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 REPLY BRIEF

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REPLY TO RESPONDENT'S STATEMENT OF THE CASE

The Respondent correctly states that 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. p. 193) On or about August 24, 2010, the Circuit Judge entered a Consent Stipulation Of Dismissal of all the Defendants except Morbark, Inc. but did not address the pending motion to amend the case. The Respondent is correct that it consented to an order to amend the complaint but fails to mention the order was apparently never signed nor entered and that 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. (R. p. 190) The motion was based on information learned in discovery and following service of Defendant's supplemental answers to discovery on or about October 15, 2010, naming Bobby Ray Smith as a witness and following his deposition on November 18, 2010, when he was first identified as an expert witness. (Appellant's Brief p. 21) The motion to amend and supplement was finally heard on March 11, 2011. On April 15, 2011, an order was filed denying the motion to amend and supplement the complaint which was finally served on June 15, 2011, months after the March 31, 2011, hearing on Defendant's motion for summary judgment. 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. On June 20, 2011, the Plaintiff's counsel also filed a Motion For Reconsideration of the denial of the Motion To Amend and Supplement the Complaint. On August 21, 2011, the Court denied the Motion For Reconsideration Of Order Granting Summary Judgment. Plaintiff timely filed a

Notice of Appeal on Sept. 21, 2011, prior to receiving a decision as to the Motion For Reconsideration of the Motion To Amend.

REPLY TO RESPONDENT'S STATEMENT OF FACTS

Respondent's account of how the accident happens is based on conjecture. No one witnessed the injury to the Plaintiff and his testimony does not support the Respondent's account. The testimony in this case is that Plaintiff powered off the machine at the end of his shift and returned to his work station at the cut-off saw some distance from the chipper machine when another worker from the back of the mill told him that they heard a tapping noise coming from the chipper machine. After finishing his cleaning the Plaintiff went to investigate and was surprised to find that the machine 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. 1127, ll. 19-25; 1128, ll. 4-16; 1129, ll. 9-120; 1130; 1156, ll. 1-10) The Plaintiff testified that he concluded there was something wrong with the machine and went to find Woodrow Woods, the mill foreman 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 the foreman 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. p. 1132, ll. 1-19) 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. p. 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)

Respondent's statement also fails to acknowledge the testimony of their expert Bob Smith, the owner of Precision Husky, Inc., an Alabama manufacturer of similar wood chipper equipment and the reseller of the Morbark machine in this case, who testified at deposition regarding the problem with the chipper stalling from being "plugged" with an overload of wood material fed to the machine after it was powered off while the vibrating feeder conveyor continued to operate and feed material to the machine. (R. pp. 703; 730, ll. 16-23; 731, ll. 1-12) Also see similar testimony of the two foremen at J.C. Witherspoon, Jr., Inc. a/k/a A& K Mulch. (R. pp. 508, 515, 516, 534, 545, 547-549) Respondent also omits mention of the testimony of Mr. Smith that Precision Husky had not made any modifications to the Morbark 58" horizontal feed, top discharge wood chipper machine that was resold to J.C. Witherspoon, Inc. a/k/a A&K Mulch, other than to attach its own proprietary warning labels to the Morbark chipper that were designed for its similar wood chipping machine models. They included a stop bar across the moveable hood to prevent the hood kicking back and hitting an operator in the event it was opened prematurely. (R. pp. 695, ll. 5-23; 696-698, 724, 756, 767, 905)

Respondent's statement also refers to the Morbark "Stationary R.H. Chipper Safety, Operators Manual" but fails to address the aspects of the manual that are relevant to the case, namely the procedure for changing the chipper knives that did not illustrate or address anything having to do with bolts along the hood flange of the machine, the procedure and timing of the

run down process, the machine warnings, etc. (Appellant's Brief p. 25) The Respondent's statement infers that the process of training to change the chipper blades was an original procedure unique to this employer and ignores the evidence that the employer's procedure was consistent with the procedure set forth in the Morbark manual. (R. p. 793-795) The Respondent further claims that Appellant committed some prior act while servicing the machine that exposed him to the rotating blades of the chipper disc before the machine had stopped. (Respondent's Brief pp. 7-8) The event(s) that Respondent points to are the same contested matters that the trial court seized upon and accepted as uncontested facts in its order granting summary judgment. (See Appellants Brief pp. 22-25) Respondent further contends that there was no contact between Morbark and the Plaintiff's employer J.C. Witherspoon, Inc, a/k/a A&K Mulch after this Morbark chipper machine was manufactured in 1996, a fact that is in dispute. (R. pp. 427-429, 438, 455)

Respondent further continues its mistaken attack on the opinion of Dr. David Clement, a human factors expert who testified as an expert that the warning system was inadequate and did not convey the specific risk involved. (Respondent's Brief pp. 9-10) Dr. Clement testified in response to questions by the Respondent's counsel as to his understanding of the machine operation as background to support his opinion about warning issues. His testimony and observations about operator movements and ANSI Z535 and the established principals of the so called "Hierarchy of Safety" goes to the warnings issue. (Appellant's Brief pp. 17-18, 28-29)

Finally, Respondent "argues" that the chipper was equipped with fan blades that were not Morbark original equipment and conjectured that the clearance between the blades and the machine hood increased the "potential for the blades to contact the hood". (Respondent's Brief p. 10) Assuming the blades were not original Morbark equipment, there is no factual basis for the

claim that the clearance between the blades and the chipper hood was reduced to a point that such clearance had anything to do with the injury to the Plaintiff. (Appellant's Brief, pp. 25-26, referring to R. pp. 996, ll. 11-25; 997, ll. 1-12)

REPPLY TO RESPONDENT'S ARGUMENTS

Response To Respondent's Argument I at Respondent's Brief pp. 11-19
The Circuit Court erred by denying Plaintiff's Motion To Amend And Supplement The Plaintiff's Complaint to provide further specifications to the existing causes of action. (Appellant's Exceptions 1-4)

Respondent begins its argument that the denial of the motion to amend was justified by characterizing it as "new design defect theory at the eleventh hour". (Respondent's Brief, p. 11) The previous motion to amend did nothing but remove the various defendants and the negligence allegations from the complaint. Although an order was not entered, the material allegations of the complaint remained as they were initially plead, and the case proceeded on those allegations until Respondent answered its overdue discovery and provided the opportunity to depose Precision Husky President Bob Smith, named as an expert at his deposition on Nov. 18, 2010. (R. pp. 642, 11. 11-25; 643-646) Following those events, the Plaintiff proposed an amendment based on the discovery answers and testimony that did no more than further specify the original allegations of paragraph 19 of the original complaint.[1] A comparison, of former paragraph 19 a-h

[1] On August 4, 2010 the Plaintiff filed a Motion To Compel Responses to Plaintiff's Interrogatories and Request For Production. (Motion, 08/04/10) 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. (Motion, 09/07/10) On October 8, 2011, the Motion To Compel (08/04/10) was heard and an Order entered compelling answers to Interrogatory #1 and #32. 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. (Resp. To Prod #17-28, 10/11/10) On October 15, 2010, Defendant Morbark served Supplemental Answers to Interrogatory #32. (Supp Ans. Interrog., #32) On Nov. 18, 2010, Defendant's expert Bob Smith was deposed. On Dec. 27, 2010, Defendant Morbark served Answers to Request For Production,

of the original complaint and the provisions of paragraph 14 a-j of the proposed amended and supplemental complaint filed as an attachment to the Motion To Amend and Supplement the complaint filed on July 30, 2010, demonstrates how overstated the Respondent's entirely "new design defect theory" protest actually is. The "new allegation" contained in the July 2010 proposed, amended and supplemental complaint, paragraph 14.d, addressing the failure to design a guard to contain the moveable hood from kick back, presumably consented to by Morbark, was initially based on information discovered while Precision Husky was still a Defendant in the case. The "new" allegation was further supported after Morbark presented Bob Smith, Precision Husky's President, the designer and manufacturer of a chipper machine that incorporates such a guard to prevent hood kick backs, as its expert. Mr. Smith further testified that Precision Husky chippers were available with a brake to positively stop the disc from turning, a device Morbark advised it had not designed or manufactured with any of its chippers. (R. pp. 711, ll. 14-23; 712-713) Based on the testimony that Precision Husky chippers and similar chipper machines incorporated brakes, on Jan. 13, 2011, Plaintiff moved to add the failure to design and equip the chipper with a brake as an additional specification. (R. p. 188) The Plaintiff also moved to include further detail of that specification of paragraph 14 d. of the proposed amended and supplemental complaint that the chipper was designed and manufactured without an adequate guard in violation of the OSHA general duty guarding requirements, OSHA Machine Guarding Regulation 29 CFR 29.1910.212 (a)(2). (R. p. 196) The allegation regarding the guarding was also further elaboration of what had already been plead and what Morbark was on notice of in the original complaint. The overblown criticism by Respondent that Plaintiff was pursuing a

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#29-36, requesting further engineering information regarding the chipper machine. (Resp. To Prod #29-36, 12/17/10). The late discovery responses and late deposition of Mr. Smith were provided information that Plaintiff considered important enough to support a motion to amend and supplement.

claim for breach of a Canadian OSHA requirement is hyperbole. (Respondent's Brief, pp. 15-16) The fact that Morbark distributed its chippers in Canada apparently without regard to the British Columbia OSHA requirements, British Columbia OSHA Regulation (Part 27.41) requiring a brake mend mechanism for mill chippers, is evidentiary not a new theory of liability. The failure to grant the motion to amend and supplement the complaint was error. Regardless of the ruling denying Plaintiff's proposed amendments, Plaintiff's claims are adequately stated in the complaint filed on March 3, 2009, and the proposed amended and supplemental complaint, alleging a defective product and breach of implied warranty and the judge considering the motion for summary judgment should have taken account of all the evidence in support of the Plaintiff's claims in the light most favorable to the Plaintiff.

Response To Respondent's Arguments II and III at Respondent's Brief pp. 20-37

The Honorable Trial Judge erred in granting summary judgment on the grounds that Plaintiff's design defect claims failed as a matter of law and because he made important unsupported factual conclusions in support of the order granting summary judgment.
(Appellant's Exceptions 3, 5, 6, 7, 8, 9, 10)

Respondent's argument in support of the summary judgment is premised on an entire array of misstated factual conclusions that it attempts to address in brief. (Respondent's Brief pp. 34-38) Respondent's argument itself points to the nature of the dispute regarding the factual conclusions recited in the summary judgment order section entitled "Relevant Facts" (R. pp. 2-4) where the Court simply recites the defense argument of the case and demonstrates a serious misunderstanding of the record. The factual differences are addressed at Appellants Brief, pp. 22-27. 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, 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. The actual record in the case is that the mill foreman 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. p. 475, ll. 21-25: 476, ll. 1-13) 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) All of this seems to have been ignored by the Respondent and the trial court. Whatever characterization might be made of the trial 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.

The relevance of the various mistakes made by the trial court in determining the "facts" goes directly to the Respondent's argument that Plaintiff failed to prove the fundamental elements of any design defect claim. Specifically, Respondent characterizes the claim as one based on a theory that the chipper was defective because "it was not made safe enough". (Respondent's brief, pp. 21) Intertwined in the Respondent's argument is an attempt to characterize Appellant's position as being critical of the Court's decision in Branham v. Ford Motor Company, 390 S.C. 203, 701 S.E.2d 5 (2010) a seminal case in deciding whether the Appellant's pre-Branham claims should survive summary judgment. Plaintiff's position in this case is that the evidence is sufficient to comply with the design defect case analysis as it has developed in the jurisprudence of South Carolina and that Branham, which addressed a jury

verdict following trial, should be interpreted to accommodate both the consumer expectation test provided by statute and the risk-utility test of the Restatement (Third) of Torts, that apparently will co-exist. Bragg v. High-Ranger, 319 S.C. 531, 462 S.E.2d 321, 328 (Ct. App. 1995) citing Claytor v. General Motors Corp., 277 S.C. 259, 286 S.E.2d 129 (1982)

In Branham the Court adopted the "risk-utility" test of causation in a case involving a vehicle roll over and alleged seat belt sleeve defects and rejected the Restatement of Torts (Second) "consumer expectations" test specifically recognized in the comments to §402A, expressly adopted in 1974 in the original and unchanged language of S.C.Code Ann. § 15-73-30, which form the basis for the consumer expectations test. The Court noted in its decision adopting the utility-risk test that it had such authority because the Legislature has not reacted to prior decisions of the Court that arguably expanded the so called "consumer expectations" test.[2] Whether some version of the risk-utility test has or has not been conculcated in the jurisprudence of the state by trial and appellate courts to explain the rationale of addressing technical matters that are apparently beyond the common understanding, the history of this Court is one of adherence to determining legislative intent and not to legislate. As in all cases of statutory interpretation, the cardinal rule of statutory construction is to ascertain and effectuate the intent of the Legislature. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." Broadhurst v. City of Myrtle Beach Election Comm'n, 342 S.C.

[2] The Legislature has expressed no intention to foreclose court consideration of developments in products liability law. For example, this Court's approval of the risk-utility test in *Claytor* yielded no legislative response. We thus believe the adoption of the risk-utility test in design defect cases in no manner infringes on the Legislature's presence in this area. Branham v. Ford Motor Company, 701 S.E. 2d at 14.

373, 380, 537 S.E.2d 543, 546 (2000). As noted by Justice Pleicones in dissent, "*the General Assembly adopted the Restatement (Second) of Torts § 402A in 1974. - - - The comments to Sect. 402A which forms the basis for the consumer expectations test, were expressly adopted as legislative intent. S.C. Code Ann. § 15-73-30. I do not believe the Court has the authority to simply reject the General Assembly's chosen test - - - . See Benat v. State Farm Mut. Ins. Co., 286 S.C. 132, 333 S.E.2d 57 (Ct.App.1985) (" It is the duty of this court to interpret the law. We have no legislative authority and cannot vary a statutory scheme and this is true no matter how logical the basis of the variance.").* Branham at 390 S.C. 44. Accord State v. Carrigan, 284 S.C. 610, 328, S.E. 2d 119 (SC App. 1985) citing *In re Winship,* 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). (Where the language of a statute is clear and unambiguous, it requires no construction and must be literally applied.) In other words, it means what it says. Jones v. South Carolina State Highway Department, 247 S.C. 132, 146 S.E.2d 166 (1966). Although there has been significant political interest expressed in amending the various provisions of the statute addressing defective products and adopting the Restatement (Third) of Torts, those efforts were not successful in the 2011-2012 legislative term and the statutory law of this state as expressed by S.C. Code Ann. § 15-73-30, remains unchanged.[3]

To the second point raised by Judge Pleicones in dissent, the Court never needed to go so far in Branham as to reject the Restatement (Second) Torts and apparently add new evidentiary burden of causation elements to existing design defect claims. An analysis of exactly what the Court adopted in Branham by endorsing the causation provisions of the Restatement (Third) of Torts is not so clear when a contrasting analysis of the actual evolutionary nature of the various

[3] http://www.scstatehouse.gov/sess119_2011-2012/prever/3375_20110531.htm; also see; S 0601 addressing Sect 15-73-10.

provisions is made. Although the risk-utility test and the consumer expectations test are different methods of determining whether a product is unreasonably dangerous they both have roots in economics. The risk-utility test turns on a determination of whether benefits of using a product as designed outweigh the harm associated with the design. It assumes the cost associated with added safety and the likelihood of injury to the user. Critics believe the risk-utility test erodes the very nature of strict liability nature of the claim. It would seem that is what the Court has done in Branham. As strictly applied, such requirement will not make the public safer in going about their activities. In contrast the consumer expectations test is more subjective and relies on a reasonable consumer's expectations of the product when used in a reasonably forseeable manner. Critics, of the consumer expectations test, believe the notion of a reasonable consumer expectation of danger while using a product is largely fictional. The evolution of the "substantial factors" causation approach and the problematic comparison with the Restatement (Third) of Torts approach to causation was detailed by Professor David W. Robertson in Causation In The Restatement (Third) of Torts: Three Arguable Mistakes, 44 Wake Forest L. Rev. 1007, 1018-1028 (Winter, 2009); The Common Sense of Cause In Fact, 75, Tex. L. Rev., 1765, (1997) and Cases and Materials on Torts (West, 3d ed. (2004). As noted by Professor Robertson, various aspects of the Restatement (Second) of Torts and Restatement (Third) of Torts are not inconsistent in purpose or application. 44 Wake Forest L. Rev. 1019, 1025. Indeed, as noted at footnote 13 in Branham, there are an array of states with hybrid approaches to selecting and applying the two tests. One of the cases cited in the Branham footnote was Ray, ex rel Holman v. BIC Corporation, 925 S.W.2d 527 (Tenn. 1996). There, the Tennessee Supreme Court answered a certified question by the Sixth Court of Appeals and concluded that in addition to the consumer expectation test, the Tennessee statute also provided for a "risk-utility" type test

(prudent manufacturer test which involves risk-utility balancing). The Tennessee Court also reviewed various jurisdictions exclusively employing the consumer expectations test and further noted "Some jurisdictions--notably Washington and Oregon--have, at times, concluded that the two approaches are really one, representing "two sides of the same coin." *Estate of Ryder v. Kelly-Springfield Tire Co.,* 91 Wash.2d 111, 587 P.2d 160, 164 (1978); *Phillips v. Kimwood Machine Co.,* 269 Or. 485, 525 P.2d 1033, 1036 (1974). - - -Clearly, however, as the courts combining the tests have come to realize, the focus of the two tests is entirely different. The consumer expectation test is, by definition, buyer oriented; the prudent manufacturer test, is seller oriented. Notwithstanding the difference in focus, these courts predict that the tests "should produce similar results." *Estate of Ryder v. Kelly-Springfield Tire Co.,* at 164. - - - We decline to weave the two tests into one. As the Oregon courts noted after revising their previous combined approach: [T]he distinction between the [two] tests is not merely academic. The result in some, perhaps most, product liability cases might be the same regardless of which test the jury applies; nonetheless, in some cases, the difference in the test can affect the outcome. A jury might well conclude that a product is not unreasonably dangerous under the cost/benefit calculus of an omniscient reasonable manufacturer but is still unsafe in a manner, or to an extent, not expected by an ordinary consumer. The difference in perspective--"reasonable manufacturer" versus "ordinary consumer"--can, as a practical matter, make all the difference. Burns v. General Motors Corp., 133 Or. App. 555, 891 P.2d 1354, 1357-58 (1995). Ray ex rel Holman at 531.

In Jackson vs General Motors Corp, 60 S.W.3d 800 (Tenn. 2001), a products liability action under Tennessee law, the Tennessee Supreme Court again addressed the issue in answer to a another certified question by the Sixth Court of Appeals and concluded that the consumer expectation test as defined by Tenn.Code Ann. § 29-28-102(8) was applicable to any products

liability claim where the plaintiff intends to show that a manufacturer is liable for plaintiff's injuries as a result of an unreasonably dangerous product. The Tennessee Court stated "The cardinal rule of statutory construction is to follow the plain meaning of the statute where the language is clear and unambiguous on its face "Legislative intent or purpose is to be ascertained primarily from the natural and ordinary meaning of the language used, without forced or subtle construction that would limit or extend the meaning of the language. - - - Absent contrary indication in the statute, we read Tennessee products liability law to permit application of the consumer expectation test in all products liability cases in which a party intends to establish that a product is unreasonably dangerous." It does not follow that because the consumer expectation test may be applied in all such product liability cases, the manufacturer will be subject to absolute liability. Whether a plaintiff is successful on a products liability claim, under the consumer expectation test, will depend on whether the trier of fact agrees that the plaintiff's expectation of product performance constituted the reasonable expectation of the ordinary consumer having ordinary knowledge of the product's characteristics." Id at 804.

The Court further cited approvingly to the Ohio case of Cunningham v. Mitsubishi Motors Corp., N0. C-3-88-582, WL 1367436 at 1 (SD Ohio, 1993) involving the application of the consumer expectation test to seat belt technology and quoted from the Ohio decision " [T]his Court is simply not willing to preclud[e] the use of the consumer expectation test in a situation involving a familiar consumer product which is technically complex or uses a new process to accomplish a familiar function. Many familiar consumer products involve complex technology. In addition, manufacturers are constantly altering the methods in which products perform familiar functions. Thus, to conclude that the consumer expectation test cannot be used because a product is technologically complex or because a new process is used to achieve a familiar result

would be to significantly reduce the use of that test.... Because of their long usage and consumer familiarity with the measure of safety which seat belts provide, consumer expectations do provide useful guidance." Jackson at 806.

Making a similar point that the two tests overlap or at least share common aspects in particular factual circumstances, the Texas Supreme Court in Hernandez vs Tokai Corp., 42 Tex. S.Ct. J. 1131, 2 S.W.3d 251 (Tex. 1999) noted that courts in jurisdictions that employ a consumer-expectation test for determining defect have mostly held that disposable lighters without childproof features are not defectively designed because they function in the manner expected by the intended adult consumers and similarly that courts in jurisdictions employing a risk-utility analysis have mostly concluded that the determinative considerations are usually matters for the jury.

Although criticized by some courts for creating a hybrid consumer expectation risk-utility test that shifts the burden of proof to the defendant to establish "that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design", California Courts long held that a trial judge may properly instruct the jury that a product is defective in design (1) if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner or (2) if the plaintiff proves that the product's design proximately caused his injury and the defendant fails to prove, in light of the relevant factors discussed above, that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design. The so called "dual approach" was explained in Barker v. Lull Engineering Co., 20 Cal.3d 413, 432, 143 Cal. Rptr. 225, 573 P.2d 443 (1978) "This dual standard for design defect assures an injured plaintiff protection from products that either fall below ordinary consumer expectations as to safety, or that, on balance,

are not as safely designed as they should be. At the same time, the standard permits a manufacturer who has marketed a product which satisfies ordinary consumer expectations to demonstrate the relative complexity of design decisions and the trade-offs that are frequently required in the adoption of alternative designs." Also see Saller v. Crown Cork & Seal Co., Inc., 187 Cal. App. 4th 1120-1231-1232 (2010) (an asbestos-mesothelmia case alleging negligent design applying the consumer expectation test)

The issue raised by Justice Pleicones in dissent was whether Branham could have been decided under one of the evolutionary versions of the consumer expectations test as has apparently evolved in South Carolina. Branham, 701 S.E. 2d at 27. There are clearly categories of cases more and less appropriate to analysis under the consumer expectations approach and those more suitable to the risk utility approach where the everyday experience of the product's users permit a conclusion that the product's design violated minimum safety assumptions and is defective regardless of expert opinion about the merits of the design. Although South Carolina has now taken judicial recognition of the Restatement (Third) of Torts, the still vital provisions of S.C. Code Ann. § 15-73-30 and the facts of this case present an opportunity to continue the consumer expectations test while continuing to develop the appropriate application of the Restatement (Third) of Torts. As noted in McGhee v. Nat'l Coal Board, 1972 3 All E.R. 1008, 1011 (appeal taken from Scot.) (U.K.) ("The legal concept of causation is not based on logic or philosophy, it is based on the practical way in which the ordinary man's mind works in the every- day affairs of life.") Accord Judith J. Thompson, The Decline of Cause, 76 Geo, L.J. 137, 148 (1987) An attempt to justify any rule of causation as too complex to be understood by common people is a clear indictment of the entire jury system, a result many partisans are striving for by legislation.

There is no doubt that many cases from various jurisdictions have applied a modified approach applying the consumer expectations test to average consumer products as well as complex devices. Similarly, many jurisdictions have applied the risk-utility analysis in a manner that accommodates various factual differences between such products. This design defect claims in this case transcend any simplistic attempt to characterize this product. As noted at Appellant's brief, the main thrust of the Plaintiff's mechanical engineering expert Roger Davis 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 universal to consumer and industrial products, generally referred to as the "Hierarchy of Safety". This case does not involve an electrical circuit analysis of a speed control switch of a vehicle that was not inspected, a defective automobile suspension system, an allegedly modified log skidder, etc.

The Respondent's brief makes no specific reference to the most important issue presented in support of the design defect claim and that such failure to guard is a fundamental and original design defect and violates the "custom" regarding guarding the requirements for all machines and the related OSHA provisions established in 1975. The evidence presented in opposition to Defendant's Motion for Summary Judgment included deposition 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. (Appellant's Brief, pp. 32-33 referring to R. pp. 606, 877-879, 1064, 1066, 1219-1221) The evidence also included existing patents including Morbark Ex. #15, a patent by Morey family member Michael Morey "Hood Assembly For A Wood Chipper" demonstrating an interlock device that prevented a chipper hood from being opened while the disc turned and various product information from

wood chipper manufacturers demonstrating wood chipper interlock devices that were being marketed. (R. pp. 611-621)

Whether the Court applies a Restatement (Third) of Torts analysis and some version of the so called risk utility analysis or proceeds with an analysis that is conceivably broader and accommodating the current statutory considerations and the middle approach as was apparently approvingly referred to in Branham by reference to Bragg v. High Ranger, the Plaintiff adequately met the primary burden at this stage of the case of showing the plaintiff was injured by a product which was in a defective condition, unreasonably dangerous to the user and was essentially in the same condition as when it left Morbark's hands.[4]

Response to Respondent's Argument IV at Respondent's Brief pp. 38-43
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 and because the trial judge erred in making unsupported factual conclusions in support of the order granting summary judgment.
(Appellant's Exceptions 3, 4)

It is well established that a "failure to warn" is an independent basis for liability, not requiring the jury to find a design defect and that a design of a machine and warning system must anticipate the conditions and circumstances in which the machine will operate and include operator worker inattention. (Appellant Brief, pp. 27-28) The Respondent does not address the

[4] "Thus, in South Carolina we balance the utility of the risk inherent in the design of the product with the magnitude of the risk to determine the reasonableness of the manufacturer's action in designing the product. Id. This "balancing act" is also relevant to the determination that the product, as designed, is unreasonably dangerous in its failure to conform to the ordinary user's expectations.- - -The state of the art and industry standards are relevant to show both the reasonableness of the design and that the product is dangerous beyond the expectations of the ordinary consumer. Reed, 697 F.2d at 1196. Rather, "[i]n the final analysis, we have another of the law's balancing acts and numerous factors [319 S.C. 544] must be considered, - - - Thus, in South Carolina we balance the utility of the risk inherent in the design of the product with the magnitude of the risk to determine the reasonableness of the manufacturer's action in designing the product. Id. This "balancing act" is also relevant to the determination that the product, as designed, is unreasonably dangerous in its failure to conform to the ordinary user's expectations. Bragg v High Ranger, 462 S.E.2d 321, 328

lower court's error in mistakenly concluding contested facts and mischaracterization of the expert witness testimony by human factors expert Dr. David Clement regarding the warning issues. Instead, Respondent continues to rely on its conjecture that this accident happened in the normal course of changing the chipper blades. (Respondent's Brief, pp. 40-41) The evidence is that Plaintiff knew not to open the chipper hood while the disc was moving. The actual testimony of the Plaintiff however is that the accident happened after a lengthy interlude during which he determined the cutter had stopped, possibly "plugged" by the materials fed from the vibrating feeder, and following his attempt to obtain assistance to investigate what he concluded was a machine malfunction. No warnings were ever provided by Morbark that were originally attached to the machine or the warning decals provided by Precision Husky that addressed such problem.

Morbark presented no evidence in opposition to the testimony of Dr. Clement that included his opinion that: (1) the design of the chipper is 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.[5] (R. pp. 843-844, 846, 855, 856, 868-871); (2) that an effective warning would include signaling at the location where the person is going to remove the hood/guard (R. pp. 845-846); (3) that the Morbark designed warnings that were applied at the Morbark factory before the machine was sold did not comply with the ANSI 535 standard because they provided no description of the hazard or outcome (R. pp. 864-865) and did not address the specific hazard of being struck in the head by the hood guard of the machine; (4) that the bootleg Precision Husky warning labels that

[5] 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.

were added to the Morbark machine were not an effective warning and were designed for a different machine (R. pp. 848-852); (5) the Morbark warnings and manual did not meet the requirements standards for an adequate warning and warning system required by ANSI Z535. (Appellant's Brief, pp. 17-19, 28-29)

Finally, Respondent attempts to argue that because some of its own inadequate warnings were no longer on the machine when the accident happened, that the machine was not in essentially the same condition as when it was manufactured. Respondent takes this position while referring to the efficacy of the precision Husky labels that quite obviously attempt to warn of some risk of the hood opening on a different style machine. (Respondent's Brief, pp. 9, 39, 43, 44) Morbark actually made such argument without producing any evidence of its own warnings that would alert the operator to the risk of the hood kick back and instead has attempted to use the Precision Husky labels in an attempt to create a misuse/argument, a factually driven issue usually considered a jury question. (Appellant's Brief, p. 29)

CONCLUSION

For all the reasons mentioned, this Court is requested to reverse and remand all issues related to the lower court's grant of summary judgment.

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

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