

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.

APPELLANT'S FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL/EXCEPTIONS

1. Did the Honorable Trial Judge err in denying Plaintiff's Motion To Amend and Supplement Plaintiff's Complaint?
2. Did the Trial Judge err in granting summary judgment without considering Plaintiff's motion to amend and supplement his complaint?
3. Did the Honorable Trial Judge err in making unsupported factual conclusions in support the Order Granting Summary Judgment?
4. Did the Honorable Trial Judge err in granting summary judgment on the grounds that Plaintiff's failure to warn claim s failed as a matter of law?
5. Did the Honorable Trial Judge err in granting summary judgment on the grounds that the Plaintiff's design defect case failed as a matter of law?
6. Did the Honorable Trial Judge err in granting summary judgment on the grounds that the chipper was not in essentially the same condition at the time of the accident as when it left Morbark's hands."
7. Did the Honorable Trial Judge err in granting summary judgment on the grounds that the failure to incorporate the additional safety devices urged by Plaintiff's expert does not render the wood chipper defective and unreasonably dangerous.
8. Did the Honorable Trial Judge err in granting summary judgment on the grounds that the Plaintiff cannot prove the requisite alternative feasible design.
9. Did the Honorable Trial Judge err in granting summary judgment on the grounds that the the case of "Plaintiff cannot prove the requisite alternative feasible design."
10. Did the Honorable Trial Judge err in granting summary judgment on the grounds that retrospective application of the so called risk-utility test referred to in *Branham v. Ford Motor Company*, 390 S.C. 203, 701 S.E.2d 5 (2010) to this claim impaired and defeated substantial rights of the Plaintiff?

STATEMENT OF THE CASE

On March 3, 2009, Peggy Knox, the duly appointed *guardian ad litem* acting on behalf of her son, Plaintiff-Appellant, Andreal Holland filed an amended summons and complaint naming Morbark, Inc., Precision Husky Corporation, A&K Mulch, LLC and Watford Industry, Inc. as defendants in an action alleging negligence, strict liability and breach of implied warranty following an accident on June 1, 2006, when the Plaintiff was struck in the face with the moveable hood portion of a Morbark 58" horizontal feed, top discharge wood chipper machine that resulted in massive facial fractures and traumatic brain injury to the Plaintiff. (R. pp. 25-38)

The individual defendants timely answered and on or about April 6, 2009, the Defendant Morbark, Inc., a sophisticated designer and manufacturer of wood processing equipment distributed throughout the United States, Canada and Europe, with the consent of the additional defendants, removed the case to federal district court. On October 13, 2009, Judge Michael Duffy remanded the case to Clarendon County Circuit Court. Initially the case included additional party defendants A&K Mulch, LLC, Plaintiff's putative employer, Precision Husky, Inc., the reseller of the Morbark chipper machine and Watford Industry, Inc., the installer of the machine at J.C. Witherspoon, Jr., Inc./A&K Mulch, LLC. Through the process of discovery it was finally determined that despite the fact that J.C. Witherspoon, Inc. initially claimed it was the Plaintiff's statutory employer, that its subsidiary, A&K Mulch, LLC was also entitled to the exclusive remedy provision of the Workers' Compensation Act. It was further discovered that although Watford Industry, Inc., had installed the wood chipper machine that the installation had not caused or contributed to the Plaintiff's injury. It was further determined that the machine reseller, Precision Husky, Inc., an Alabama manufacturer of similar wood chipper equipment and

the reseller of the Morbark machine, had not made any modifications to the machine other than to allegedly attach its proprietary warning labels that were designed for its similar equipment.

On July 9, 2010, the Court entered a Consent Scheduling Order requiring the parties to identify their expert witnesses by October 1, 2010, and to make the witnesses available for deposition and to complete discovery by October 29, 2010. (R. pp 21-22) The Order further provided that all dispositive motions were to be filed by November 19, 2010. 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 solely against Defendant Morbark, Inc. (R. pp. 193-198) On August 24, 2010, the Circuit Judge entered a Consent Stipulation Of Dismissal of all the Defendants except Morbark, Inc., the designer and manufacturer of the machine. (R. pp. 1303-1328) The Court did not address the pending motion to amend and the case continued on with all the original Defendants included in the caption. On January 13, 2011, the Plaintiff filed a second Motion To Amend/Supplement Complaint based on information learned in discovery and following the deposition of the Defendant's expert witness, Bobby Ray Smith. (R. p. 190) Mr. Smith was deposed on Nov. 18, 2010, following service of Defendant's supplemental answers to discovery (10/15/10) identifying him as a witness and Responses To Request For Production received on December 27, 2010. (R. pp. 1194-1196, 1204-1215) The motion to amend and supplement was heard on March 11, 2011. (R. p. 135) On April 15, 2011, an order was filed denying the motion to amend and supplement and mistakenly stated that the August 4, 2010, Plaintiff's Motion To Amend and Supplement had been decided at a hearing on October 8, 2010. (R. pp. 15-19, 20, 163-183) The Order was eventually served on the Plaintiff's attorney on June 15, 2011. On June 20, 2011, the Plaintiff's counsel filed a Motion For Reconsideration And To Amend and Alter Judgment and Order with supporting

memorandum. (R. pp. 184, 199-208) The Court did not address the motion prior to the date the Notice of Appeal was filed on September 11, 2011.

On August 4, 2010 the Plaintiff filed a Motion To Compel Responses to Plaintiff's Interrogatories and Request For Production. (R. p. 192) On Sept. 7, 2010, the Plaintiff filed a Second Motion To Compel Responses to Plaintiff's Interrogatory #32 and Request For Production #15 requesting further information regarding the design standards and regulations related to the Morbark chipper. (R. p. 191) On October 8, 2011, the Motion To Compel (08/04/10) was heard and an Order entered compelling answers to Interrogatory #1 and #32. (R. pp. 20, 163-183) As is relevant here, on October 11, 2010, Defendant Morbark served Supplemental Answers to Request For Production, #17-28, in response to Plaintiff's request for further engineering information and engineering design standards for the chipper machine. (R. pp. 1204-1210) On October 15, 2010, Defendant Morbark served Supplemental Answers to Interrogatory #32. (R. pp. 194-196) On Dec. 17, 2010, Defendant Morbark served Answers to Request For Production, #29-36, requesting further engineering information regarding the chipper machine. (R. pp. 1211-1215). 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 neuropsychological condition. (R. pp. 188-189) The motion for protection was not heard and the Plaintiff's deposition proceeded as scheduled.

On February 13, 2011, the Defendant Morbark, Inc. filed a Motion For Summary Judgment. The Motion For Summary Judgment was heard on March 31, 2011. (R. pp. 54-134) On June 2, 2011, an Order granting the motion for summary judgment was filed with the court. (R. pp. 1-13) On June 16, 2011, the Plaintiff's counsel filed a Motion For Reconsideration And To Amend and Alter Judgment and Order granting summary judgment with supporting

memorandum. (R. pp. 185, 209-222) The Court denied the motion by Order dated and filed on August 23, 2011. Plaintiff timely filed a Notice of Appeal on Sept. 21, 2011.

STATEMENT OF FACTS

The saw mill operation at Alcolu, SC, where Plaintiff-Appellant worked, was begun by J. C. Witherspoon, Jr. with the formation of A&K Mulch, LLC in 2003. A&K Mulch, LLC, was one of Mr. Witherspoon's forest products processing companies operated under the core company J C Witherspoon Jr., Inc. In 2004 the Plaintiff was hired to operate the cut off saw and was eventually given the extra responsibility of changing the knives on the wood chipper machine either once or twice per day depending on the foreman's decision and direction. From 2004 until the date of the Plaintiff's injury, the A&K Mulch operation employed similar style wood chippers manufactured by Morbark, Inc. The used Morbark 58" horizontal feed, top discharge wood chipper machine (serial #914) which was involved in Plaintiff's accident was purchased by J.C. Witherspoon, Jr., Inc. from Precision Husky Corporation, a manufacturer of similar equipment and reseller of used equipment and was actually installed at A&K Mulch in approximately mid-late April 2006. The Morbark 58" wood chipper machine was originally designed in the 1960's by Norvel Morey, the founder of Morbark, Inc. located in Winn Michigan. According to the original purchase order and related documents the 58" Morbark chipper machine was manufactured and specially equipped with a 5" thick chipper disc (#40236-580) and heavy duty fan blades (40239-580). (Witherspoon, Ex. 15, Morbark # 001, 006, 008-010) There was no label or information attached to the machine or contained in either the Morbark "48" & 58" Stationary R.H. Stationary R.H. Chipper Parts Manual nor the Morbark "Model 48" and 58" Stationary R.H. Stationary R.H. Chipper Safety Operators Manual" that identified or referred to the modification of the machine or the respective parts.

Mr. Woodrow Woods, the experienced mill foreman of A&K Mulch, LLC and former mill superintendent at Georgia Pacific, testified that A&K Mulch had no formal program to train chipper “operators”, including the Plaintiff, to change the chipper knives. He explained however that the general procedure for changing chipper knives was the same for all the chippers he had experience with throughout his thirty-five year career and that the various one piece hood and two piece hood configurations all required the person changing the knives to shut off the power and “lock out and tag out” the power supply and wait for the internal rotating disc where the chipper knives are attached to stop before changing the knives, a period of approximately 10-15 minutes depending on what material was being fed the machine as the power was cut off. (R. pp. 478, ll. 20-25; 479, ll. 1-9; 507, ll. 8-25; 508-509) Mr. Witherspoon, on behalf of A&K Mulch, also testified there was no formal training to change the chipper knives and that the process did not require anyone who was highly trained or even very smart. (R. pp. 430-43, 433) Plaintiff’s actual training to change chipper knives was informal and was conducted by various employees who had previous experience with a variety of wood chipper equipment while employed at Georgia Pacific. Although the Plaintiff had a low average I.Q., was dyslexic and had lifelong reading comprehension difficulty he was considered a good employee. (R. pp. 498, ll. 15-25; 514, ll. 1-4)

Mr. Woods explained that the Morbark chipper machine here involved was located outside the mill operation building where boards were cut from raw timber and the cutting waste was directed on a conveyor to a “vibrating feed conveyor” to be automatically fed, without an operator present, outside to the chipper machine that would chip the cutting waste and exhaust the chips to “chip piles” of saleable mulch product. (R. pp. 491, ll. 13-25; 492, ll. 17-25; 493, ll. 1-17). In reference to photo exhibits, Mr. Woods explained the features and operation of the

chipper machine. Referring to Woods Photo Exhibit #7, he explained that the fans attached to the rotating disc on the motor side of the chipper create an updraft of the chips in the closed cutting chamber directing the chips to the top discharge and that the chipper knives are located on the opposite side of the disc and are recessed in the disc and bolted through the disc to the fan side. (R. pp. 503, 504, 519, 523-524) He further explained that as the chips were exhausted through the top of the machine they would pass through a sized chip screen on their way to the chip pile and that if the chips were too large to pass through the screen that they were directed through a pipe attached to the outlet and recycled back through the chipper. (R. pp. 484, 485, 486, 487, 519) Mr. Woods further explained that in order to change the chipper knives that once the disc had stopped turning, and in the case of the two piece hood design here involved, that the “operator” would remove the two pins, Morbark Part # 30107-480 (R. p. 603) holding the hood assembly, Morbark part # 40045-580 (R. 601) to the fixed hood section Morbark Part #40046-580 (R. p. 602) as shown and detailed in the Morbark “48” & 58” Stationary R.H. Stationary R.H. Chipper Parts Manual (R. p. 596-601) Both Mr. Woods and Mr. Witherspoon testified that it was typical to have to use a hammer to remove the pins from the hood assembly and that a certain “wobble” of the hood on the hood hinge was observed when the pins were removed. (R. pp. 421, ll. 6-25; 436, ll. 14-25; 437, ll. 1-7; 483, ll. 20-25) Mr. Woods further explained that it was not possible to see whether the disc and drive mechanism was turning while the “operator” was in the position to remove the spring clip/cotter keys from the pins securing the hood section and that if the chipper was moving very slowly you could not hear it moving. (R. 475-476)

Mr. Woods further explained that although the chipper hood flange of the “moveable” section of the hood/guard assembly contained holes along the flange hood corresponding to matching holes in the adjoining flange of the machine, that the procedure to operate the machine

did not require the sections to be bolted together, but depended upon the pins located at the top of the hood/guard to lock the sections together. (R. p. 522) Mr. Woods explained that using the pins instead of bolting the flanges improved efficiency and was a safe procedure and had nothing to do with the injury to the Plaintiff. (R. pp. 511, ll. 17-25; 512, ll. 1-18)

Mr. Woods also addressed the issue of stalling the chipper machine. He explained that the chipper slowed progressively after switching off the chipper power, with the disc first moving very fast and slowing as the momentum dissipated. He also stated that if material continued to be fed the chipper after it was powered off by the separately controlled vibrating conveyor that it would slow down more quickly and would eventually stop it. (R. pp. 507-509) He also testified that he was aware that there were occasions that the feeder did not operate properly. (R. pp. 508, 515-516) Mr. Robert Roseboom, a supervisor of the fence mill area at A&K Mulch where a similar 48" Morbark chipper was in use testified that it was his experience that the disc typically came to a stop 5-10 minutes after the power was shut off, assuming it did not have anything being fed into it, and approximately 3-4 minutes if the chipper had material being fed to it after it was powered off. (R. pp. 534, 545-547) He further explained 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. (R. pp. 564-547, 548) He also stated that even though the vibrating conveyor was designed to feed the chipper without operator assistance that on occasions an unusual size or shape piece of wood would hang up as it was being fed to the chipper intake and clog up the machine. (R. 547-548) He further explained that even with the chipper powered on, in the event the chip separator (cyclone) clogged and plugged up the screen that it would back up the chipper which would continue to try to chip until it stopped. (R. pp. 548-549)

Plaintiff's regular job was to operate the cut off saw inside the mill and his work station was located a considerable distance from the rear door of the mill where the chipper was located outside on a concrete pad, out of the sight of Plaintiff and other workers on the line. (R. pp. 493, ll. 14-18; 494, ll. 21-24; 495, ll. 1-15) The only regular occasion the Plaintiff was required to attend to the chipper was to change the chipper knives at noon and at quitting time. On the day of the accident the chipper knives had not been changed at the normal noon period because Mr. Woods advised the Plaintiff at lunch that the machine was cutting well and that the blades did not need changing. Plaintiff testified that the last time he had seen the machine was on the previous day and that most likely the knives were last changed by the night crew the evening before the accident. (Holland, pp. 1141, ll.23-25; 1142, ll. 1-3; 1162, 14-25) On June 1, 2006, at approximately the normal mill quitting time, the Plaintiff went to the back of the mill near the doorway where the separate controls and power disconnects for the chipper and vibrating conveyor were located. Plaintiff testified that he turned off the power to the chipper 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. (R. pp. 1151, ll. 9-22; 1153, 15-19; 11154, ll. 7-18) After shutting off the power to the chipper and following the "lock out-tag out" procedure and assuring the power disconnect to the chipper could not be inadvertently turned back on, the Plaintiff returned to his regular work station at the cut-off saw and continued to clean up around his work station. (R. pp. 1126, ll. 5-14; 1127, ll. 1-18) The Plaintiff further testified that he continued cleaning up at the cut-off saw location for about 5-7 minutes when another worker from the back of the mill told him that they heard a tapping noise coming from the chipper machine. The Plaintiff further testified that he waited a few more minutes and then went to investigate. (R. pp. 1127, ll. 19-25; 1128, ll. 4-8; 1129, ll. 9-15) He stated that when he arrived

at the machine that he was surprised that it appeared to be stopped because the normal run down time had not elapsed. After turning off the vibrating conveyor he put a stick into the feed opening of the machine as he had been trained to do and determined the disc was not moving at all and would not move back and forth with the pressure from the stick as was normal when the disc was stopped. (R. pp. 1128, ll. 9-16; 1129, ll. 9-20; 1130, ll. 1-25; 1156, ll. 1-10) The Plaintiff concluded there was something wrong with the machine and went to find the mill foreman, Mr. Woods, who was working at the front of the mill, and to tell him about the problem. (R. pp. 1129, 6-25; 1131, ll. 1-18; 470, ll. 7-13) The Plaintiff further testified that Mr. Woods told him to find "Mr. Leroy", an older more experienced employee to look at the chipper. Plaintiff testified he found "Mr. Leroy" who was busy selling snack items from his private "canteen" and told him that he would come when he finished. (R. pp. 1131, ll. 19-25; 1140, 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. (R. pp. 1132, ll. 10-25) He further testified that he then went back to the chipper and discovered one of the pins securing the hood was missing on the opposite side of the machine from the motor. (R. pp. 1141, ll. 6-20) Plaintiff testified that he then removed the spring clip securing the remaining pin from the hood and as he worked the pin out, the hood unexpectedly opened, hit him in the face and knocked him unconscious. (R. pp. 1132, ll. 10-15; 1133, ll. 3-8; 1137, ll. 1-11; 1138, ll. 21-24; 1142, ll. 22-25; 1143, ll. 1-10)

Plaintiff was discovered next to the machine in an unconscious condition by co-worker Mr. "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 curved 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. He was diagnosed as suffering a permanent traumatic brain injury and has been determined to be permanently disabled by the Social Security Administration. Since the accident he has been examined and tested on three occasions by neuro-psychologist Dr. Robert Deysachs. On April 9, 2009, Dr. Deysach again tested the Plaintiff and reported that the results were consistent with previous testing and that Plaintiff had a verbal IQ of 64 (1st percentile) and a full scale IQ score of 76. (R. 1059-1063) Plaintiff continues to suffer from anxiety, depression and difficulty sleeping. Plaintiff's mother and his appointed GAL, describe his personality change and lack of cognitive function and attention span as dramatic.

Although no one witnessed the accident many witnesses speculated about what had happened. None of them were aware of the Plaintiff's actions leading to his attempt to remove the remaining pin from the hood assembly. The only witness to the accident was the Plaintiff

whose massive facial and brain injuries prevented him from communicating for an extended period of time. (R. p. 470, ll. 14-18) The only other persons that closely examined the machine following the accident was Woodrow Woods, the mill foreman. Mr. Woods testified that the machine was powered off at the time of the accident and that he observed the damaged moveable hood portion of the machine before it was removed and replaced. He testified that he observed damage to the fan side of the hood corresponding to minor damage to a fan blade on the motor side of the machine. He also testified that the pins that were removed were undamaged. (R. pp. 481, ll. 16-25; 512, ll. 1-6, 522) Mr. Woods further testified that although it appeared to him that a section of the fan had struck a section of the hood/guard, that there was no problem with the clearance between the fans and the hood lining up while the machine was operating. (R. p. 512)

Following the accident Mr. Witherspoon instructed that the damaged hood be removed and another fabricated by Watford Industries to replace the Morbark hood item. The "new" hood assembly was reinstalled and the machine was returned to production. The "new" hood section lacked the original Morbark warning information and Mr. Witherspoon contacted Morbark to order replacement decals. On July 24, 2006, Morbark, Inc, shipped a decal kit for the 58" Morbark chipper machine to J.C. Witherspoon, Jr., Inc. (Morbark customer # 15624). (R. pp. 427-429, 438, 455)

In response to a related workers compensation claim, on July 27, 2006, Roger E. Davis, P.E., conducted an investigation on behalf of a workers' compensation carrier, in an attempt to determine the cause of the accident. Accompanied by Mr. Woods, Mr. Davis examined and photographed the machine that had been repaired and placed back in service and thereafter issued his report on August 3, 2006. Mr. Davis observed that the damaged Morbark chipper hood section had various warning labels attached to it which he later determined were Precision

Husky labels for a similar two piece hood chipper machine manufactured by Precision Husky but which also had a hood lockbar that was pictured in the warning label attached to the Morbark hood. (R. pp. 904, 1064) Mr. Davis determined that the run down time of the machine after powering off, without any load of wood being fed after the power was turned off was approximately 14 minutes. He also measured the clearance between the fan blade and the side of the newly manufactured hood which he determined was approximately ½ inch. He also observed that the chipper hood hinge was manufactured without any bushing and that the unbushed hinge and heavy hood created a “wobble” sufficient for the fan side of the hood to strike the fan. He further concluded that it was foreseeable that an operator might open the hood before the disc coasts to a full stop and that the warning affixed to the machine failed to convey that serious injury or death could result from the hazard. He later explained that in fact the design and manufacture of a moveable hood section acting as a guard of the rotating disc that could be opened while the disc continued to rotate violated the general duty provision of OSHA regulation 29 CFR 29.1910.212 (a)(2), “The guard shall be such that it does not offer an accident hazard in itself” and general engineering design principles referred to as the “Hierarchy of Safety” requiring hazardous machine operations be eliminated by design and that such principle is not satisfied by plastering a machine with warnings or boilerplate instruction in a handbook. See: ANSI standard Z535. (R. pp. 520, 907) Mr. Davis further opined that that the moveable hood/guard could be made safe by preventing it from being opened while the disc continued turning. The method he proposed included a motion detector to detect the drive shaft rotation and/or a maximum run down time device. (R. pp. 1042-1044, 1054-1057)

STANDARD OF REVIEW

Issue # 1-Denial of Motions To Amend And Supplement Complaint.

The trial judge's findings will not be overturned without an abuse of discretion or unless manifest injustice has occurred. City of North Myrtle Beach v. Lewis-Davis, 360 S.C. 225, 232-33, 599 S.E. 2d 462, 465 (Ct. App. 2004) In the absence of a proper reason, such as bad faith, undue delay, or prejudice, a denial of leave to amend is an abuse of discretion. Forrester v. Smith and Steele Builders, 295 S.C. 504, 508, 369 S.E. 2d 156, 159 (Ct. App. 1988) 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 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) The party opposing the motion has the burden of establishing prejudice. Parker v. Spartanburg Sanitary Sewer District, 362 S.C. 276, 278, 607 S.E.2d 711, 716-717 (Ct. App. 2005)

Issue # 2-Granting Summary Judgment

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, 390 S.C. 375, 701 S.E.2d 772 (Ct. App. 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), SCRC.P. 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).

ARGUMENT I

The Honorable Trial Judge Erred By Denying Plaintiff's Motion To Amend and Supplement The Plaintiff's Complaint To Provide Further Specifications To The Existing Causes Of Action. (Exceptions 1,2)

The allegations of Plaintiff's complaint (03/03/09) that has never been amended, despite two motions to accomplish that purpose, alleges that Morbark undertook a duty to design, manufacture, market and distribute the Morbark chipper machine that was operated by the Plaintiff at the time of his injury and that such machine failed to comply with industry standards and practices, etc. The first motion to amend and supplement the complaint with attached proposed amended complaint (07/30/10) attempted to dismiss the claims against all the Defendants except Morbark and to proceed solely on the products liability and warranty claims. A consent order was circulated to allow the amended complaint and was apparently signed by some, but not all of the defendants. The so called amended complaint did not include any new cause of action but addressed further specifications that the Morbark chipper was defective. The additional specifications focused on the fact that the machine employed a two piece hood/guard of the cutting area of the machine that could be opened while the machine was in operation, that the machine did not have a device to determine when the cutting action had stopped, that the warnings attached to the point of operation of the machine were inadequate to convey the specific danger and risk of serious injury or death and that the instructions accompanying the machine failed to adequately describe the process and dangers related to changing the chipper knives. (R. pp. 193-198, par. # 14)

Despite the language of the Court's Order (filed 04/15/10) denying the Plaintiff's Motion and concluding that the Plaintiff's first motion to amend had been considered and granted at a hearing on an unrelated matter held on October 8, 2010, the only hearing that was ever held on

either of Plaintiff's motions to amend and supplement the complaint was conducted on March 11, 2011. (R. pp. 15-20, 135-162, 163-183, 1322-1325) The record in this case does not indicate that an order was ever entered allowing any amendment. The Order from that the March hearing was eventually served on the Plaintiff's attorney on June 15, 2011, and the Plaintiff's Motion For Reconsideration And To Amend and Alter Judgment and Order, filed June 20, 2011, with supporting memorandum, addressing the mistake. (R. pp. 184, 199-208) The motion for reconsideration was not addressed by the Court prior to the date the Notice of Appeal was filed on September 11, 2011.

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 grant leave to amend". 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 in this case mistakenly concluded Plaintiff was presenting a second amendment and more 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, 04/15/11) The Order further attempted to define and characterize the testimony of Plaintiff's expert witnesses Dr. David Clement and Roger Davis, P.E., and the evidence presented¹ in an erroneous justification of the Defendant's argument that it was prejudiced by the timing of the amendment. The order further failed to address the Defendant's failure to comply with the scheduling deadline established by the Court that literally created the very situation it claims it was prejudiced by. Specifically, on July 9, 2010, while all of the named defendants were still involved in the case, the Court entered a Consent Scheduling Order requiring the parties to identify their expert

¹¹ "Thus, Plaintiff's only defect theory to this point concerns the absence of an interlock." (Order, 04/15/11, p. 2)

witnesses by October 1, 2010, and to make the witnesses available for deposition and to complete discovery by October 29, 2010. (R. 21-24)

Despite being served with Interrogatories #5 and #6 on March 29, 2009, that requested the Defendant Morbark to identify any expert witness that it intended to use at trial and a corresponding Request To Produce #4, regarding the materials and report of such expert served at the same time, the Defendant first identified Bobby Ray Smith, the President of Precision Husky Corp., as its expert witness at a deposition it conducted in Birmingham, Alabama on November 18, 2010, weeks after the deadline provided in the scheduling order. (R. p. 642) Upon returning from Mr. Smith's deposition the Plaintiff served additional Requests For Production #29-36 on November 19, 2010, that were answered by Defendant (dated 12/17/10) and received on December 27, 2010. (R. p. 1211-1215) Further, Defendant served its Notice of Deposition for the Plaintiff and the Guardian Ad Litem Peggy Knox in early 2011 and conducted those deposition on Jan 14, 2011, and January 28, 2011, and thereafter filed its Motion For Summary Judgment on February 17, 2011, all of which was well beyond the deadlines established in the Scheduling Order. (R. p. 1079-1164, 1166-1178) Only when confronted with the Plaintiff's Motion to Amend and Supplement did the Defendant, without any sense of irony, claim prejudice because presumably it would have to re-depose "witnesses" based on the "new allegations" regarding violation of OSHA standards and related engineering principles, something that the Defendant had done quite thoroughly months before.

The Court's Order also incorrectly identified various factual matters and incorrectly analyzed the testimony and significance of the testimony of the expert witnesses that adequately and timely supported the Plaintiff's motion. Specifically, both of the Plaintiff's experts Dr. Clement and Mr. Smith were deposed and offered their opinions months before the deadline

established in the Scheduling Order and while Plaintiff's Motion To Amend and Supplement was awaiting a hearing. The additional testimony of the Defendants expert Bob Smith added and substantially contributed to the opinions of both Dr. Clements and Mr. Davis and offered additional grounds for the second motion to amend.

The testimony of David Clement, PhD. was always presented and limited to human factors issues and never had anything to do with the machine design issue or regarding a brake as referred to in the Order and Dr. Clement went to lengths to explain that he was not offering an opinion on anything other than human factors and warning issues. (R. p. 18) The testimony supporting an amendment to include the additional specification regarding a chipper brake came from Defendant's expert Smith who testified that he believed all chipper manufacturer's, including Morbark, offered such option. (R. pp. 711-713) The Court's 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 unexplainable. A review of the testimony of Plaintiff's experts Dr. Clement and Roger Davis, P.E. and Defendant's expert Smith reveals the actual basis of the Plaintiff's first and second motion to amend.

David Clement, Ph.D., was presented as a human factors expert. Dr. Clement is a retired university professor with decades of experience teaching and consulting in the area of human factors research, design, analysis and forensics. He was presented in this case as a human factors expert. His qualifications include human factors planning and analysis and particularly as it relates to warnings, instructions, operator capabilities, perception and awareness.

Defendant deposed Dr. Clement on Sept. 13, 2010, at which time he offered his opinion regarding the dangers presented by the lengthy run down time of the machine after it was 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 the applicable ANSI standard Z535. He testified that the design of the Morbark chipper was flawed because the hood/guard could be inadvertently opened before the disc had stopped turning and that it was likely that a person would come to rely on insufficient cues that the disc has stopped turning which hazard could be avoided with effective warnings complying with ANSI Z535 at the point of action as a step in the so called Hierarchy of Safety, a long established engineering design principal.² (R. pp. 843-844, 846, 855, 856, 868-871) He further testified that an effective warning would include signaling at the location where the person is going to remove the hood/guard. (R. p. 845-846) He further testified that the Morbark designed warnings that were applied at the Morbark factory before the machine was sold did not comply with the ANSI Z535 standard because they provided no description of the hazard or outcome (R. p. 864-865) and did not address the specific hazard of being struck in the head by the hood guard of the machine. He further testified that the bootleg Precision Husky warning labels that were added to the Morbark machine were not an effective warning and were designed for a different machine. (R. p. 848-851) Finally, Dr. Clement testified that the Morbark warnings and manual did not meet the requirements standards for an adequate warning and warning system required by ANSI Z535. (R. pp. 863-867)

The Plaintiff's expert Roger Davis was the only professional engineer witness in the case and the only professional witness who investigated this accident shortly after the event. On August 31, 2010, he was deposed and testified to 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 safety mechanisms incorporated in the machine design, alternative designs and features and

² 1. Design out the hazard; 2. Guard out the hazard; 3. Train out the hazard; 4. Warn out the hazard; 5. Don't produce the product.

specifically that the chipper machine did not comply with 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”*. Mr. Davis testified at length during his deposition on August 31, 2011 that: (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) (R. p. 913, 926-929, 943-944); (2) even if the industry custom regarding the attachment of the hood was similar to the Morbark design when the machine was manufactured in 1996, it is not sufficient to comply with a standard of safety that should be used (R. p. 933); (3) there are available alternate designs of mill wood chippers with moveable hoods that prevent “kick back” including the 58” wood chipper manufactured by Precision Husky that has a two piece hood design with a hood lock that rotates back against the two part hood as a locking device and also incorporates a visual port and screen on the side of the hood where the disc can be seen; (4) if the rotating hood lock of the Precision Husky 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; (5) there are mobile wood chippers with adaptable interlock designs that prevent the hood from opening while the disc is turning (R. p. 933); (6) the interlock timing device that he opined could be incorporated in the hood/guard design as referred to in the report of his investigation was readily available (R. p. 941); (7) the British Columbia OSHA Standard (part 27.41) referred to a requirement to have an effective brake on mill chippers with moveable hoods, including those distributed by Morbark in British Columbia. (R. p. 1160-1161)

When the Defendant finally identified the Precision Husky President, Mr. Bobby Ray Smith as an expert witness during his deposition on November 18, 2010, the details of his

testimony created both confirmation and support of Plaintiff's prior allegations and new information to support further amendments. Specifically, Mr. Smith provided information including: (1) that he had no knowledge of the ANSI Z535 machine warning design requirements or presumably whether the Morbark labeling system complied with the requirement (R. p. 710); (2) that both customers and dealers expected and depended on the manufacturer to produce equipment that would satisfy OSHA standards (R. p. 711); (3) 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 (R. pp. 711-712); (4) 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 chipper manufacturers offered such an option (Smith pp. 99-100, 101); (5) That Mr. Smith's knowledge of the accident was based on his conversation with J.C. Witherspoon (R. p. 701); (6) 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 (R. pp. 695-698); (7) that if the rotating hood lock was in position and there was an internal malfunction of the machine that kicked against the hood, that the hood lock would keep it from opening (R. 724); (8) 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 Precision Husky equipment that actually had a hood lock that was not part of the Morbark design (R. 689-690); (9) 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 and that

other reasons the machine might “plug” and stall included 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. (R. pp. 703, 731)

The significance of the testimony by Mr. Smith followed by the further discovery responses strongly supported additional specifications sought by the Plaintiff in the first and second motions to amend and supplement. Further, the Defendant failed to carry its burden of showing prejudice in granting such further specifications and it was an abuse of discretion not to allow the amendment. Forrester v. Smith and Steele Builders, 295 S.C. 504, 508, 369 S.E. 2d 156, 159 (Ct. App. 1988); Jarrell v. Seaboard Systems R.R., Inc., 294 S.C.183, 363 S.E.2d 398, 399 (S.C. App. 1 987); Parker v. Spartanburg Sanitary Sewer District, 362 S.C. 276, 278, 607 S.E.2d 711, 716-717 (Ct. App. 2005)

ARGUMENT II

The Honorable Trial Judge Erred In Making Unsupported Factual Conclusions In Support Of The Order Granting Summary Judgment (Exception 3)

On March 31, 2011, the Court heard argument on Defendant’s Motion for Summary Judgment filed on February 17, 2011. The matters submitted in opposition to the Defendant’s included the extensive discovery record including the depositions of various fact and expert witness deposed by the parties and the interrogatory answers, responses to request for production and responses to request for admissions. The Court issued its Order Granting Summary Judgment, entered on June 2, 2011, and on August 23, 2011, entered its further Order denying Plaintiff’s Motion For Reconsideration and To Amend and Alter Judgment and Order.

In that section entitled “Relevant Facts” (R. pp. 2-4) the Court simply recites what might be described as the defense version of the facts of this case demonstrating a serious misunderstanding of the record. A fundamental difference between the Court’s analysis and the

actual record begins with the assertion that the Plaintiff was attempting to open the moveable section of the hood/guard to change the chipper knives when the accident happened. The record is without contradiction that Plaintiff was injured after determining that the machine had stopped prematurely and after various attempts to seek assistance to assess the reason the machine had stopped, following which he returned to the machine and after discovering that one pin was already missing from the hood, removed the remaining pin from the hood when the hood sprang forward and struck him. (R. pp. 1132, ll. 10-15; 1133, ll. 3-8; 1137, ll. 1-11; 1134, ll. 21-24; 1142, ll. 22-25; 1143, ll. 1-10) The process of opening the hood/guard, was described by Mr. Witherspoon who testified that the hood weighed 150-200 pounds and after the pins were removed, it was opened by standing behind it and pulling on the handle "it had a handle right in the middle of the top of the hood that gives you the maximum leverage to pull it back". (R. p. 436, ll. 3-5) Presumably, even if the disc was still turning slowly, there was no warning or indication that removing the remaining pin would cause the hood/guard to open without pulling it open. Four other fundamental factual conclusions cited by the Court demonstrate its misunderstanding of the record.

Beginning at page three of the Order the Court notes "the employee could feel the vibrations and hear the disc if the disc were still moving". The actual record in the case as to item (1) was addressed by the mill foreman Mr. Woods and the Plaintiff. Mr. Woods explained that it was not possible to see whether the disc and drive mechanism was turning while the "operator" was in the position to remove the spring clip/cotter keys from the pins securing the hood section and that if the chipper was moving very slowly you could not hear it moving. (R. pp. 475-476) Mr. Woods further testified that employees at the mill used ear plugs in noisy areas such as the chipper area. (R. pp. 488, ll. 16-25, 489, ll. 1-3) Mr. Holland testified he was wearing

his ear plugs when he went to the chipper. (R. p. 1136, ll. 15-21) The Plaintiff testified he neither felt nor heard any sound from the machine before he attempted to remove the remaining pin from the hood/guard. (R. pp. 1129, ll. 16-25, 1130, ll. 1-3)

Also at page three of the Order, the Court, referring to the Plaintiff, concludes "Indeed, he recalls a prior occasion when Witherspoon reprimanded Plaintiff for opening the hood prematurely". The actual record in the case as to this matter was addressed by the Plaintiff, the mill foreman Mr. Woods, Mr. Witherspoon and A&K Mulch employee R. Roseboom Mr. Witherspoon testified he recalled an occasion that he saw the Plaintiff at quitting time with the hood up on the chipper machine and the disc was rotating. He did not see him open the hood/guard but saw him standing next to the machine. Mr. Holland and others recalled that the incident was approximately six months before the accident and that Mr. Holland had the chipper hood open using an air hose to clean the chipper disc area. (R. pp. 92, ll. 15-25; 1143-1149, ll. 1-9) According to Mr. Witherspoon the normal process for changing the chipper blades, once the machine was stopped and the hood/guard was opened, was to use an air hose on the and blow out the stuffed wood that was accumulated on the chipper knives before removing the knives. (R. pp. 440, ll. 9-15) That procedure is consistent with procedure set forth in the Morbark "Model 48" and 58" Stationary R.H. Stationary R.H. Chipper Safety Operators Manual". (R. pp. 777, 793-796) According to the Plaintiff, his procedure for changing the chipper blades, once the machine was stopped and the hood/guard was opened, was to use an air hose to blow off around the area and remove the stuffed wood that was accumulated on the chipper knives with a flat bladed screwdriver before removing the knives and to spin the disc by hand to reach each area. (Holland, pp.143; 144) Finally, Mr. Woods testified that he was responsible for issuing disciplinary warnings for carelessness and that he had never warned the Plaintiff for carelessness

and that no one, including Mr. Witherspoon, Mr. Roseboom, David Wright or any employee ever told him of any incident in which the Plaintiff had opened the chipper hood/guard while the disc was turning. (R. p. 498, ll. 15-25)

Also at page three of the Order, the Court concludes “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 the Plaintiff’s accident”. The actual record in the case as to this matter was addressed by the Morbark representative Jim Strong, Plaintiff’s expert Roger Davis and the mill foreman Mr. Woods. The record is clear that photos of the chipper machine show a hood/guard assembly with holes for bolts along the vertical and horizontal flange of the item and Jim Strong testified that the purpose of the pins in addition to the bolts provided “another layer of security” to the hood attachment. (R. pp. 344, 345, ll. 4-18) The record is also clear that the hood/guard is designed with attachment points on the vertical flange (Morbark part # 30378-700) of the hood/guard where two pins Morbark Part # 30107-480) hold the hood assembly (Morbark part # 40045-580) to the fixed hood section (Morbark Part #40046-580) as shown and detailed in the Morbark “48” & 58” Stationary R.H. Stationary R.H. Chipper Parts Manual that does not show holes in either the hood/guard flange or bolts in the parts diagram or list of parts. (R. pp. 596-602) Plaintiff’s expert engineer, Roger Davis, testified the lack of flange bolts was not a cause of the accident and that neither the Morbark “48” & 58” Stationary R.H. Stationary R.H. Chipper Parts Manual nor the Morbark “Model 48” and 58” Stationary R.H. Stationary R.H. Chipper Safety Operators Manual” showed or referred to such bolts or to any use or procedure involving flange bolts to change or inspect chipper knives. (R. pp. 918, ll. 21-25; 999, ll. 18-25; 1000, ll. 1-1; 1001; 1037-1044) The procedure for changing the chipper knives set forth in the Morbark operator’s manual concludes with step # 13

“Close and pin hood before start up”. (R. p. 795) Further, as previously noted, Mr. Woods also explained that although the chipper hood/guard flange of the “moveable” assembly contained holes along sides of that item that the procedure to operate the machine did not require the sections be bolted together, but depended upon the pins to lock the hood sections together. (R. pp. 511, pp. 20-25; 512, ll. 11-18; 522) Mr. Woods explained that using the pins instead of bolting the flanges improved efficiency and was a safe procedure. Also at page three of the Order, the Court concludes (4) “Furthermore, the fan blades on the chipper at the time of the Plaintiff’s accident were not the ones originally installed by Morbark. The clearance between Morbark’s original 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.” The actual record in the case as to this item was addressed by Morbark representative Jim Strong, Plaintiff’s expert engineer Roger Davis and the mill foreman Mr. Woods. Mr. Strong testified that although he had never inspected the chipper that based upon the photographs taken by engineer Roger Davis on July 26, 2006, after the “new” hood/guard was remanufactured and installed by Watford Industry, Inc. and the machine was put back into production, that he concluded the fan blades that were installed on the chipper at the time the picture was taken were not the heavy duty fan blades (Morbark part # 40293-580) manufactured and originally installed by Morbark. (R. pp. 561-562, 601-605) He further explained that the Morbark H.D. fan blade he was referring to was also not shown in the Morbark parts manual which listed “fan blade box type” as part # 30160-580, which he explained was designed for a 4” thick disc and not the 5” disc that was installed on chipper serial #914. (562, ll. 1-24; 563, ll. 1-5) He further explained that the fan that was installed on the chipper was similar to the Morbark produced “paddle blade” fan. (R. pp. 566, ll. 1-19) He further explained that the approximate

clearance between a chipper equipped with a 5" thick disk and the Morbark box type fan blades (part # 40293-580) and the base or back of the hood was 5/8"-7/8". (R. p. 565, ll. 7-20) Mr. Strong's explanation regarding fan types did not match Defendant Morbark's answers to interrogatory # 8 requesting the Defendant identify each assembly, sub assembly, etc., of the chipper machine as it was finally assembled and distributed. The Defendant's initial discovery responses identified the fan blade for Morbark Chipper serial #914 as part # 30160-580, not the fan blade referred to by Mr. Strong. Following Mr. Strong's deposition on August 24, 2010, Defendant submitted responses identifying the fan and related parts referred to by Mr. Strong. (R. 1204-1210) Engineer Roger Davis testified that when he inspected the chipper on July 26, 2006, after the "new" hood/guard was installed, that he measured the clearance between the fan blade and hood and determined it was approximately 1/2" and testified that the clearance was adequate for the machine to operate properly and did not contribute to the hazard. (Davis, pp. 995, ll. 4-19; 996, ll. 4-24; 997, ll. 15) Finally, mill foreman Mr. Woods testified there was no problem with the operation of the machine related to the fans and/or fan clearance before or after the accident.

Whatever characterization that might be made of the Court's reference to the factual matters referred to in its "Statement of Facts", these were thoroughly disputed factual matters and were not an appropriate basis for summary judgment. It is fundamental that considering the evidence and all factual inferences drawn from it in a light most favorable to the nonmoving party that summary judgment is appropriate only when there is no genuine issue of material "triable" fact such that the moving party must prevail as a matter of law. SCRCF, Rule 56(c); Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E. 2d 688 (2000); Tupper v. Dorchester County, 326 S.C. 318, 325, 487 S.E. 2d 187, 191 (1997); 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); Donahue v. Multimedia, Inc., 362 S.C. 331, 337, 608 S.E.2d 162, 165 (Ct. App. 2005) Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). Further, 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 III

The Honorable Trial Judge Erred In Granting Summary Judgment on the grounds that Plaintiff's failure to warn claims fail as a matter of law (Exception 4)

The Court's discussion of this matter, (R. pp. 11-12) includes a discussion of the history of the machine and the fact that the warnings attached were not Morbark warning labels. The Order then apparently attempts to rely on the presumed impact of the warnings on those labels manufactured by Precision Husky Corp for a different machine along with a general reference to the Morbark Operators Manual and Plaintiff's knowledge of the knife changing procedure to charge the Plaintiff with what appears to be intentional misuse of the machine or assumption of the risk. The attempt to use the warning claims to create a misuse argument is a factually driven issue that is contested. Although knowing misuse, will bar recovery, the issue is usually considered a jury question. Fleming v. Borden, 316 S.C. at 458; Kosester v. Carolina Rental Cent., Inc., 313 S.C. 490, 443 S.E. 2d 392 (1994); Small v. Pioneer Mach. Co., 316 S.C. 479, 450 S.E. 2d 609 (Ct. App. 1994). Further, misuse of an allegedly defective product is an affirmative defense to liability that the defendant must plead and prove. 63 Am. Jur. 2d Products Liability Sect. 41 (1997); 63A Am. Jur. 2d Products Liability Sect. 1148 (1997); 72 C.J.S. Supp. Products Liability Sect. 47 (1975).

The record in the case includes the testimony by Dr. Dávid Clement as to those original Morbark warning labels, marked as Plaintiff's Exhibits #7, #8 to Dr. Clement's deposition. (R. pp. 363-377) Dr. Clement testified that the relevant Morbark labels did not address the specific hazard at the point of action, the location to check for the machine rotation or provide a clear and understandable warning of the risk of serious injury or death as required by American National Standards Institute, American National Standards Institute, (ANSI) Safety Alerting Standards, Regulation Z-535 (1992 and amendments) and the established engineering principals of the "Hierarchy of Safety". He further testified that the original Morbark warnings did not address the actual risk involved and that the lack of the Morbark ineffective warnings was not causal.

It is well established that a "failure to warn" is an independent basis for liability, not requiring the jury to find a design defect. Greiner v. Aktiengesellschaft, 540 F.2d 85, 92-93 (3d Cir. 1976) It is likewise fundamental that a design of a machine and warning system must anticipate the conditions and circumstances in which the machine will operate and including operator worker inattention. Gardner v. Q.H.S., Inc., 448 F.2d 238 at 242-243 (4th Cir., 1971), citing from Mickle v. Blackmon, 252 S.C. 202, 166 S.E.2d 173 (1969); Manufacturer's Liability In Negligence, Products Liability, Matthew Bender, 2-1132 (excusable failure to follow directions cases) There is no evidence that Plaintiff was aware of the specific risk involved with removing the remaining pin or voluntarily manifested a willingness to accept such a specific risk as the tree climber with the knotted rope had in Anderson v. Green Bull, 322 S.C. 422, 432, 505 S.E.2d 354, 359 (Ct. App. 1998). See also: Wagner v. Firestone Tire and Rubber Co., 890 F.2d 652,657 (3d Cir. 1989); Horn v. Fadal Machining Centers, LLC, 972 So. 2d 63, 79 (Ala. 2007) (1007 W.L. 431427) citing McIsaac v. Monte Carlo Club, Inc., 587 So. 2d 320, 324 (Ala. 1991) and Hannah v. Gregg, Bland & Berry, 840 So.2d 839, 860-61(Ala. 2002) (denying motion for s.

for failure to present undisputed evidence of actual awareness of risk and conscious appreciation of the danger based on warnings) Further, it is generally a jury question once the Plaintiff has produced an expert human factors expert who offered the opinion that the warning system was inadequate and did not convey the specific risk involved and that the Plaintiff likely did not fully understand the specific risk involved. The unopposed testimony of the human factors expert alone is sufficient to create a jury issue as to the issue of the adequacy of the warnings system. Campbell v. Gala Inc., No. 6:04-2036 RBH, 2006 W.L. 1073796 (D.S.C., 04/20/06); Allen v. Long Mfg. NC, Inc., 332 S.C. 422, 432, 505 S.E.2d 354, 359 (Ct. App. 1998) (citing 63 Am. Jur. 2d Products Liability Sect. 1240 (1997)).

ARGUMENT IV

The Honorable Trial Judge Erred In Granting Summary Judgment on the grounds that Plaintiff's design defect claims failed as a matter of law. (Exceptions 5, 6, 7, 8, 9, 10)

As noted in Branham v. Ford Motor Co., 390, S.C. 203, 701 S.E. 2d 5 (August 16, 2010), a post judgment appeal, the 1974 the General Assembly adopted the Restatement (Second) of Torts Sect. 402A, including the comments, as Section 15-73-10, -20 and-30, S.C. Code Ann. (1976), our Defective Products Act. The Branham case, adopting the risk utility test in design defect cases, and apparently dismissing any conflict with the authorizing legislation, specifically the so called "consumer expectations test" adopted in the Restatement Second of Torts, was decided after this case was filed. The "gotcha" implications of the lower court relying on Branham as the exclusive method to prove a design defect without allowing the amendment of the complaint are resounding. Regardless of the basis of the lower court's analysis, Plaintiff-Appellant presented sufficient evidence for the purpose of addressing the Defendant's motion for summary judgment and to demonstrate that the Morbark Chipper was in a defective condition, unreasonably dangerous to the user, beyond which an ordinary user would expect and

circumstances that foreseeably attend to the use of the product, was essentially in the same condition at the time of the accident as when it was produced and adequately addressed the requirements of the Court's decision judicially adopting the "risk utility analysis" requirements and the Restatement (Third) of Torts as the exclusive method to prove a design defect case.

As a beginning of this analysis and given the extensive record in this case, it is difficult to understand how the lower court concluded "Thus, Plaintiff's only defect theory to this point concerns the absence of an interlock." (R. p. 16) The testimony of Roger Davis, PE, was that the hood/guard design violated the principles of the so called Hierarchy of Safety, and also violated the provisions of OSHA 29 CFR1910.212 (a) (2) General Requirements for machines guards, requiring that "The guard shall be such that it does not offer an accident hazard in itself". Defendant Morbark has taken the position that there are no design or safety standards at all that apply to so called "stationary" or "mill chippers" and that OSHA guarding standards do not apply to a manufacturer. Although the lower court never mentioned the testimony of Mr. Davis as to his opinions regarding the design and guarding requirements, even the Defendant's expert witness Bob Smith testified that both customers and dealers expected and depended on the manufacturer to produce equipment that would satisfy OSHA standards (R. p. 711). Further, the testimony from Morbark's representative Jim Strong was that Morbark specifically advised its customers that its "stationary chippers" machines comply with Michigan OSHA Standards containing the same guarding requirement as the federal standard.³ (R. pp 553, ll. 4-17, 630) Further, it has long been recognized that OSHA standards have been accepted as going beyond a simple evidentiary issue and have been accepted as establishing a manufacturers custom and

³ MIOSHA - General Industry Safety Standards Commission: Part 1. General Provisions R 408.10034. Machine guards and devices. Rule 34. (2) - - - The guard shall not create a hazard in itself.

continuing safety duty not limited to the date of manufacture, to establish foreseeability of its purchasers breaking the OSHA law and to represent industry custom and standard of care. The Use of OSHA in Products Liability Suits Against the Manufacturers of Industrial Machinery, 1 Val. U.L.Rev, 37, 75, 79-81, 84 (1976)

A. The Court's findings, conclusions and order granting judgment in favor of the Defendant on the grounds that "The chipper was not in essentially the same condition at the time of the accident as when it left Morbark's hands." are erroneous.

As noted in Fleming v. Borden, Inc., 316 S.C. 452, 458, 450 S.E. 2d 589 (1994) liability may be imposed even if there is alteration of the product which could be anticipated by the manufacturer, or did not causally contribute to the Plaintiff's injuries. The claims by the Defendant that the machine was "altered" included the issue that the fan blades were apparently different from the blades that were originally included with the 5" thick disc and the fact that flange bolts that were not listed in the Morbark Parts Manual, machine drawings, labels attached to the machine nor were they referred to in the Operator's Manual in connection with the process to change the chipper knives, all as was reviewed in analyzing the Courts erroneous "Statement Of Facts, supra, pp. 21-26. The flange bolts and fan blades were a clear example of product alterations anticipated by the manufacturer and neither of these so called alterations were causal. Morbark's conjecture that the fan clearance issue was causative is at least in dispute. The Court further cited the missing Morbark warning labels attached to the machine as another example of product alteration. As previously addressed, Dr. Clement testified that the original Morbark warning labels were ineffective and did not provide a clear and understandable warning of the risk of serious injury or death as required by American National Standards Institute, American National Standards Institute, (ANSI) Safety Alerting Standards, Regulation Z-535 (1992 and

amendments) and the established engineering principals of the “Hierarchy of Safety” and were not causal.

B. The Court’s findings, conclusions and order granting judgment in favor of the Defendant on the grounds that “The failure to incorporate the additional safety devices urged by Plaintiff’s expert does not render the wood chipper defective and unreasonably dangerous.” are erroneous.

The lower court’s discussion of this issue seems focused on reiterating snippets from the Branham and Bragg cases without a discussion of the evidence in this case. (R. pp. 6-7) The evidence cited by the Court was limited to a reference to the rotating hood lock on the Precision Husky chipper that Defendant’s expert agreed would prevent the hood from opening unexpectedly if there was an internal malfunction that kicked the hood back. (R. p. 724, 933, 1027) The main thrust of the Plaintiff’s expert was that the machine as designed with a hood/guard that could be opened while the machine was operating violated the customs and standard addressed in the OSHA guarding requirement as well as the long standing principles of machine design generally referred to as the “Hierarchy of Safety”. The Order makes no reference to this most important issue presented in support of the design defect. This is not a “theory” about making a product “safer” it is a fundamental and original design defect and the “custom” as established by OSHA for machine guarding requirement was established in 1975 and was continuing thereafter. Additionally, the Order did not address the testimony and evidence of publications and patents addressing wood chipper safety, safety devices and patents presented describing the state of the art at the time this machine was manufactured. (R. pp. 1013-1020, 1031-1033, 1035, 606-630) The patent evidence demonstrates that the concept of interlocks to prevent the opening of guards during operation is long standing and that interlock technology is not new and is regularly employed with machinery with moveable guards and in event, the issue is not whether an interlock is another safety device but that a moveable hood/guard that can be

opened while the machine continues to operate is inherently unsafe. The state of the art and review of existing patents including Morbark Ex. #15 (R. p. 611-621), a patent by Morey family member Michael Morey "Hood Assembly For A Wood Chipper", demonstrates the point that moveable guards must be positively secured during operation and not present a hazard by a mistaken or inattentive operator. Although there are no ANSI standards directly addressing "mill chippers" there are standards addressing guarded machinery, mobile chippers and other machinery incorporating moveable guards. Finally, the Order (R. p. 9) casually refers to the fact that there is no proof of similar incidents involving stationary wood chippers. The testimony of both Dr. Clement and Roger Davis referred to the report of the Center for Disease Control (CDC) addressing the numerous injuries and fatalities involving stationary wood chippers from 1992-2002. (R. pp. 877-899)

C. The Court's findings, conclusions and order "Plaintiff cannot prove the requisite alternative feasible design." are erroneous.

Again focusing on its selected aspect of Mr. Davis' testimony, the lower court concluded that the proposed interlock of the hood/guard to prevent the operator from accessing the chipper while it continued to turn did not meet the requisite proof of an alternative design, including consideration of the associated costs, safety and functionality, now purportedly required by Branham v. Ford Motor Co., 390 S.C. at 546, 462 S.E.2d at 330. As previously noted following his inspection of the machine in July 2006, Mr. Davis issued his report in this case on August 3, 2006. The lower court now takes issue with the analysis based on the decision in Branham that was issued after this case was that filed in 2009. Presumably the opinion is sufficient under the consumer expectation test required by the statute and the comments to Section 402A. The question here is whether the risk-utility test approved by the Court is also satisfied and/or is so rigid as to support dismissal of this action on summary judgment rather than remand as was ordered in Branham. 5 Star, Inc. v. Ford Motor Co., 395 S.C. 392, 718 S.E.2d 294 (2011). See:

In Re Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices and Products Liability Litigation, 754 F. Supp. 2d 1208, 1220 (C.D. Cal. 2010) (Explaining Calif. Courts flexible use approach between expectations test and risk-utility test depending on the complexity of the scientific or technical information involved); Saller v. Crown Cork & Seal Co., 187 Cal. App. 4th 1220 (2010); Mansur v. Ford Motor Co., E049411 (CAAPP-2011). Further, despite urging from various factions the S.C. Legislature has not proceeded to adopt the Restatement (Third) of Torts in place of the Restatement (Second) of Torts or amend the Defective Products Act. (<http://www.scstatehouse.gov/sess119-2011-2012/prever/3375-20110531.htm>)

It is Appellant's position that the Court's ruling in Branham, essentially rewrites the Defective Products Act and that such amendment of the law should follow the rule that legislation which provides procedural or remedial benefits should be given retroactive application but that legislation limiting or affecting substantial rights should be prospective only. Goff v. Mills, 279 S.C. 382, 308 S.E. 2d 778, 780 (1983) If the Court's decision in Branham is so characterized, then the Plaintiff should be entitled to proceed and in fact has sufficiently addressed the applicable standards of proving a design defect case.

CONCLUSION

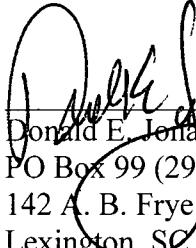
As to Argument I, this Court is requested to make findings consistent with its view of the case and reverse and remand the case for the lower court to grant Plaintiff's amended and supplemental complaint.

As to Arguments II and III, this Court is requested to make findings consistent with its view of the case and reverse and remand the case for trial on the issue of the failure to warn.

As to Arguments II and IV, this Court is requested to make findings consistent with its view of the case and reverse and remand the case for trial on the issue of design defect.

For all the reasons mentioned, this Court is requested to make findings consistent with its view of the case and reverse and remand the case for consideration of Plaintiff's motion to amend and supplemental its complaint and to order the case to trial.

December 16, 2012

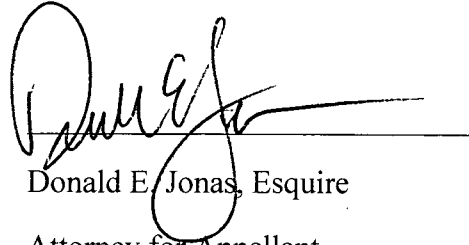


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Certification As To SCRAP 211

The Appellant's Final Brief and Final Reply Brief complies with SCRAP 211(b) and contains the materials proposed to be included in the record on appeal.

December 16, 2012

A handwritten signature in black ink, appearing to read "Donald E. Jonas", is written over a horizontal line.

Donald E. Jonas, Esquire

Attorney for Appellant