hood where the disc can be seen. (Depo. pp. 82, 83, 84, 85)

8. That if the rotating hood lock was in position and there was an internal malfunction of the machine that kicked the some force against the hood, the hood lock would keep it from opening. (Depo. p. 111)

9. On April 13, 2006 Precision Husky sent a set of shaft bearings to J.C. Witherspoon because of complaints that the machine was making noise. (Depo. Smith, p. 73-74)

10. That Mr. Smith had no knowledge or information regarding the decals that were on the Morbark machine and that Precision Husky did no maintenance on the machine but did apply the warning labels they used on Precison Husky equipment that actually pictured the Precision Husky hood lock that was not part of the Morbark design. (Depo. Smith pp.76- 77)

11. That in his opinion operating a chipper machine being automatically fed by a vibrating conveyor could "plug" and stall the chipper if the conveyor was allowed to continue to feed the machine after the chipper was shut off. (Depo. Smith, pp. 90) Other reason the chipper machine might plug include an excessive amount of oversized chips, worn out fan blades, holes in the lower casing band or the hood, holes in the blow pipe, blow pipe to narrow, holes in the blow pipe transition. (Depo. Smith, p. 118)

STANDARD OF REVIEW

When considering the appeal of an action granting summary judgment and dismissing the case, the appellate court is free to decide questions of law with no particular deference to the lower court. See S.C. Constitution Art. V, Sect. 5 and 9; S.C. Code Ann. Sect. 14-3-320 and Sect. 14-3-330. Williams v. Smalls, Op. # 4755, (Ct. App. Oct.20, 2010). Further, the appellate court has jurisdiction to find facts in accordance with its views of the preponderance of the evidence when reviewing the grant of a summary judgment motion and applies the same standard which governs the trial court under Rule 56(c), SCRCP. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E. 2d 857, 860 (2002); Redwend Ltd. Partnership v. Edwards, 354 S.C. 459, 468, 581 S.E.2d 496, 501 (Ct. App. 2003). Summary judgment is appropriate when there is no genuine

issue of material fact such that the moving party must prevail as a matter of law. Rule 56(c), SCRCP; Tupper v. Dorchester County, 326 S.C. 318, 325, 487 S.E. 2d 187, 191 (1997). In determining whether any triable issues of fact exists, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party, and summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000); Manning v. Quinn, 294 S.C. 383, 385, 365 S.E. 2d 24, 25 (1988); Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). Further, summary rdjudgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E. 2d 688 (2000) "In determining whether any triable issue of fact exists, the evidence and all factual inferences drawn from it must be viewed in a light most favorable to the nonmoving party." Donahue v. Multimedia, Inc., 362 S.C. 331, 337, 608 S.E.2d 162, 165 (Ct. App. 2005). Generally, only "a mere scintilla of evidence" is required to defeat a motion for summary judgment when the burden of proof is by a preponderance of the evidence. Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

ARGUMENT

Issue # 1 (Defendant's Grounds #1, 2, 5, 6, 7)

The Morbark Chipper was in a defective condition, unreasonably dangerous to the user and essentially in the same condition at the time of the accident as when it was produced. The original design and manufacture of the machine violated standard engineering principles and specifically the warning standards provided by Ansi Z535 at the point of action, a step in the so called Heirarchy of Safety, ASTM WK28145. It also violated the provisions of OSHA 29 CFR1910.212 General Requirements for all machines requiring that "The guard shall be such that it does not offer an accident hazard in itself". Morbark has produced nothing to indicate that the chipper complied with the standards referred to and has taken the position that the so called mill chipper industry has no design and safety standards at all. Morbark is very careful to distinguish this chipper and its design form others that incorporate locking handles to prevent a hood kick back, chippers with safety devices that prevent the hood from being opened while the disc rotates, chippers with brakes that effectively stop the machine, etc.

There is no real argument that the 10-15 minute run down time of the machine represents a hazard to a user who must determine when it is safe to open the hood that is designed as a guard of the cutting wheel in this style of chipper. The sum of the warnings and instructions to an operator directing him what to look for and how to make such an assessment is contained in an sticker attached to the machine that warns "Do Not Open When Chipper Is Turning" (Morbark Doc #075) and at page (Morbark 000040) of the Morbark machine manual advising "Check the chipper sheave to verify the it has stopped before turning". (Copy attached as Exhibit #2 to deposition Roger Davis) There is nothing to support Morbark's claims that such "warnings" complied with the standards of design and manufacture. Apparently recognizing the problem with such claim Morbark additionally argues that no warnings were even required because Plaintiff had worked on the machine in the past and was aware of the danger. The

evidence in the case however is that the machine manual was not made available to the Plaintiff and that a variety of people used a number of procedures to determine the machine had stopped turning. Morbark actually claims Plaintiff, with a serious reading comprehension handicap, should be considered a sophisticated user or that the employer was a learned intermediary responsible for making up the deficiencies of the Morbark design and warnings. There is no basis for that conjecture.

Morbark also argues that the machine was not in essentially the same condition that it was manufactured, apparently pointing to the testimony of Morbark draftsman Jim Strong who testified that the post accident photos of the machine he looked at revealed fans on the disc that were not the items that the disc was equipped with in 1997. The technical details of this issue come down to the fact that this machine #914 was produced with a heavy duty disc and was equipped with a fan blade item # 40239-580 (designed horizontal width of 5 5/16") rather than the standard disc and fan blade item # 30160-580 (designed horizontal width of 6 7/16") as was featured in the Morbark Machine Manual that accompanied the machine. No marking on the machine or reference in the manual addresses this interesting fact that potentially creates its own hazard. It is curious that Morbark attempts to use its failure to advise the owner of the equipment about any special equipment the machine was produced with as a defense. The significance of this detail is that the only person to inspect the machine and make measurements shortly after the accident was Roger Davis, PE. Mr. Davis measured the distance between the fans that were on the machine at the time of his inspection and the clearance with the hood and determined it to be adequate and not a cause of the accident.

Issue # 2-Plaintiff misused the wood chipper. (Grounds #3, #8)

Defendant is apparently arguing that because the Plaintiff was injured he must have misused the chipper by attempting to open the hood as it was designed to be opened to inspect the reason that the chipper had stopped and that the left side hood pin was not in place. The total time between initially turning off the power, consulting Mr. Woods, attempting to find "Mr. Leroy" and finally attempting to open the hood would have been at or beyond the normal run down time of the machine. Plaintiff testified as to how he checked the machine to be certain it had stopped before proceeding. Nothing in the testimony or evidence suggests that Plaintiff misused the chipper.

Issue # 3-The Plaintiff failed to proved evidence of an alternative feasible design. (Grounds # 3).

The amazing little community of Winn MI, home of Morbark and the kin of Morbark patriarch Norvel Morey, contains other chipper manufactures and inventors, some of whom share the Morey surname and patent ownership of such devices. Despite Morbark's inability to produce a design engineer in response to the 30(b)(6) notice, it is a very sophisticated designer and manufacturer. Plaintiff's experts Dr. Clements, and Roger Davis each addressed a variety of alternative designs issues within their scope of expertise. Additionally, Defendant's expert Bob Smith testified that the design of his competitive 58" Precision Husky vertical feed, top discharge chipper with top mounted safety bar would effectively prevent exactly what happened in this case and would have prevented the hood from coming back any further than the bar.

Legal Authorities To Be Presented

Plaintiff will present such authorities as may be pertinent to the argument presented by the Defendant. Generally:

Duty and Adequacy of warnings and alternative-
Gardner v. Q.H.S. Inc., 448 S.E. 2d 238 (4th Cir. 1971)
Branham v Ford Motor Co., ____ S.C. ___, 701 S.E.2d 5, 10 (2010)
Odom v. GD Searle & Co. 979 F.2d 1001 (4th Cir. 1992)
Allen v Long Manufacturing NC, Inc., 332 S.C. 422, 505 S.E.2d 354 (Ct. App. 1998)
Holst v. KCI Konecranes Int'l Corp., 2010 W.L. 3543585 (S.C. App., 2010)
Campbell v. Gala Indus. Inc., (D.S.C., 2006)
Comment j. Restatement Torts (Second) Sect 402
Human Factors in Products Liability, Matthew Bender , p. 99-1
Ansi Z535
Heirarchy of Safety, ASTM WK28145

Excusable Failure To Follow Directions
Cases cited at
Manufacturers Liability In Negligence, Products Liability, Matthew Bender, 2-1132

Machine Design and Guarding
General authorities and including
OSHA 29 CFR1910.212 General Requirements for all machines
Work Safe BC, Part 27.41, Wood Products Manufacturing -Chippers , Hogs and Planers
Various patents and industry publications featuring wood chipper designs for interlocks and safety and preventers.

March 30, 2011

Respectfully submitted,

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ATTORNEY FOR PLAINTIFF

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF CLARENDON) 08-CP-14-0461

Andreal Holland, by his Guardian ad Litem, Peggy Knox,

Plaintiff,

vs.

Morbark, Inc., Precision Husky Corporation, A&K Mulch, LLC, Watford Industry, Inc.,

Defendants.

COPY

Deposition of JAMES C. WITHERSPOON, JR. taken on June 30th, 2010, commencing at 1:10 p.m. at the Law Offices of Land, Parker and Welch in Manning, South Carolina. Laura B. Landrum, Notary Public in and for the State of South Carolina.

APPEARANCES

FOR THE PLAINTIFF:
Donald E. Jonas, Esquire
Columbia, South Carolina

FOR THE DEFENDANT MORBARK:
Curtis L. Ott, Esquire
Columbia, South Carolina

FOR THE DEFENDANT A&K MULCH:
John A. Ecton, Esquire
Irmo, South Carolina

FOR THE DEFENDANT WATFORD:
Saunders M. Bridges, Esquire
Florence, South Carolina

FOR DEFENDANT PRECISION HUSKY:
Joel C. Bailey, Esquire
Birmingham, Alabama

J. Calhoun Land, IV, Esquire
Manning, South Carolina

Direct Examination by Mr. Jonas	**Pg. 2**
Cross Examination by Mr. Ott	**Pg. 104**
Cross Examination by Mr. Bailey	**Pg. 136**
Cross Examination by Mr. Bridges	**Pg. 142**
Redirect Examination by Mr. Jonas	**Pg. 142**
Exhibit Index	**Pg. 155**

(Court Reporter's Note: dash "--" indicates incomplete sentence, incomplete phrase, trailing off, interruption)

Laura B. Landrum, Court Reporter
(843) 389-3989

It was stipulated by counsel that the deposition would be taken in accordance with the South Carolina Rules of Civil Procedure and Amendments and pursuant to notice.

By agreement of counsel and with the consent of the deponent, the deponent agreed to waive the right to read and sign the deposition after the same had been duly transcribed.

JAMES C. WITHERSPOON, JR., after first being duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION BY MR. JONAS:

Q. Would you please introduce yourself?

A. I'm J. C. Witherspoon, Jr. from Alcolu, South Carolina.

Q. Mr. Witherspoon, my name is Don Jonas. I represent Andreal Holland, who was a former employee of a business you own. Do you recognize the name?

A. Yes, sir.

Q. I'm going to ask you more about it, but at the beginning of these depositions, it's always good to remind the witnesses and all the parties present that this is, in fact, an important part of the process in preparing for trial. As you answer my questions today, I know you're aware that you're under oath and that the deposition is being taken verbatim by this

doing business as?

A. John's Trucking and Lumberjack Services. Those are the two I'm familiar with.

Q. Where do you live?

A. Alcolu.

Q. Do you have a home address here?

A. 2374 Alderman Camp Road.

Q. Now, do you reside with anyone at Alderman Camp Road?

A. My wife.

Q. And how long have you lived at that address?

A. 1984.

Q. Is your wife employed?

A. Yes, sir.

Q. What does she do?

A. She's a nurse anesthetist.

Q. Where does she work?

A. Tuomey.

Q. As we prepared to notice this deposition, I sent out what is called a Notice of Deposition of Defendant A & K Mulch, LLC and another notice for J. C. Witherspoon, Jr. Are you appearing on behalf of A & K Mulch, LLC?

A. Yes, sir.

Q. Do you have -- let me mark this as Plaintiff's One.

PLAINTIFF'S EXHIBIT NUMBER ONE WAS MARKED.

by J. C., Inc.

Q. Right.

A. They have separate accounting records. They're all kept separate in the office there, so in order to obtain these records, she'd have gone to the appropriate file cabinet or whatever to pull what records she needed.

Q. So when you -- let's go back to the origin of this. I think it's appropriate that we get the record cleared up. I'll go back to Exhibit A in a minute, but -- let me have this marked as Exhibit Two.

PLAINTIFF'S EXHIBIT NUMBER TWO WAS MARKED.

Q. All right. Let me hand you what's been marked as Plaintiff's Two, and these are just copies from the Secretary of State's office that seem to refer to a few of the business you own or have been involved with. The first one is J. C. Witherspoon, Jr., Inc., and that looks like it was essentially formed in 1982 or thereabouts.

A. That's correct.

Q. You were the original incorporator of that?

A. Yes, sir.

Q. Just by way of background, it says a survived merger with Jimmy's Trucking. What was Jimmy's Trucking?

A. Jimmy's Trucking was a separate corporation where we

separated the trucking from J. C., Inc.

Q. So -- now, back when? I'm not trying to go back that far in history, but just to get kind of a picture of it -- it also says it survived a merger with Witherspoon Forest Products, Inc., and that was in 2004. Those businesses were operating separately up until 2004? Jimmy's Trucking and Witherspoon Forest Products?

A. Whatever the date was, yes, sir.

Q. What caused you to bring them in under the umbrella of J. C. Witherspoon, Jr., Inc.?

A. Multiple reasons. The cost of bookkeeping. The -- Jimmy's Trucking was formed strictly because it was a trucking business and because of the -- our legal system today as far as needing to keep something at arm's length. So the value of keeping the exposure for Jimmy's Trucking separate from J. C., Inc., it wasn't worth the value. Witherspoon Forest Products, it just was not worth the value to keep it separated, so we brought it back in.

Q. What does Witherspoon Forest Products actually do?

A. Timber purchases.

Q. Anything else?

A. No.

Q. So if I've got this straight, you had the saw mill

operation, you had the trucking company, and you had timber purchases -- probably logging crews go under that umbrella?

A. The logging crews are under J. C., Inc.

Q. All right. So in your mind, up to that point, you saw some advantage to keeping these things separated?

A. Yes.

Q. For whatever your reasons, and then sometime, it looks like in 2003, along comes A & K Mulch, LLC. What was the explanation for that? How does that fit into the corporate structure?

A. It's just a separate business. We decided to get into the mulch business.

Q. Okay. Part of the preparation of this -- everybody is a little concerned, I'm certainly concerned, about how you kept employees of A & K Mulch from J. C. Witherspoon, Inc., and I've looked at some of your records here and I think we've asked the question to get ready for this in Exhibit A. You had employees of J. C. Witherspoon, Inc. when you formed A & K Mulch. I mean, your saw mill and yard was being operated by employees of J. C. Witherspoon, Jr., Inc.

A. No, sir.

Q. What company then employed the people over there in 2003?

MR. ECTON: Object to the form.

Q. I'm sorry. That was confusing. Let me restate it. It's a fairly important question. Your saw mill operation and I'm not sure how you refer to it but --

A. A & K.

Q. It's in the business of what? What do they do over there?

A. When it started we were making cypress mulch and it extended itself into sawing cypress.

Q. All right. And that business has been going on for how long over there?

A. I'd have to go back and pull the exact date. I think it's 2001, or 2002 or 2003, somewhere in there. I'd have to pull that date.

Q. All right. And the employees you had over there, approximately how many people did you have in 2002 and 2003?

A. I don't know.

Q. Twenty?

A. I don't remember.

Q. All right. Well, Andreal Holland was one of them in 2003, wasn't he?

A. I'm not sure of his employment date.

Q. All right. You do know that his uncle is employed there or was employed there. I don't know if he

still is or not.

A. I'm not -- I'm not aware of there being an uncle.

Q. All right. Well, let's go back to the question I started with. In 2003, it says November 17th, you formed this A & K Mulch, LLC and apparently it is also located -- at least the people employed by that company seem to be at the same location that you were operating at before. You don't make a distinction between A & K Mulch employees anymore, do you, and J. C. Witherspoon, Jr., Inc.?

A. Yeah, and I always have.

Q. All right. How do you maintain that distinction?

A. Separate time sheets, payroll records.

Q. All right. In the information that you've provided today, do you have your payroll records, and I'm going to look here at some for Andreal Holland. Is that part of what you've produced here today?

A. I think so. I'm not -- I haven't --

Q. You need to familiarize yourself with it because you're going to get tied to this answer. You are here on behalf of A & K Mulch.

A. Yes, sir, but I assume that John brought you this information.

Q. He did. You can check. I'm not trying to trick you.

A. DEPONENT REVIEWS DOCUMENTS. I've seen these, but I haven't studied them, no.

Q. Let's get them marked as an exhibit so we can refer to them.

PLAINTIFF'S EXHIBIT NUMBER THREE WAS MARKED.

Q. Plaintiff's Exhibit Three are documents your attorney provided with some other documents, but I understand that you're referring to Plaintiff's Exhibit Three to answer the question about whether or not the employees were separately employed by Witherspoon, J. C. Witherspoon, Jr., Inc. or A & K Mulch, LLC, and you maintain that you had separate records for each employee.

A. That's correct.

Q. Now, looking at the records and referring back to Mr. Andreal Holland, how was he employed from the point he began work with you until the point of his injury?

A. To the best of my knowledge, he as employed by A & K.

Q. Can you refer to the records there and show me any accounting of that, how he was employed? I mean, I think we've asked for employment applications and other matters that don't seem to be in these materials.

MR. ECTON: Object to the form.

A. You want to know if there's an employment application

here?

Q. That would be one document I'd like to see, the payroll information or anything showing that this man was employed by A & K Mulch solely.

A. The only record I could refer to is his attendance record, which says the department was A & K.

Q. Okay. Looking at Exhibit Three, there's a mark down at the bottom that apparently has been put there to keep these things in order and it says "AK 018," so looking at this record, it looks like the top left corner says "2005." There was a daily attendance record, and you're referring to A & K -- as this being proof of his employment by A & K?

A. As far as what I have seen so far looking through here, yes, sir.

Q. All right. It also shows a starting date of April 5th, 2004. Do you know if that's the date he began work there?

A. I would have to go back to employment records to confirm that.

Q. Where would those records be?

A. Well, if you had requested those, it should be in this information here.

Q. All right. Well, we'll go back through it. So based on Exhibit Three, that's what you would point to to

demonstrate that he was an A & K employee?

A. From what information I've seen here so far, yes, sir.

Q. All right. Let me -- part of the information that was provided this afternoon was also the Articles of Organization of A & K Mulch, LLC. Let's just get those marked for the record.

PLAINTIFF'S EXHIBIT FOUR WAS MARKED.

Q. Looking at Plaintiff's Four, you've referred to the organizer of A & K Mulch, LLC as J. C. Witherspoon, Jr., Inc. Is that right?

A. Yes, sir.

Q. Do you have any personal interest in A & K Mulch, LLC other than through your ownership of J. C. Witherspoon, Jr., Inc.?

A. No, sir, as of that time.

Q. Has there been any change in that relationship at all?

A. It's been separated completely in, I think, 2008.

Q. How did that work out?

A. The accountant thought it was beneficial to separate them.

Q. Okay. Let's go back to the question about who Andreal Holland worked for when this accident happened on June 1st, 2006. Do you have any record

of that time frame to demonstrate who paid him? I mean, who employed and paid him? We've looked at a 2005 record and that doesn't really answer the question.

A. He was employed by A & K Cypress and Mulch, which is an LLC owned by J. C., Inc., and J. C., Inc. did all of the payroll.

Q. So if I follow what you're saying, the paycheck stub wouldn't have been from A & K Mulch?

A. That's correct.

Q. All right. And also provided to us are employee quarterly contribution and wage reports for a range of dates, but these all seem to be J. C. Witherspoon, Jr., Inc. It's in account number 166006. This is your only quarterly account, quarterly filing?

A. To the best of my knowledge, yes, sir.

Q. So we're not going to find one for A & K Mulch?

A. No, sir, not to my knowledge.

Q. All right. Let's go ahead and mark these as one exhibit.

PLAINTIFF'S EXHIBIT NUMBER FIVE WAS MARKED.

MR. ECTON: Don, when you mark them as one exhibit, do you want to mark how many pages there are, and we can go back and do that on the other documents too?

chippers?

A. One of them was removed and this one was installed. This was a larger machine than the initial one.

Q. All right. What was the initial machine?

A. It was a 48-inch. It was a smaller machine. Basically the same machine, just smaller in diameter.

Q. Was it a Morbark piece of equipment?

A. I think it was a Morbark piece.

Q. Okay. If you would, give me the history of that first piece of equipment. When you started up A & K Mulch, you had to have a chipper if that's what the business was going to do.

A. It was a chipper, but I'm not sure if it was purchased from Morbark. I'm not sure.

Q. In this case we've found out that Precision Husky sold this Morbark piece of equipment to J. C. Witherspoon, Jr., Inc., I think. Is that right?

A. It could have been billed out to J. C., Inc. I'm not positive of that.

Q. Okay. The process of identifying the piece of equipment and making arrangements to purchase it, that would have been your responsibility?

A. Yes, sir.

Q. All right. How did you go about making the decision to go to Precision Husky and get that piece of

Q. Let's mark these separately. Let's go Nine-A through whatever..

PLAINTIFF'S EXHIBITS NINE-A THROUGH NINE-F MARKED.

Q. All right. You've looking now at what's been marked Nine-A through Nine-F. See if you can identify those.

A. That appears to be our location, A & K, at the back of the mill. You can see the Morbark chipper with the hood that had replaced the one that was damaged.

Q. All right. Now, in each one of these photographs, they're taken from different angles, and I'll represent that these were taken by the fellow from Warren Engineers, Roger Davis, when he was investigating. Did you meet with him, Mr. Davis?

A. Not to my knowledge.

Q. All right. He took these, I think, when he was out there on July 27th, 2006, so it couldn't have been long after the accident that this thing got fixed up and this new hood put on there. I mean, did it take a week or even less to get it fixed?

A. Less.

Q. So you were back in production. There was no damage to the equipment other than the hood?

A. I don't recall. I don't -- it might have damaged some knives. It might have damaged a paddle. I'm

not sure.

Q. It was something that could be done by you without aside assistance or without needing Mr. Watford and his group to fix it?

A. Right.

Q. Plaintiff's Nine-D, who is working on this thing, if you know?

A. That appears to be Woodrow Woods.

Q. Okay. So you say Mr. Woods would have been one of the fellows that would have had -- he would have been able to perform maintenance on the machine?

A. That's correct.

Q. It looks like he's got a hammer in his hand. He's pounding on that pin.

A. Yes, sir.

Q. Are you familiar with that process?

A. Oh, yes.

Q. Okay. So to get that pin out of there, what do you have to do? Does it require a hammer?

A. Yes, sir.

Q. So if I understand, one of the things in getting this thing -- accessing the knives, you've got to get a hammer out or some heavy instrument and pound on those pins and get them out and then pull the hood back?

box and you lock it out and tag it out with your own lock that you're furnished. That's the first thing that you do. The second thing you do is you come over to the piece of equipment and you observe whether the disk is still turning.

Q. Where do you observe that?

A. There's a couple of different areas. You can look at the flywheel from the back side. You can see the belts or you can look visually right in this hole here and see whether the disk is turning. You can look in here and see whether the shaft is turning.

Q. Let's be very clear about what you're saying. When you refer to belts, you're talking about -- I'm looking at Nine-A here. This yellow guard over the top of what are apparently the belts.

A. Yeah. There's a big shiv here and a smaller shiv on the other side, and there's probably six big belts that wrap around those shivs.

Q. So if you were going to use that as a method of looking at the machine, you wouldn't -- you can't see through the guard. You'd have to look at this space between the guard and what is essentially the drive shaft for this?

A. Yes. You can look from here and see the shaft which is located here, or you can look here.

Q. Let's focus on this right now. You're saying that any operator should have been able to see down through here, that is, in this space between the hood and this guard, and you can see some movement there if it's turning?

A. Yes, sir.

Q. Why don't you draw a big arrow down to where you mean you should be looking.

A. This is one of the areas where you could be looking.

Q. Yes, sir. I understand that. Now, let's put a number "1" there.

A. DEPONENT COMPLIES.

Q. All right. Where else should he look?

A. There. DEPONENT INDICATES.

Q. Okay. Now, that "2," what part of the machine is that?

A. That's the in-feed spout.

Q. All right. If there is no material moving through there at the time, and I guess -- one question I guess would be, how long does it take for this thing to slow down and stop?

A. It could take fifteen to twenty minutes.

Q. I think the fellow timed it at a little less than that, but I'll take your word for it. You've been around these things all your life, so it could take

-- let's use a figure. You think it could be as much as twenty minutes?

A. It could. It depends on the condition of the bearings, how tight the chipper belts are. There are a number of factors that would determine how long it would take.

Q. So it wouldn't be, I guess you'd say, less than ten minutes?

A. It's machine specific as to how long it takes it to stop but in my experience, no, sir. There is a third location also. I'm going to go ahead and finish.

Q. Okay. What is it that you're pointing at?

A. I'm trying to get around to the other side to where the electric motor is located. On the other side you can make the same visual inspection as you can do on this side.

Q. Okay. So we've got three points and generally you're saying it's machine specific, and I take your point that at some stage when you say "machine specific," you mean specifically depending on the condition of the machine. It could take twenty minutes to run down and stop after it was stopped, or it could take considerably less.

A. It could take less, yes, sir.

Q. When I use ten minutes, maybe that's not an average

A. That's a chip screen.
Q. Do you know where that came from?
A. Precision.
Q. So you would have had that contact with Precision before this accident happened? I mean, not just this chipper machine --
A. I think all of this was purchased at the same time. I think the records will show that.
Q. So they weren't purchased together, they were purchased about the same time?
A. They could have been on the same purchase order, I'm not sure, but they were both installed about the same time --
Q. All right.
A. -- if not the exact time.
Q. Well, let's take a look at that. Let's get this marked.
PLAINTIFF'S EXHIBIT TEN WAS MARKED.
Q. Plaintiff's Ten is AK 057. This looks like an invoice that is dated February 25th, 2008, and maybe you can help me understand what that's about.
A. This appears to be where we sold that piece of equipment to LPS.
Q. What piece of equipment?
A. That chipper -- the chip screen identified in the

picture there and it says a 40 foot Morbark Vibrator Conveyor, and I don't recall that right off, and a blower.

Q. That chip screen is no longer there because you sold it?

A. That's right.

Q. Here's another -- this may be the one I want to get to. Let's get that marked and this one also.

PLAINTIFF'S EXHIBITS ELEVEN AND TWELVE MARKED.

Q. All right. Let's look at Plaintiff's Eleven and Twelve. Plaintiff's Eleven is AK 053 through AK 055 and then Plaintiff's Twelve is PH 028 through PH 033, so what we've got here, I think, are the documents that led to the purchase of the Morbark chipping machine.

A. DEPONENT REVIEWS DOCUMENTS.

Q. All right. Having had a chance to look at Plaintiff's Exhibits Eleven and Twelve, can you say now when you purchased the 58-inch Morbark chipper machine that we're involved with here?

A. The quotation is on 3/14/06, and it appears that I made a $5,000 deposit to secure the order.

Q. All right. It looks like there was a delivery date of April 6th, 2006.

A. Yes, sir.

A. Correct.
Q. So it wasn't new to you.
A. No, sir.
Q. All right. Now, one of the things after -- let's get this marked.

PLAINTIFF'S EXHIBIT THIRTEEN WAS MARKED.

Q. Looking at Plaintiff's Thirteen, this looks like an order to Morbark after the accident. This is numbered at the bottom AK 056, but it's dated July 24th, 2006. Did you order these items here?
A. I could have. We've used a number of different companies to get decals, safety decals.
Q. All right. Morbark had a decal kit for this model and apparently that decal kit was to put stickers back on this thing, on this new hood, that had been manufactured by Watford. That's what it looks like,
A. It could have been. I'm not sure what decal kit -- I mean, we did have to buy decals to go back on that hood. At some point in time decals was bought. Whether they were -- we have extra decals around because that's part of maintenance to make sure that safety decals are maintained.
Q. Well, I think we've got enough pictures to see what it looked like when Mr. Davis examined it. We've already looked at that stack and we can just track it

back to the date of his report. It doesn't look like there's anything on there other than some stickers on the side, "Danger, Lock Out for Safety." I mean, whatever decals were put on there that came in this decal kit, it looks like it came after that inspection. One of the things that I wanted to ask you about is --

MR. OTT: Is that a question or is that just a -- I didn't hear an answer to anything. I object to the form of the question, if that is one.

Q. I didn't allow you to answer that question. Did these decals that were ordered from Morbark, finally were they put on the machine?

A. I think I answered. I'm not sure. I'm not sure where these particular stickers went. They could have been put on there. I don't know that.

Q. All right. Well, one of the things I want to ask you about, and let's get this one marked --

PLAINTIFF'S EXHIBIT FOURTEEN WAS MARKED.

Q. One of the things we were provided in preparation of this was some information from Morbark. My question is, have you ever had occasion to look at this document before?

MR. BRIDGES: What number is that?

Q. Fourteen. This would be Morbark 012 through 075. I

think that's consistent. Plaintiff's Exhibit Fourteen is a parts manual for the Morbark equipment.

A. That's what it appears to be, yes, sir.

Q. And this would apply to both the 48-inch and the 58-inch machines that you got?

A. It appears to be, yes, sir.

Q. Morbark apparently has got a decal kit.

A. I'm sure they do, yes, sir.

Q. I mean, that probably --

A. And it's probably in the parts book. I'm not sure of that but --

Q. All right. The parts manual has a variety of information and on the back of the exhibit here, it refers to a number of Morbark 066 through Morbark 075. These look like decals that Morbark ultimately provides for their chipping machine, the 48-inch and 58-inch models. Do you agree with that?

A. It appears to be, yes, sir.

Q. As a part of this exhibit, there also is attached a safety operator's manual, and that starts with Morbark 024 and it looks like it goes through Morbark 060. Is that safety manual something you were provided?

A. It could have been.

Q. Do you keep one near or around the machines anywhere?

two pins out, you pull the hood back and that's all there is to it.

MR. OTT: Object to the form.

A. Yes, sir.

Q. Is there any more to it?

A. As far as getting to the knives?

Q. Yeah.

A. You go through the same safety procedure I described as far as lock out/tag out, make sure it has stopped turning, but basically you unpin it.

Q. But this doesn't require a great deal of skill. I mean, you need a hammer or a drift, something to knock those pins out?

A. Yeah.

Q. And you need a wrench to undo those bolts to get the knives out?

A. Yes, sir.

Q. So you're not talking about somebody that is highly trained to do this work, are you?

A. No, sir.

Q. I mean, these are basically fundamental and pretty simple skills. Somebody that's not very smart could do the work?

MR. ECTON: Object to the form.

A. If you train them properly.

Q. They don't have to do the maintenance. I mean, they just knock those pins out, turn the bolts, put the new ones in and put it back together?
A. It's not rocket science, no, sir.
Q. And Mr. Holland wasn't a rock scientist, was he?
A. That's a matter of opinion.
Q. Well, you've got one. You were his employer. On a scale that you're familiar with of other employees --
A. It depends on the capacity that you hired him to do. It depends on what you were comparing him to and what is the capacity.
Q. You don't do any kind of testing or anything like that when you're hiring people.
A. No, sir.
Q. And you don't know whether they can read or not.
A. No. When they fill out the application, some of them might -- someone might notice their ability.
Q. That's not a requirement of the job, is it?
A. No, sir.
Q. So if they're dyslexic or if there is some other problem with their comprehension, that's not going to change anything either, is it?
A. No.
Q. It's kind of what you expect for this kind of job, isn't it, somebody who basically learns by seeing and

by doing, not a person who would read a book and study it. I mean, you actually have to show these people, your employees, how to operate these things.

A. Not necessarily. I won't -- I wouldn't go that -- I don't like to --

Q. I'm not downgrading anybody but --

A. I don't like the way you're going, that people who work in a saw mill are illiterate type people.

Q. Some of them are.

A. It's possible but it depends on -- my daddy told me a long time ago, "Son, regardless of what you think of someone, if you stop and listen to them you'll be surprised," so I -- you know, I disagree with your comment, sir.

Q. Well, there are smart people that aren't educated, aren't there?

A. Just because you can read a hundred words a minute and this one can only read two, that doesn't necessarily mean how smart you are.

Q. And just to get to the point, you didn't have any special training materials for Mr. Holland, did you?

A. Nothing specifically special other than what his occupation might entail.

Q. What was that about? Other than "Here's the hammer, here are two drift pins and here's a wrench," what

else was he trying to do?

A. Well, number one, make sure the machine stops, lock out/tag out, inspect for broken bolts, damaged cutter knives. I mean, all of those things are there when you pull it apart.

Q. Well, this machine, as I understand it, was locked out and tagged out when this accident happened.

A. I think it was. I was not there myself, but that is our safety procedure.

Q. So to your knowledge, Mr. Holland had never been given any formal materials to study about this machine, nor do you know if he could comprehend it.

A. I don't know.

Q. All right. But you do know that Mr. Woods would be the guy who would have shown him how to get the thing stopped, and where to look, and how to change the blades. I mean, you pointed out three places he should have looked. You didn't show him that Mr. Woods did.

A. Mr. Woods could have and I might have helped in the training of him.

Q. The real problem is that the machine doesn't stop when you power it off. I mean, that's really kind of the problem.

MR. OTT: Objection to the form.

Q. Isn't that what you're guarding against here?
A. Yeah. There is no physical way to stop that type of inertia. The thing operates on a flywheel type of effect.
Q. Did you consider the comments of Roger Davis when he came out about his concerns about how to make this machine safe?
A. I don't remember if I had the privilege of meeting him. I'm not sure that I'm aware of his comments.
Q. Let's get this marked.
PLAINTIFF'S EXHIBIT NINETEEN WAS MARKED.
Q. All right. Mr. Witherspoon, after the accident -- well, let me go through this first. At the time that this accident happened, were you there?
A. No, sir.
Q. Where were you?
A. I don't recall exactly where I was located.
Q. When did you first hear about this?
A. I don't recall the exact time, but I was notified.
Q. Shortly after?
A. Yes, sir.
Q. When you got to the yard, had Mr. Holland already been taken off to the hospital?
A. Yes, sir.
Q. And who did you talk to about how this happened?

and I don't recall who. Everybody was talking about it.

Q. So just to be clear, there was no investigation done by anybody at A & K or Witherspoon, whatever you want to call it. You depended on --

A. I investigated it myself as far as --

Q. All right. What did you determine?

A. I determined that the hood had gotten hit by something and flew open. I was the one instructing to take the hood off. It was under my direction.

Q. Well, I don't think there's any question that that's part of the information, but what was the damage to the cutter or to the knives?

A. I don't know that there was any specific damage to the knife itself other than it was time for maintenance. We changed knives in the evening, whether they were sharp or not, if they were sharp or dull.

Q. How long has Mr. Wright worked for you?

A. I don't know. I'd have to go back to the employment records.

Q. What does he do?

A. Mr. Wright is capable of doing a host of different functions at the saw mill.

Q. Well, what's his job? Does he have a title?

it, but any normal size man can tilt the hood without injuring himself.

Q. It has a handle right in the middle of the top of the hood that gives you the maximum leverage to pull it back?

A. Yes, sir.

Q. That handle was on the original hood and on the replacement hood?

A. Yes, sir, I believe so.

Q. Well, according to your recollection, that handle was on both of the machines, the 58- and the 48-inch as well?

A. Yes, sir.

Q. At some point to get to the hood, you've got to get the pins out. I think we've agreed that you saw Woodrow knocking the pins out in one photograph. He had a hammer. Are they about a half-inch round or something?

A. They're normally either five-eighths or three-quarters of an inch in diameter.

Q. Okay. There are no bushings or anything, that's just a rough fit?

A. Initially they're a fairly tight fit, but from wear, taking them in and out, they do get a little bit loose.

Q. So to get the pins out, we know you need some kind of device to hammer with, and you're not going to lift this hood from the side. You've got to pull it from the back?

A. That's the easiest place to do it. A good man could pull it -- stand off to one side and do it, but that's not the easiest way.

Q. As I understand it, the pin on the hinge isn't bushed either?

A. No, sir.

Q. So it's also a rough fit? It's not cast but it's -- at least your replacement hood looks like it's cold rolled steel?

A. Basically, yes.

Q. So that's got a hinge but it's not a tight fit, so there is some wobble in it?

A. Yes, sir. I don't know the specifics of how much tolerance it has in it but, yes, it does.

Q. Well, the question, I think, that was pointed out by Mr. Davis, is it allows enough play in the hood to actually move the hood so that it might contact the knives in the cutter. I mean, has it been your experience that there's enough slop in that hood that you can move the hood either way enough to --

A. The tolerance is fairly close, depending on where a

A. Not the exact date, no, sir.
Q. Watford has given us an invoice. Have you looked at that?
A. I have seen it.
Q. All right. Well, based on that, what can you say?
A. Well, I'd have to see it again. I haven't seen it recently, but I have seen the invoice.
Q. Well, let's go --
A. I'm not sure if that's not the billing date.
Q. All right. Is there any way that you can determine that date?
A. To be exact, the exact day, no, sir. I don't know of any way I can tell you that.
Q. When you ordered these kits from Morbark, these decals, who would have installed those and been responsible for that?
A. Well, as I stated earlier, if that particular kit was ordered for that particular machine, then Woodrow could have installed them or myself. I don't recall.
Q. Well, you only had two Morbark machines. Who else would you have ordered them for?
A. Well, we have other equipment that need safety decals.
Q. Did you order these from Morbark?
A. Yeah.

Q. Did you order them?
A. I probably did, but I'm not positive of that.
Q. All right. So the question gets down to, did they ever get installed?
A. I would assume they did.
Q. All right. I made a request to inspect the machine quite some time ago. Do you have any objections to having somebody take a look at it even now?
A. I don't have any -- we don't own it. I don't have any idea where it's at.
Q. What is that?
A. The chipper.
Q. Okay. At some point -- I mean, when I drove by it, I think I saw an operation that was still ongoing.
A. Well, re-ask the question, please, sir.
Q. We'd like to go look at the chipper. Do you have any objection to somebody looking at it at this stage?
A. We do not have the chipper any longer.
Q. I understand but you still have the mill operation that's set up.
A. Yes, sir.
Q. And that mill operation tied at that end to a machine.
A. So you want to know if you can come look at my mill operation currently?

stationary side and loosen both of those pins?

A. I would think so, but --

Q. Other than that one time when you saw him doing what he wasn't supposed to, did you ever watch Mr. Holland knock out the pins and open this hood?

A. I'm sure I did, but I -- there's nothing that specifically would bring my memory to a specific time.

Q. Then once those pins are out, the two pins on each side, what's the next step?

A. Normally, your next step would be to go in and -- just about all chippers pack a little bit of wood on the outside in the pocket of each knife. You would clean that out -- maybe take the air blower, compressed air, and blow everything off.

Q. Before we get there, though, at some point, we've got to pull the hood.

A. Well, yeah, yeah, yeah.

Q. And the hood is pulled back towards, I guess, what I would call the front of the machine. Is that what you would call the front?

A. Yeah.

Q. Then there's a stop there where the hood rests on, right?

A. That's correct.

Q. And then there's a bolt there that keeps the hood attached to the machine -- the pins you called them.
A. Pins, yeah.
Q. When you arrived that evening, was the hood still attached?
A. Yes.
Q. Was the bolt damaged? The hinge bolt?
A. I don't recall.
Q. Were the two bolts on the stationary and guard side present?
A. The bolts?
Q. The pins. I'm getting my terms mixed up here. The two pins that you would loosen before you can pull open the hood.
A. I don't know where the pins were. I don't specifically remember.
Q. Is it possible that he had neglected to put the pins back in after that machine started after the dinner break?
A. No.
Q. Why not?
A. Because the hood wouldn't stay open if it wasn't pinned properly. Maybe I didn't understand your question. Maybe I --
Q. Is it possible that he neglected to put the pins back

in after the dinner break?

A. No.

Q. And the chipper started and continued to work, and then at some point it slammed up?

A. No.

Q. Do you still have the pins that were on the hood of the machine at the time of the accident?

A. No.

Q. Do you still have the bolt, the hinge bolt, that was on --

A. No.

Q. -- the machine at the time of the accident? You still do have the hood itself?

A. Yes.

Q. But the machine was sold, I think the documents show, sometime in 2008?

A. I think that's correct, yes.

Q. Did Mr. Holland change blades on the 48-inch?

A. To the best of my recollection, yes.

Q. And was that 48-inch Morbark used by A & K Mulch from the time A & K began business up until it was replaced with the 58-inch?

A. I don't believe A & K -- in fact, I know A & K did not have a chipper when it began -- it started. At some point in time, the 48-inch was bought from the

A. 1985.

Q. How long have you been a customer of Morbark?

A. Probably since 1985, I guess.

Q. Have you found them to be a reputable company?

A. Yes, sir.

Q. Have you found them to be attentive to requests of their customers?

A. For the most part. Sometimes you've got to twist their arm a little bit harder but, yes.

Q. If there were any decals or anything that you thought were needed for this machine, would you have requested them from Morbark?

A. Oh, yes, I think so.

Q. You actually purchased this Morbark 58-inch chipper through Precision Husky, correct?

A. Purchased it from Precision Husky.

Q. Was Morbark involved in any way, shape or form with your purchase of this machine from Precision Husky?

A. No.

Q. To your knowledge, was Morbark even aware that you had purchased this machine from Precision Husky?

A. The salesman might have been aware. I don't know. I don't recall.

Q. Are you talking about if a salesman came by your business and saw, "Hey, there's one of our Morbark

machines on the premises?"

A. Well, when I was in the market to buy one, I might have contacted -- I probably contacted Morbark and Precision both.

Q. Once you decided on a particular machine, do you have any reason to think Morbark was aware of that particular purchase?

A. Not unless they did a follow up.

Q. That's all the questions I have for you. I appreciate your time.

A. Yes, sir.

CROSS EXAMINATION BY MR. BAILEY:

Q. Mr. Witherspoon, my name is Chandler Bailey. We met what seems like a long time ago, I bet, right now. I represent Precision Husky in this lawsuit. Curtis has done pretty much a good job of covering everything I've got, so I won't be nearly as long as these other guys, but I wanted to ask you just a couple of questions about the purchase of this machine and just clear up a couple of things about what you did, okay?

A. Okay.

Q. As I understand it, you testified that you were in the market for a bigger chipper. You had the 48-inch, and you were looking for a little bigger

chipper.

A. That's correct.

Q. Do you recall how you found out that Precision had this used Morbark chipper?

A. Well, I probably picked up the phone and called the salesman, Clayton.

Q. Who is that?

A. Clayton Hooper.

Q. And he's the salesman for Precision in this area?

A. That's correct.

Q. And you knew him because, as we talked about earlier, you've had some other dealings with Precision --

A. Yes.

Q. -- and some of their equipment. Is that right?

A. That's correct.

Q. What do you recall about that transaction? I mean, how did you -- did you go out to Leeds, Alabama and inspect the machine or anything like that before you bought it?

A. No, I took Clayton -- he said the machine had -- was in good shape. They had taken it on a trade. That it was not a rebuilt machine, but that he had gone over it, and everything seemed to be in good shape and, of course, I told him I needed a chip screen to go along with it. We kind of laid it out the way we

needed it, and he put the package together.

Q. Okay. And I think -- I'm not sure which -- you went over, I think, the purchase order, and as far as you know, is this really the only documentation that you have -- I think you produced it today, or your lawyer did -- relating to the purchase of this equipment?

A. To my knowledge, yeah. I mean, this would be the two initial things with your down payment. I gave him the order, and then that's the bill itself.

Q. The bill that came with the machine when it was delivered? Okay. Just to make sure -- I'm sure this is obvious, but those are your signatures on the quote, pages two and three of Exhibit Eleven there, at the bottom of each of those pages, right?

A. Yes.

Q. Okay. I think you mentioned earlier, Mr. Witherspoon, that once the machine was shipped to you, did Precision have any more involvement with it?

A. I heard a -- it sounded like a rough bearing. I told Clayton about it, and he said, "Everything checked out fine with us, but we'll give you a set of bearings if you'll put them in." We didn't need to.

Q. Okay.

A. We never did. It was just an inherent noise that was in the machine. We never had a failure.

of the age of it. From this photo, I cannot read it, all of them, but I don't --

Q. You don't see anything that looks like Defendant's One there?

A. Uh-uh.

Q. All right. Now, if I understand from this invoice, Plaintiff's Thirteen, this would be where the decals were apparently sent from Morbark. There's a receipt date of July 28th of 2006.

A. Uh-huh.

Q. Would that be your stamp on there?

A. We stamp invoices like that.

Q. Well, this has got a customer number, 15624. Are you a customer of Morbark's with that number?

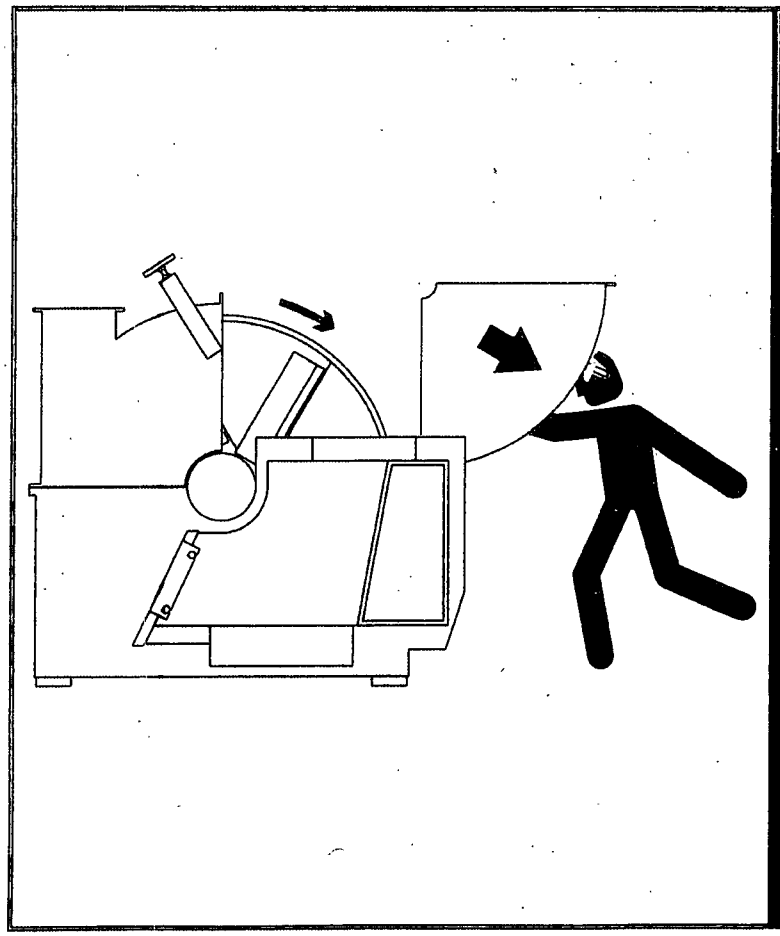
A. I can't confirm the number. I am a customer of Morbark.

Q. So Morbark's -- whatever they did here in sending you this decal kit, it looks like, if you read this, it was ordered and possibly sent on 7/24/06 and received on July 28, 2006.

A. Okay.

Q. Now, looking back at Plaintiff's 9-A through, I think, 9-F, I don't see any stickers that appear like in Defendant's One or any of these things that are shown in Two or Three, Defendant's Two or Three, on

DEFENDANT'S EXHIBIT
1
Witherspoon
PENGAD 800-631-6989

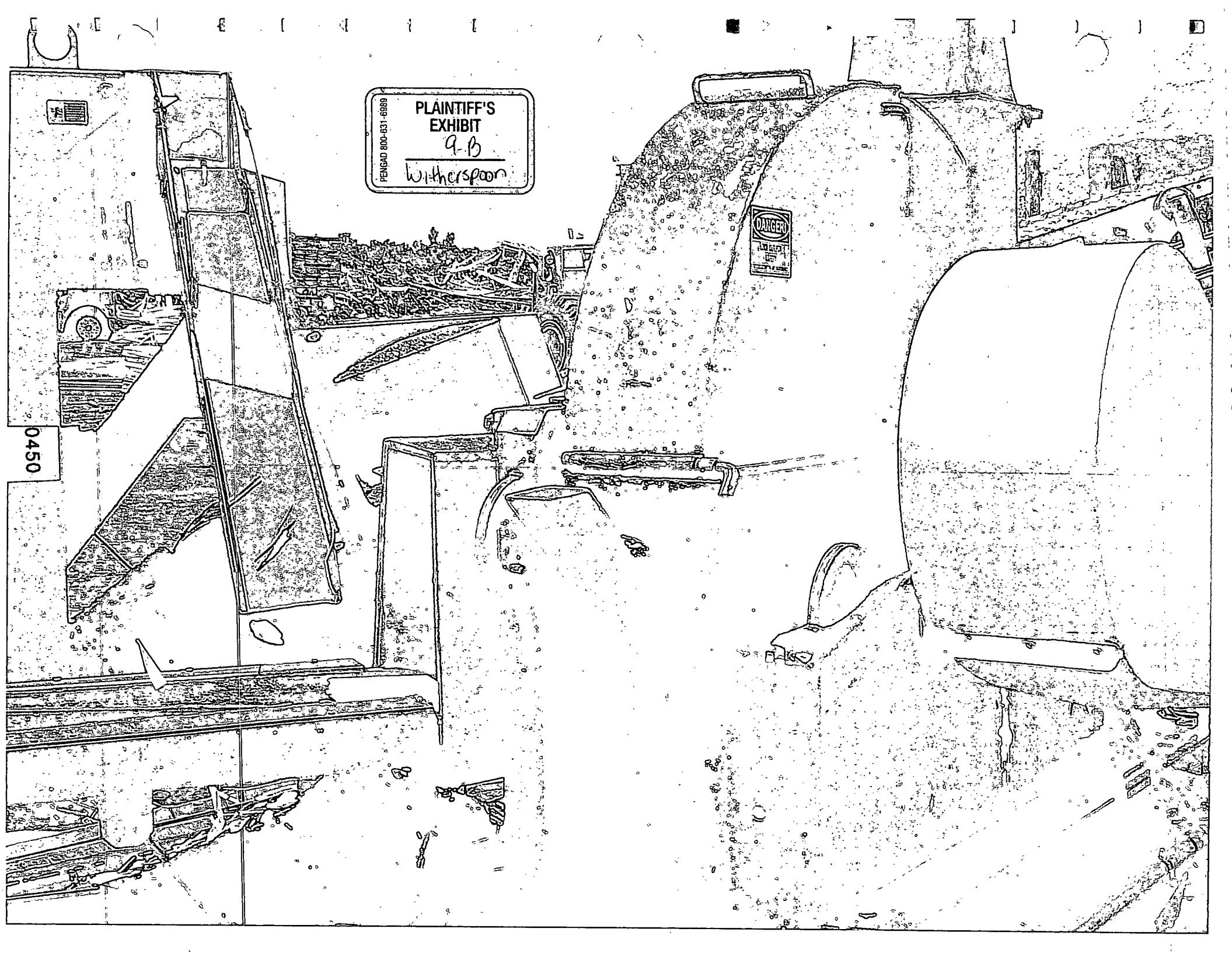


⚠ DANGER

- Never operate chipper with missing hood bolts.
- Never operate chipper without hood lock secured.
- Never open hood while disc is turning.
- To confirm disc is stopped, visually check disc shaft or drive wheel.

97-4263


0449
PENGAD 800-631-6989
PLAINTIFF'S
EXHIBIT
9-A
Witherspoon


PLAINTIFF'S
EXHIBIT
9-B
Witherspoon
PENGAD 800-631-6989
DANGER
0450


PLAINTIFF'S
EXHIBIT
9-C
Witherspoon
PENGAD 800-631-6989
PRECISION
PRECISION HUSKY CORPORATION
DANGER!
LOCK OUT FOR
SAFETY
BEFORE ATTEMPTING ANY MAINTENANCE

PLAINTIFF'S EXHIBIT
9-F
Witherspoon
PENGAD 800-631-6989

0454

(11)

INVOICE

MORBARK, INC.
BOX 1000
WINN, MI 48896
PHONE: 989-866-2381
FAX: 989-866-2280
WEB: WWW.MORBARK.COM

Invoice:	396867 RI
Customer:	15624
Branch:	400
Order:	715061 SO
Related PO:	
Date:	07/24/2006
Page:	1

SOLD TO
J.C. WITHERSPOON JR., INC.
PO BOX 289
ALCOLU SC 29001

SHIP TO
J.C. WITHERSPOON
US HWY 301 NORTH
ALCOLU SC 29001

RECEIVED
JUL 28 2006
BY:_____

Late fee of 1 1/2% per month due on all past due balances
Return parts subject to restocking charges

Customer P.O.	F.O.B.	Delivery Instructions:	ground

Line	Item Number	Description	UM	Ship	B/O	Unit Price	Extended Price	Tax
2.00	39513-112	DECAL KIT FOR MODEL	EA	1		74.07	74.07	Y
3.00	Taxable Freight	FREIGHT 3#	BX	1		9.94	9.94	Y
4.00	Tracking	UPS#1Z4573040342335490						
5.00	Text Line	JM / VB 7-21-06						

8193

PLAINTIFF'S EXHIBIT
13
Witherspoon
PENGAD 800-631-6989

AK056

Terms: NET 30 DAYS | Net Due Date: 08/23/2006 | Tax Rate: 7 % | Sales Tax: 5.88 | **Total Order** 89.88

[8-2125]

06455

48" & 58"

STATIONARY R.H. CHIPPER

PARTS MANUAL

S/N_____

SOLD AND SERVICED BY:

_____

MOBARK PARTS MANUAL 012 THROUGH 023

PLAINTIFF'S EXHIBIT 14 Witherspoon
PENGAD 800-631-6989

PLAINTIFF'S EXHIBIT 10 Wood 8/4/10 LA
PENGAD 800-631-6989

Manufactured By:
Chiparvestors, Inc.

Morbark-000012
Holland v. Morbark, et al.

76345-109
5/93

MORBARK SALES CORPORATION
P.O. BOX 1000 • WINN, MICHIGAN 48896
Telephone (517) 866-2381
Fax (517) 866-2280

PURCHASE ORDER

*** ADDENDUM ***

VENDOR # 09006

VENDOR: CHIPPER/EJTORS, INC.

SHIP TO: JOHNSON-SHERMAN COMPANY
410 WEST WALNUT
GOLDSBORO NC 27530
JERRY KEEN @ (919) 735-0864

DATE	CUSTOMER P.O. NO.	MORBARK P.O. NO.	WORK ORDER NO.		REQUEST SHIP DATE
12/18/95	180013	MSC-498			2/26/96

QTY.	DETAILED DESCRIPTION OF EQUIPMENT
1	5103 - MORBARK MODEL 58" STATIONARY CHIPPER, S/N 914
	STANDARD EQUIPMENT:
	58" Diameter Disc
	Chip Size - 3/4"
	6 Knife, Horizontal Feed with Top Discharge
	16" Diameter Round Wood Chipping Capacity
	OPTIONAL EQUIPMENT:
1	4" Fronts, 5/8" Clamps
6	Heavy Duty Fan Blades with T-1 Inserts @ $50.00 each
1	-T-1 Hood Liners
1	-T-1 Belly Bands
	5" Thick Chipper Disc
	Manual Swivel Discharge Spout (includes transition piece)
	-DELETE Manual Swivel Discharge Spout (includes transition piece)
	CHIPPER WARRANTY STANDARD SIX (6) MONTHS
	OEM WARRANTY ON ELECTRICAL COMPONENTS

PLAINTIFF'S EXHIBIT 15 witherspoon
PENGAD 800-631-6989

MOBARK CHIPPER INSPECTION SALES
JOHNSON,SHERMAN CO 2/96

PG 1 THROUGH 11

Morbark-000001
Holland v. Morbark, et al.

TOTAL

This order is to be entered in accordance with prices, delivery and specifications as shown. Notify us immediately if you are unable to comply with specifications, delivery, etc.

10457

Authorized By — Date

Accepted By (Vendor Signature) — Date 1-9-96

White - Vendor Yellow - Sales Pink - Data Processing Goldenrod - Check Out

MORBARK
Final Inspection Report

Company: Kenneth Day **Date:** 2-13-14

Model #: 60" Chipper **Serial #:** 914

	Yes	No
1. Load Completion Forms Completed and Signed?	✓	
2. Equipment Documentation Container Properly Installed?	✓	
3. Parts Manual, Operator Manual, Check Sheets, in Container with Protective Covering?	✓	
4. All Decals Properly Installed?	✓	
5. Loose Items Properly Secured and Packaged?	✓	
6. Parts Kit Included?		✓
7. No Hydraulic, or Oil Leaks?		
8. All Area's Painted to Specifications?		
9. All Customer Documentation Included?	✓	
10. Machine has been greased?		

Comments: Knife brace bar in envelope

Morbark-000002
Holland v. Morbark, et al.

Sales Region

Authorized Signature

White Copy - With Equipment Yellow Copy - Traffic Pink Copy - Final Inspection Goldenrod Copy - Production

[8-2036]

00458

FOR ALL CHIPPERS
QUALITY CONTROL INSPECTION REPORT File: QCCHIP1

Customer _____ S/N _____ W/O # _____

Chipper Model _____ Serial Number _____

CHIPPER BASE

_____ A. The chipper base is square and flat.

_____ B. The bearing pads are in the right location.

_____ C. Chipper hood rails are properly positioned.

_____ D. End Plate for dirt separator drilled and taped.

_____ E. The chipper base pads are properly positioned.

_____ F. Chipper base is properly welded and all welds meet specifications and are clean.

_____ G. Belly band and ~~separator ring~~ are properly positioned so that chipper disc turns free.

_____ H. Dirt separator door properly positioned and swings free.

_____ I. The separator door is properly positioned and slides free.

Start Date _____ Completion Date _____ Total Hrs. _____

Leadman _____ Quality Control Insp. _____

CHIPPER HOODS

_____ A. The chipper hoods are square.

_____ B. The chipper hood rails are properly positioned.

_____ C. The disc lock lugs are properly positioned.

_____ D. The disc lock lugs and gussets are properly positioned.

_____ E. The separator ring is properly positioned so that chipper disc turns free.

_____ F. The chipper hoods are properly welded and all welds meet specifications and are clean.

_____ G. The chipper hood are aligned with belly band, (back end of chipper base).

Start Date _____ Completion Date _____ Total Hrs. _____

Leadman _____ Quality Control Insp. _____

Morbark-000003
Holland v. Morbark, et al.

CHIPPER INFEED SPOUT

_____A. The spout is properly welded and welds meet specifications and are clean.

_____B. The spout wings are drilled and line up properly with the jig.

_____C. Set up spout with proper show in jig.

_____D. The gussets for wings are properly positioned.

Start Date_____Completion Date_____Total Hrs._____

Leadman_____Quality Control Insp._____

FAN BLADES

_____A. The fan blades are properly welded and welds meet specifications and are clean.

_____B. The fan blades are properly marked for the drill.

_____C. The fan blades are balanced.

t Date_____Completion Date_____Total Hrs._____

eadman_____Quality Control Insp._____

CHIPPER DISC

CP - mc A. The knife clamps are properly studded and studs are tight and clamps are cleaned.

BCP - mc B. The chipper knives are properly babbitted and are cleaned.

CP - mc C. The counter knives are properly cleaned.

BCP - mc D. The counter knife thickness are .3750.

CP - mc E. The chipper knife thickness for 48 & 58 chippers are .3750.

CP - mc F. The chipper knife thickness for 22, 23, 27 & 30 chipper are .5000.

BCP - mc G. The chipper disc and pockets are cleaned.

CP - mc H. The holders, counter knives, chipper knives, and clamps are properly positioned and torqued 500 to 800 ft. lbs.

BCP - mc I. The wear plate is clean and properly positioned on disc and bolts are tight.

mc J. Did clamp show good plaster gauge?

Morbark-000004
Holland v. Morbark, et al.

art Date_____Completion Date_____Total Hrs. 10

00460

adman_____Quality Control Insp._____

CHIPPER ASSEMBLY

SW	A.	The draw ring is properly positioned on the shaft and the draw ring bolts are torqued 3800 to 4000 in. lbs. (48 & 58 Chipper) 8800 in. lbs. (22,23,27 & 30 Chipper).
SW	B.	The fan blades are properly positioned on disc and the bolts are tight.
SW	C.	The rim blades are properly positioned on disc and the welds meet specifications.
—	D.	The twig paddles are properly positioned and the bolts are tight.
SW	E.	The Disc is properly balanced.
SW	F.	The chipper bearings are properly positioned on shaft.
SW	G.	The bearing housings are properly positioned on chipper base and the bolts are tight.
SW	H.	The back bearing is properly tighten at .005.
SW	I.	The front bearing is properly tighten at .002.
SW	J.	The disc is properly positioned in chipper base and the disc turns free.
SW	K.	The infeed spout is properly positioned and the bolts are tight.
SW	L.	The feed plate anvil is properly positioned to the chipper knives and the bolts are tight.
SW	M.	The chipper hoods are properly positioned and bolts are tight.
SW	N.	All bearings are properly greased.
—	O.	The discharge cover is properly positioned and the cover swings free.
SW	P.	The chipper is clean and the welds meet specifications.

Start Date_____ Completion Date 2-9-96 Total Hrs. 25

Leadman_____ Quality Control Insp. _____

This Chipper Model_____ S/N_____ has been inspected thoroughly and is ready for Final Check Out.

Signed_____ Date_____

CHIPPER FINAL INSPECTION

CHFINAL

W/O 34509 SIZE 58 S/N 914 FOR J&S S/N _____

TYPE DISC ROUND TYPE CLAMP mod ( ) TYPE HOLDER Conv

TYPE FAN BLADE Box (HD) ROTATION RH SEPARATOR NO

NO. OF KNIVES 6 CHIP SIZE 3/4 DISC THICKNESS 5"

1. Knife to anvil clearance on 48 & 58 .014 DISC X-RAY # 580-30
   Knife to anvil clearance on 75 _____ DISC DATE 1-96
   Knife to anvil clearance on 75 & 83 w/twig separator _____
   Grease in bearings YES
2. Knife to spout clearance or horizontal anvil .039 F - .037 B
3. Assembly Torques:
   Maxi fan blades _____ Box Paddle type pan blades ok
   48 & 58 draw rings ok 75 x 83 draw ring _____
   48 & 58 & 75 & 83 wear plate bolts ok
   48 & 58 anvil clamps ok 75 anvil clamp _____
   48 & 58 feed plate ok 75 & 83 feed plate _____
   48 pillow block bearing _____ 58 pillow block bearing ok
   75 & 83 pillow block bearing _____
   48 & 58 front bearing ok 75 front bearing _____
   48 & 58 front bearing cap ok 75 front bearing cap _____
   Knife clamps ~~conv.~~ Mod ok
   Knife clamps - super _____
4. Are all bolts, nuts and studs Grade 8 YES All washers hardened YES
5. Diametrical clearance on front bearing before installation .005
   After installation .002
6. Is the draw ring bent NO Is there clearance between chipper shaft and draw ring NO
   Is there clearance between shaft and disc NO
7. Wear plate to knife clamp clearance ok
8. Is wear plate height lower than the height of the knife clamps YES
9. After running the chipper, does the bearing seem cool _____
10. Are chipper bearings blocked correctly YES
11. Is the cleaner block installed correctly on the chipper base YES
12. Amount of clearance between bearing cap and housing .003
13. Reading from the high knife to low knife - .001-.005 high; .005-.003 low .001-.000
14. Is there any clearance between knife and counter knife NO; the knife and counter knife or counter NO
    knife and holder NO
15. Amount of show, feed plate to anvil 1/16
16. Is chipper disc balanced YES
17. Is clearance between the knife and edge of wear plate correct YES
18. Does every weld look perfect YES
19. Does the chipper hood fit correctly and do the hood bolts fit correctly YES
20. Is chipper cleaned 100% YES
21. Is there clearance between holder and disc NO
22. Did clamp show good plaster gauge YES
23. Is bottom of the pocket flat and square with disc YES

Date of holders _____
Date of clamps _____
Date on shaft _____
Date on disc _____
Date on draw ring _____

Regrind Knives for woods crew NO

Morbark-000006
Holland v. Morbark, et al.

NOTES: (List anything unusual about disc, hardware, etc.) 4" FRONT T-1 HOOD LINER & BELLY BAND; 5" DISC, SHAFT DISC & DRAWRING HAVE BEEN BLUED TO CHECK SEATING (OK)

COMPLETION DATE 2-9-96 11:462 INSPECTOR SN

EQUIPMENT LOAD COMPLETION REPORT

Customer: Johnson/Sherman Company Contact: Jerry Keen

Address: 410 West Walnut
Goldsboro, NC 27530

Phone: 919-735-0364 Completion Date: 2-7-96

P.O. Number: 180013 W.O Number: 34508/34509

Model: 58" Chipper Serial Number: 913 w/o #345

Main Power Model: _____ Serial Number: _____

Options: 58" Chipper, 6-Knife, Horizontal Feed, Top Discharge, 3/4" CHip, 4" Fror 5/8" Clamps, 6 EA., Heavy Duty Fan Blades with T-1 Inserts, T-1 Hood Liners, T-1 Belly Bands, 5" Chipper Disc, Knife Gauge Kit

Model: 58" Chipper Serial Number: 914 w/o# 34509

Main Power Model: _____ Serial Number: _____

Options: 58" Chipper, 6-Knife, Horizontal Feed, Top Discharge, 3/4" Chip, 4" Fron 5/8" Clamps, 6EA, Heavy Duty Fan Blades with T-1 Inserts, T-1 Hood Liners, T-1 Belly Bands, 5" Chipper Disc, Knife Gauge Kit

Items Shipped Loose

1. _____ 6. _____
2. _____ 7. _____
3. _____ 8. _____
4. _____ 9. _____
5. _____ 10. _____

Parts Books: X Operator Manuals: X Check Sheets: X

Items Back Ordered

1. _____ 4. _____
2. _____ 5. _____
3. _____ 6. _____

Comments: *Requested Ship Date 2-26-96

Morbark-000008
Holland v. Morbark, et al.

Regional Manger: _____
Requested Shipping Date: _____ Delivery Carrier: _____
Inspected By: _____ Shipping Manager: _____
Delivered By: _____ Shipping Date: _____
Received By: _____ Receiving Date: _____

White Copy - Sales Yellow Copy - Dealer/Customer Pink Copy - Traffic Dept. Gold Copy - Product Manager [8-2037]

CHIPPER CHECK SHEET

...aler:
...stomer: JOHNSON-SHERMAN COMPANY
...ddress: 410 WEST WALNUT
GOLDSBORO, N.C. 27530
Telephone: JERRY KEEN @ 919/735-0364

P.O.180013 S/N #913
W.O.#34508
EQUIP.#913
Checked byTOM ACKER
Completion Date2/8/96

____48" _X_58" ____75" ____83" ____Model 30 ____Model 27 ____Model 22

____Model 23 _X_CHIPPER ONLY ____Chip Pac ____For Field Installation

No. of Knives: 6 Chip Size 3/4" Feed: HORIZ Discharge: TOP Type Fan: BOX

Type Disc: RD Rotation: RH Type Pocket: Mor Clamp No Separator_X_

Twig Discharge Spout_____ Transition_____ Disc Thickness: 5" Separator_____

DESCRIPTION	PART NUMBER	DESCRIPTION	PART NUMBER
Knife	39233-159	Wear Plate	40240-580
Counter Knife	39233-116	Rim Blade	30193-750
...amp	40232-580 (40291)	Fan Blade	40239-580
...older	30133-580	Pusher Block	40174-580
Anvil	39233-243	Horizontal Anvil	39233-252
Anvil Clamp	40021-580		
Feed Plate	30132-580	Front Bearing Housing	30134-580
Infeed Spout	40029-580	Bearing	23661-216
Belly Band	30040-580	End Cap	30131-580
		Seal	25173-047
Hood - Infeed	40045-580	Lock Ring	23962-122
Hood - Discharge	40046-580	Nut	23962-022
Shaft	30120-580	Rear Bearing Housing	23973-113
Draw Ring	30090-580	Bearing	23661-110
Disc 5"	40236-580	Adaptor Kit	23962-226
...eper Plate	30067-580	Knife Gauge	40180-580
		Hood Pins	30107-480

Notes: 4" FRONTS, H-D FAN BLADES/T-1 INSERTS, T-1 HOOD LINERS, T-1 BELLY BANDS, ___

5" CHIPPER DISC_____

Morbark-000009
Holland v. Morbark, et al.

CHIPPER CHECK SHEET

Dealer:
Customer: JOHNSON-SHERMAN COMPANY
Address: 410 WEST WALNUT
GOLDSBORO, N.C. 27530
Telephone: JERRY KEEN @ 919/735-0364

P.O. 180013 S/N #914
W.O. #34509
EQUIP. #913
Checked by TOM ACKER
Completion Date 2/8/96

____48" _X_58" ____75" ____83" ____Model 30 ____Model 27 ____Model 22

____Model 23 _X_CHIPPER ONLY ____Chip Pac ____For Field Installation

No. of Knives: 6 Chip Size 3/4" Feed: HORIZ Discharge: TOP Type Fan: BC

Type Disc: RD Rotation: RH Type Pocket: Mor Clamp No Separator_X

Twig Discharge Spout_____ Transition_____ Disc Thickness: 5" Separator____

DESCRIPTION	PART NUMBER	DESCRIPTION	PART NUM
Knife	39233-159	Wear Plate	40240-5
Counter Knife	39233-116	Rim Blade	30193-750
Clamp	40281 ~~40232~~-580	Fan Blade	40239-5
Holder	30133-580	Pusher Block	40174-5
Anvil	39233-243	Horizontal Anvil	39233-2
Anvil Clamp	40021-580		
Feed Plate	30132-580	Front Bearing Housing	30134-580
Infeed Spout	40029-580	Bearing	23661-2
Belly Band	30040-580	End Cap	30131-580
		Seal	25173-0
Hood - Infeed	40045-580	Lock Ring	23962-1
Hood - Discharge	40046-580	Nut	23962-02
Shaft	30120-580	Rear Bearing Housing	23973-11
Draw Ring	30090-580	Bearing	23661-118
Disc 5"	40236-580	Adaptor Kit	23962-22
Keeper Plate	30067-580	Knife Gauge	40180-58
		Hood Pins	30107-48

Notes: _4" FRONTS, H-D FAN BLADES/T-1 INSERTS, T-1 HOOD LINERS, T-1 BELLY BANDS,
5" CHIPPER DISC_____

Morbark-000010
Holland v. Morbark, et al.

COPY

STATE OF SOUTH CAROLINA COUNTY OF CLARENDON Andreal Holland by his Guardian Ad Litem Peggy Knox, Plaintiff, vs. Morbark, Inc., Precision Husky Corporation, A & K Mulch, LLC, and Watford Industry, Inc., Defendants..	IN THE COURT OF COMMON PLEAS C/A NO. 2008-CP-14-00461

DEPOSITION OF

WOODROW WOODS

****

Wednesday, August 4, 2010
9:56 a.m.-1:36 p.m.

The deposition of WOODROW WOODS, taken on behalf of the Defendant at the offices of Land, Parker & Welch, 29 South Mill Street, Manning, South Carolina, on the 4th day of August, 2010, before Lyn Allen, Court Reporter and Notary Public in and for the State of South Carolina, pursuant to Notice of Deposition and/or agreement of counsel.

Garber Reporting Service
Certified Court Reporters
Post Office Box 12348
Columbia, South Carolina 29211
(803) 256-4500

WOODROW WOODS, being duly sworn, deposes and testifies as follows:

MR. WOODS - EXAMINATION BY MR. OTT:

Q: Tell us your full name please.

A: Woodrow Woods Jr.

Q: Mr. Woods, we just met before your deposition began. But I am an attorney. My name is Curtis Ott. And I represent a company called Morbark.

A: Yes, sir.

Q: They manufacture wood chippers. And we're here to take your deposition today. Have you ever done this before?

A: No, sir.

Q: What I tell folks, Mr. Woods, is that a deposition is a question and an answer session where I'm going to ask you a number of questions about what you know concerning this lawsuit and Mr. Holland's accident. And your role simply is to answer the questions that I might have or the other lawyers might have. Do you understand that?

A: Yes, sir.

Q: All right. The most important thing we're going to do today is communicate. If I ever ask you a question that you do not understand, would you let me know that?

A: Yes, sir.

Q: And I'll be happy to rephrase the question or do

whatever I need to do to make sure that you understand what I'm asking of you; okay?
A: Yes, sir.
Q: But if you do answer one of my questions I'm going to assume first that you understood my question and second that the response you gave me was an answer to the question I just previously asked you. Is that fair?
A: Yes, sir.
Q: Mr. Woods, this will probably take a little bit of time today which is good news on a hot day maybe. But if you need to take a break at any time, please let us know and we'll do that; all right?
A: Yes, sir.
Q: What is your current occupation? Where do you work?
A: A&K Mulch.
Q: And what is your position there?
A: I am the mill foreman.
Q: How long have you been the mill foreman?
A: I started there in August of 2004.
Q: Was the saw mill already up and running when you started there?
A: Yes, sir. It was.
Q: Was there a mulch operation up and running when you started there?
A: No, sir.

Q: Were you brought in to start up that mill operation as it pertained to the mulching?
A: I didn't understand the question.
Q: Sure. Were you brought in to start up the mulching aspect of what they were doing at the mill?
A: No, sir. I was brought in at the time when we just had the regular saw mill was there with the chipper and everything. We wasn't doing no mulch at that time.
Q: But the chipper was already there?
A: The chipper was already there. Yes, sir.
Q: Were they using the chipper?
A: Yes, sir. We were using the chipper?.
Q: What were they using the chipper for if it wasn't for the mulch?
A: We were using the chipper to, like the waste slabs, butts, the part that comes off, the waste that comes off the logs went into the chipper and was processed into chips.
Q: But you weren't trying to sell those chips or do anything with them?
A: Well, under my understanding we were selling the chips to, you know, whoever consumers that wanted it.
Q: Do you know who that was at that time?
A: No, sir. I did not communicate with those.
Q: When did the mulching aspect begin?

Garber Reporting Service
Certified Court Reporters
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Columbia, South Carolina 29211
(803) 256-4500

A: My supervisor -- no, sir. I don't have a supervisor but my, the owner of the company is Mr. Jimmy. That's the man that I is under.
Q: Okay. Were you working on June 1, 2006 when Mr. Holland had his accident?
A: Yes, sir.
Q: Where were you when it happened?
A: I was in the front of the mill.
Q: And tell me where that is in relationship to the chipper.
A: The chipper is in the back of the mill. And I was notified by one of the employees his name is Leroy Frierson. And that's when I came back there.
Q: So you did not witness the accident?
A: No, sir. I didn't.
Q: Are you aware of anyone who actually witnessed the accident?
A: No, sir. I don't.
Q: From where you are in the back of the mill can you even see the chipper?
A: I was in the front of the mill. No, sir.
Q: I'm sorry.
A: I was in the front of the mill. But from where the position that I were, I could not see the chipper.
Q: What did Mr. Frierson say to you?

A: He told me that Drael was face down on the ground that when he found him back there. And he need some help. Tell me to call 911. That's what I did. First I went back there where he was first and looked at him myself. And then I went and called 911.

Q: When you got to where Mr. Holland was on the ground, was there anyone else around?

A: Frierson, Leroy Frierson was there. And maybe one or two more people was there. I don't know exactly who it was but I, my main concern was Andreal. That was my concern.

Q: And what was his condition when you found him?

A: It was bad.

Q: Tell me what you mean.

A: He was face down where that, where that piece of equipment, you know, where it hit him and he was face down on his stomach. And I raised his head up because that's where he had the injuries in his face and whatnot. And I looked at him and that's when I went and called 911.

Q: What did you see in his face?

A: His eye, I can't tell which one it was, was very messed up because he had a lot of blood on his face. And his mouth and his jaw and whatnot, his face was messed up.

Q: Was he conscious?

August 2004 up until his accident?
A: Yes, sir.
Q: So he had experience changing blades on chipper machines at A&K Mulch from at least August 2004 up until June 1, 2006?
A: Yes, sir.
Q: And assuming that he was working that day he would be changing the blades two times a day?
A: Yes, sir. He changed them twice a day.
Q: And the person who helped him do that would vary depending on what day it was or who was around?
A: Yes, sir.
Q: So is it fair to say that no one had changed the blades more often than Mr. Holland from the time you started up until his accident?
A: He was the main one doing the changing. Yes, sir.
Q: When the 52-inch machine was brought in, why did that happen?
A: When we brought the 52-inch in, we was in the process of making more, in other words, the smaller one wasn't getting, it wasn't cutting as much as we wanted to cut and produce as much. So we wanted to produce more so we got a larger one.
Q: Were you involved in the purchase of the 52-inch?
A: No, sir.

Q: What happened to the 48-inch?
A: We moved it and put it down, still got it at the mill. It's at the fencing mill.
Q: At the what?
A: I call it, it's a smaller mill. Where we do, manufacture fencing. But that's where the smaller one's at.
Q: Is it still in operation?
A: Yes, sir.
Q: What do they use it for?
A: Chip up the waste that comes from the fencing mill.
Q: Were you involved at all with the installation of the 52-inch machine when it got to A&K?
A: Yes, sir. I was.
Q: What was your involvement?
A: With the maintenance-wise installing and whatever it takes, I mean, to put it, you know, put it in there.
Q: Did it go in the same place as the 48-inch?
A: Yes, sir. It sat on the same platform.
Q: Was it the same design except for being a little bit bigger?
A: Same design except for being a little bit bigger. Yes, sir.
Q: When that chipper was first put in use at A&K, did it have any warning decals or symbols on it?

A: Yes, sir. It had some. But we put some more on it.
Q: Do you remember when it was that you put more on it?
A: Right after we got it. It was, I don't know exactly when but that was right after we got it. But it had some. It had decals on it when it came.
Q: And this is probably stretching your memory too much but do you remember what decals it had on there before and which ones you put on?
A: The one that was on there when it came was talking about the wheel turning, stop turning. And it didn't have no picture on it. But it had the, something like, well, like if you get your hands stuck in there, you know, while it's still turning.
Q: So it was written but there wasn't a diagram?
A: It was written. Right.
Q: And y'all put those diagrams on where it shows someone getting hit in the head after it was brought in to service at A&K?
A: Right. After we installed it. Yes, sir.
Q: So those decals where it showed someone getting hit in the head no doubt those were on there at the time of Mr. Holland's accident?
A: Yes, sir. It was on there.
Q: But you also remember even before that there being written warning on the machine saying do not touch it

with sprocket that runs the belt to the motor, we've got a guard built around that. We've got a mesh wire that you can't get your finger in. And you can clearly see the sprocket and the belt turning through that mesh wire.

Q: And if you see the belt or the sprocket turning then you know the wheel is turning?

A: Then you know the wheel is turning. Yes, sir.

Q: And is that how you instructed and taught people how to determine --

A: Yes, sir. Everybody that work there, that's a, you know, you've got to just look at it and make sure it stops turning. You can't guess.

Q: Okay. Are there any other places that you can look into the machine to see if it's still, the wheel is still turning after you lock it out?

A: The majority of the chippers that I worked around had the guard and the mesh wire. They're not fully enclosed to where you can, you can see it. It's visible.

Q: Can you also hear the wheel still turning even after it's been locked out?

A: At some point in time. But when it comes down to a very slow rotation you can't hear it.

Q: Can you feel the machine if you touched it too early to

see if it was still vibrating from the wheel still turning?

A: It's according to how fast it's turning. If it's turning real slow you can't even hardly feel it.

Q: When you remove the Carter key and that guard to get the hood open, are you standing in an area where you can be able to see whether the disk is still moving or the belt is still moving?

A: When you, when you get up there to move that Carter key or whatever, you're not in the position to see whether the wheel is turning. That's why it's best to make sure the wheel is stopped turning before you even commence to get up there to pull a pin out.

Q: Okay.

A: That's a no-no.

Q: And did you tell that to the folks who were responsible for changing the blades?

A: Yes, sir. I went over that many times.

Q: Even before Mr. Holland's accident?

A: Even before the accident happened.

Q: Were there any manuals, operator manuals?

A: We have, yes, sir, we have operator manuals for the chippers.

Q: Did you have it back for the 48-inch machine?

A: Yes, sir. We did.

Q: Do you still have it?
A: That 48, we got, I think we done pulled that one out of there.
Q: That's not the one at the fencing mill?
A: The smaller one is at the fencing mill.
Q: That's the 48-inch?
A: Right.
Q: Does the 48-inch machine, do y'all still have that operator's manual?
A: For the 48-inch?
Q: Yes, sir.
A: We should have it. My understanding after they moved it from the big mill and put it at the smaller one. But I believe it's still there. I don't know for sure. But I know we had it.
Q: Is there a place on the machine where that operator's manual is kept?
A: Yes, sir. It's a little small, something like a little whatever plastic, well, it's plastic for weatherized that you can stick the manual in.
Q: When the 52-inch was put in did y'all have an operator's manual?
A: Yes, sir.
Q: Was it with the machine?
A: Yes, sir.

Q: Did you tell the operators of the chipper or the folks who were going to change the blades to read the operator's manual before they worked on that 52-inch?
A: No, sir. I did not.
Q: Was it available there for them to read it?
A: It was available. Yes, sir. Right up in my office.
Q: Do you remember -- so that one was not kept on the machine? That was kept in your office?
A: No, sir. That one was kept in my office.
Q: Do you remember there been being a decal on the machine telling operators to read the safety manual before working on it?
A: Say that again.
Q: Do you remember there being a decal or warning on the machine telling operators to read the safety manual or operator's manual before working on that chipper?
A: It might have been one on there. I don't know for sure.
Q: You don't remember?
A: I don't remember.
Q: Did you expect Mr. Holland and the other folks who had changed the blades on this chipper to have read the manual on the 52-inch machine before they would do any work on it?
A: No, sir. The, what I expect that they knew how to change the knives. What I'm saying, when you, if they

had to do maintenance on it, I expect for them to do the, to do, read the manual if they're going to do maintenance. If they're going to change the knives I feel that they was experienced with what they were doing at that point in time to do that.

Q: Because they had already been doing it on the 48-inch?

A: Been doing it all the time.

Q: And the procedure stayed the same?

A: Yes, sir.

Q: Besides your monthly and weekly safety meetings with the employees, were there any written instructions on how to change the blades on the chipper?

A: No, sir. I did not have any.

Q: Does A&K still have that 52-inch machine?

A: The one that we had the accident?

Q: Correct.

A: No, sir.

Q: Where is it?

A: I don't know.

Q: Was it sold?

A: I presume it was.

Q: Were you involved in whatever was done such that that machine is no longer at A&K?

A: No, sir.

Q: Do you have a chipper now at A&K for the saw mill?

Q: Who are the folks who operate the chipper now or change the blades in the chipper now?
A: David Wright and Levain that does the one now.
Q: Bane is his --
A: Levain.
Q: Oh. Mr., is it Mr. Brown?
A: Levain Brown. Yes, sir.
Q: Did you ever witness Mr. Holland before his accident try to open the hood on the, a chipper before the wheel had stopped turning?
A: No, sir. I have not.
Q: Did you hear that he had done that before his accident?
A: No, sir. I have not.
Q: Were you aware of a time when Mr. Witherspoon caught him doing that?
A: No, sir.
Q: Were you aware of a time when David Wright saw him doing that?
A: No, sir.
Q: If you had ever seen him try to open the hood before that wheel had stopped turning, what would you have done?
A: He would have got written up.
Q: Why?
A: Because that's a safety precaution. And it was, it

MR. JONAS: Object to the question.

Q: He might have some objections to my questions but you're still going to need to answer them.

A: Say that again.

Q: Sure. Understanding how the accident happened as you do that Mr. Holland got hit with the hood, can that accident happen if Mr. Holland follows A&K's procedures for changing the blades?

A: If it was proper procedure, safety procedure is followed that would not happen.

Q: Did you find the Carter key or the pins that held the hood in place when you looked at the machine after the accident?

A: I really didn't look for them. Because the hood was, you know, it was damaged. We couldn't even operate it.

Q: Do you know if those pins were damaged or sheared off or anything like that?

A: No, sir. They weren't damaged or sheared off.

Q: Did you see them after the accident?

A: Yes, sir. I seen them after the accident.

Q: You just didn't notice them on that day?

A: I didn't notice the Carter key. But the pins, the pins were there. But, you know, like I said we had a Carter key also to go in there. But I didn't see the Carter key. The pins were there. The pins weren't sheared

Q: But specifically you knew that the hood could kick back and hit you in the head?
A: Yes, sir. I knew that.
Q: You didn't even need the diagram to tell you because you already knew that?
A: I already knew that. But you do need the diagram because it's supposed to be on there.
Q: Where did you get the additional decals that were put on the machine after the 52-inch was installed?
A: I had, didn't get them, they got them through the office.
Q: Did you know --
A: Somebody ordered. I don't know who ordered them.
Q: Do you know from where they were ordered?
A: No, sir. I don't.
Q: Have you ever spoken with anyone from Morbark, either one of their sales representatives or anyone from their manufacturing facility?
A: Yes, sir. I've spoken to them.
Q: Who have you spoken with?
A: I couldn't call their name. They have come there and some of the maintenance guys that work on it, the Morbark machine. And I would communicate with them and talk. But to know them by name, I don't know them.
Q: Do you remember what y'all were talking about?

Q: All right, Mr. Woods. I represent Mr. Holland in his suit against Morbark, the manufacturer of the machine that we claim was involved in this accident. I'm going to show you a photograph. Let me get this marked.

(Plaintiff's Exhibit Number One was marked for identification purposes.)

Q: We've got Plaintiff's One. This is a photograph. Can you recognize the person in the photograph?

A: Yes, sir.

Q: Who is that?

A: Looks like me.

Q: It does. Is that the machine that we're, you've been referring to as the 52-inch machine?

A: Yes, sir.

Q: All right. I'll represent to you that Morbark calls that a 58-inch machine.

A: Okay.

Q: Have you ever heard of it?

A: Yeah. I heard of 58-inch also. Yes, sir.

Q: All right. So in that photograph while we're looking at it, it looks like you've got a hammer and you're taking on one of the pins that lock the hood in place. Is that what you're doing?

A: Yes, sir.

Q: Is that hammer kept near by the machine?

A: Where we can get it when we get ready to take the pins out of it because you can't, we don't keep it, no metal close to the machine because we don't want no metal going into it. But we have it where we can get to it.

Q: All right. In the background of that photograph there is some conveyors that seem to be very busy here with chips loaded. Would you describe a little bit, help me understand the operation of the mill and what happens before these conveyors and this chute reaches the feed chute of the machine? What is going on ahead of this part of the production line?

A: You talking about the chips back there?

Q: Well, what I'm looking at here is there is a chute or some sort of a --

A: Oh, okay.

Q: -- device here that brings chips.

A: Okay. Okay.

Q: Something to the line here.

A: This is the in-feed right there.

Q: Yes, sir. You're looking at this --

A: Right.

Q: -- large section?

A: Right.

Q: All right. Let's label this thing if you would. Just take is this and circle and put in-feed next to it

where you mean in-feed.

A: In-feed. That's the mouth of it right there.

Q: Just write on that photograph.

A: The mouth or the in-feed.

Q: Yeah. All right. So we've got the in-feed. Now, what feeds the in-feed?

A: Okay. The vibrator. That's the vibrator. They put a vibrator right there. It vibrates and pushes the waste into that, the mouth of that, the chipper.

Q: Would you write in about where you were looking at or where you're pointing to as the vibrator?

A: It's yay wide but I just put it right on this right here.

Q: All right. We're seeing only a piece of it in the photograph?

A: Right.

Q: All right. Now, what connects up to the vibrator? What's ahead of that?

A: It's a belt that comes to, it's a belt that probably like 20 or 30 feet in front of that.

Q: All right.

A: In front of the vibrator.

Q: Now, as this 58-inch machine takes in the material where does it discharge to?

A: It discharge, it goes up that pipe there.

Q: Uh-huh (affirmative response).
A: And it's a chip shaker over here. That's where the mouth of that hanging over there. And the over-sized chip comes back down through there. And the regular chip that be, the good chips fall on the belt.
Q: All right. Let's put pipe up there since you used that term.
A: All right. Out-feed pipe.
Q: Out-feed pipe. Okay. And the over-sized chips that go back into the machine, whatever you call this green thing here?
A: Yes, sir. Right. Yes, sir.
Q: Go ahead and label that whatever you think's appropriate.
A: Over-size chip.
Q: Okay. And you said over-sized chip?
A: Chip return.
Q: Return. And then the good chips are discharged, where is that at in the photograph?
A: On the out-feed belt.
Q: Okay. Let's call it that then. All right. And this pile behind the machine, is that where all this ends up?
A: Yes, sir.
Q: Okay. So what do you call that when you --

A: That's the chip pile.
Q: Let's call it the chip pile then. Okay. Now, during your testimony you've talked about a belt guard. Okay? And I assume you're referring to this yellow thing over here.
A: Right.
Q: All right. However you referred to that would you mark that so we'll know what we're talking about?
A: (Witness complies).
Q: All right. Now, the hood that is the movable section of the machine that you're working on here, where is that?
A: That's the top that you lift open to get into the wheel.
Q: All right. I want to make sure we're using the same term.
A: Yeah.
Q: So what do you want to call it?
A: That's the hood.
Q: Let's mark it hood then.
A: (Witness complies).
Q: Okay. Now, there's another section of that hood that's part of the machine that's fixed, isn't it?
A: Yes, sir.
Q: All right.

A: Right.
Q: So this would be the movable section maybe?
A: Right. That would be, I'll say the half of it.
Q: All right. Excellent. All right. Now, and just to be sure we know what's going on here, you with the hammer you've got your hard hat on that day? That's part of what you do when you work in the yard, wear a hard hat?
A: Well, we're supposed to wear them at all times if the mill is in operation.
Q: All right. I was curious. You've got your safety glasses on also. Is that part of the requirement?
A: Yes, sir. The safety glasses.
Q: This is something you train in your safety meetings to wear that hat and those safety glasses?
A: Yes, sir. I mean, the hard hat is worn all the time.
Q: Yes, sir. Now, in addition to that, what is this I'm going to call it orange or red thing sticking out of your ear?
A: That's the ear plug.
Q: Okay. Would you circle that and put ear plug so we know what --
A: (Witness complies).
Q: Now, why do you wear ear plugs on that job?
A: According to what area you're in for the sound.
Q: Is it a noisy place?

A: Sound reduction. In some areas. Yes, sir.
Q: Is that one of the noisy areas?
A: Where the chipper at. Yes, sir.
Q: All right. I was looking at photographs. Let me ask you to take a look at, well, let's get this marked.
(Plaintiff's Exhibit Number Two was marked for identification purposes.)
Q: I'm going to show you Plaintiff's Exhibit Two. What is this?
A: By looking at it that looks like the smaller chipper.
Q: Yes, sir. I'm not trying to trick you with this. I think this was taken during the investigation by Warren Engineers. I represented it as the small chipper, the 48-inch. Can you recognize the background there? I mean, I don't know what you pick up from that.
A: That would be the smaller fencing mill.
Q: All right. If you would put small fence mill so we know where that's at.
A: (Witness complies).
Q: All right. Now, since we're calling this the 48-inch would you put that someplace on the machine so we'll know again what we're talking about?
A: (Witness complies).
Q: All right. So this 48-inch if I follow the testimony it was in the position, looking at Plaintiff's Exhibit

One where you're attacking that pin with the hammer, that 48-inch machine was in that location where that 58-inch machine is in that picture?

A: Yes, sir.

Q: All right. And sometime, and I follow what you said, sometime in, if I got it right, before the accident with Andreal and sometime in 2006 they took this 48-inch machine and moved it to the fence mill, fencing mill and they installed this 58-inch?

A: Yes, sir.

Q: All right. Now, one of the questions I had, and let me just get one other photograph marked?

(Plaintiff's Exhibit Number Three was marked for identification purposes.)

Q: We're looking at Plaintiff's Three. What is that?

A: Those were some cypress logs that's in the park.

Q: All right. Now you refer to cypress logs, is that what the chipping operation involves is chipping cypress logs?

A: Those are the logs that we have had out there then. But what -- rephrase the question again.

Q: Well, as I understood from some other testimony that the line that Mr. Holland was working on where it finally ends up in this chipper machine essentially processed cypress logs. Is that --

A: Yes, sir. Yes, sir.
Q: And those are the logs in this pile that's shown in Plaintiff's Three before they get to the processing line?
A: Yes, sir.
Q: All right. Where do these come from?
A: The logs?
Q: Yes, sir.
A: Out of the swamp.
Q: All right. I follow that that's probably where they grow.
A: Yes, sir.
Q: Does Witherspoon have an operation where they send out these essentially logging crews out to cut and bring these to the mill? Are these delivered by Witherspoon employees?
A: I don't know. The only thing I know is the logs is on the yard.
Q: All right. Those logs then go where in the mill?
A: They go to the head saw where the head saw produces them into boards. And the waste that comes off of them comes to the chipper.
Q: All right. Now, if I follow what you're saying then this chipper is at the end of the line. The head saw cuts those logs into boards?

A: Yes, sir.
Q: All right. And whatever is left over after that sawing operation goes through, essentially there's a cut-off saw someplace in this?
A: Yes, sir.
Q: That's where Andreal worked?
A: Yes, sir.
Q: You called it a slabber; is that right?
A: Well, it's a cut off saw and you trip the slab also.
Q: All right.
A: So cut off saw and tripped the slabs.
Q: I worked at a lot of jobs but never in a saw mill. So I'm trying to understand then. Ahead of where Mr. Holland worked was the head saw and David Wright worked up in that area?
A: Yes, sir.
Q: And after the boards had been cut from the logs what essentially is left over heads down the line to and is separated, goes through the cut off saw and then to the chipper. Is that close to correct?
A: Yes, sir. That's pretty close.
Q: All right. So what's being chipped is what's left over after the saw has cut the boards?
A: After it run through, the board goes through the edger and the edger trims the waste off the board.