047

IN THE SUPREME COURT OF FLORIDA

CASE NO. 82,795

STANDARD HAVENS PRODUCTS, INC.,

Appellant,

vs.

FERNANDO BENITEZ and ALINA BENITEZ, his wife,

Appellees.

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On Certified Question from the United States Court of Appeals for the Eleventh Circuit

# ANSWER BRIEF OF APPELLEES

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## STATEMENT OF THE CASE

This cause raises the question of the treatment which should be accorded the so-called "product misuse" defense under Florida's pure comparative fault tort system. The case arises out of a civil action brought by the respondents, Fernando Benitez and Alina Benitez, his wife ("plaintiffs"), against the petitioner, Standard Havens Products, Inc. ("Standard Havens") seeking the recovery of damages sustained as a result of the traumatic amputation of Fernando Benitez' left leg just below the knee. The injury occurred during a maintenance operation when Fernando inadvertently stepped into a 12" to 18" gap or opening which existed in the protective screen enclosure placed over an auger mechanism situated in the bottom of a large pollution control apparatus known as a "baghouse." After stepping into the opening, plaintiff's leg became ensnarled in the rotating auger. The baghouse was designed and sold by Standard Havens to Fernando's employer, Community Asphalt.

The case was removed from state circuit court to federal district court for the Southern District of Florida, concluding with a one week trial in April of 1991. The cause was submitted to the jury on products liability theories based upon principles of strict products liability and upon principles of negligent design, manufacture, and instructions for safe product use.

At the conclusion of the trial, the jury specifically found in its special verdict that: (a) "there [was] negligence on the part of ... Standard Havens ... in designing, manufacturing and



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assembling the ... baghouse which was a legal cause of injury ... to the plaintiff;" (b) "the ... baghouse, designed, manufactured and sold by the defendant [was] defective when it left the possession of the defendant and such defect [was] a legal cause of injury ... to the plaintiff;" and (c) "there [was] negligence on the part of Fernando Benitez which was a legal cause of the plaintiff's damage ...." Causal fault was allocated 70% to Standard Havens and 30% to Fernando Benitez. Implicit in the jury's specific findings that the Standard Havens' baghouse was defective and that such defective condition was a legal cause of damage to the plaintiff is the conclusion that the plaintiff's accident was reasonably foreseeable to Standard Havens.[1]

The jury also found in its verdict that the plaintiff "knowingly misuse[d] the ... baghouse in a manner for which the product was not made and not foreseeable to the defendant which was [also] a legal cause of his injury."[2] Based solely upon this

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[1] In specifically finding that the baghouse was "defective and unreasonably dangerous" the jury applied an instruction which stated that a "product is unreasonably dangerous because of its design if the product fails to perform as safely as an ordinary person would expect when used as intended or in a manner reasonably foreseeable by the manufacturer ...."

[2] The only way to reconcile the apparent inconsistency in the jury's findings regarding foreseeability is to view the jury's finding on the "misuse" question in pari materia with its finding on the comparative negligence question, where the jury apportioned 30% of the fault to the plaintiffs and 70% of the fault to Standard Havens. If viewed in this fashion, then the verdict is consistent, i.e.- the plaintiff was comparatively negligent for misusing the product and his misuse constituted 30% of the fault causing the accident. This view of the jury's verdict is also consistent with the fact that Standard Havens relied upon the identical conduct of plaintiff to support both its comparative negligence defense and its misuse defense.



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latter finding by the jury, the Eleventh Circuit certified the following question to this Court:

> Does a plaintiff's knowing misuse of a product in a manner neither intended nor foreseeable by the defendant manufacturer bar recovery, as a matter of law, on a products liability claim sounding in negligence?

The narrow phrasing of the question certified by the Eleventh Circuit fails to incorporate the other three specific liability findings made by the jury in its verdict, which findings stand on an equal footing with the misuse finding.[3] When thus reviewed in context, the only appropriate phrasing of the question raised by the actual jury verdict in this case is:

> Does a jury finding of unforeseeable product misuse which is only "a," not the "sole," legal cause of a user's accident totally bar any recovery by the user, even though the same jury found the product was defective and unreasonably dangerous, the defendant manufacturer was negligent, and both the product defect and the manufacturer's negligence were "a" legal cause contributing to the user's accident?

We believe that the answer to the question actually posed by the facts of this case is found in Florida's Comparative Fault Statute [§768.81, Fla. Stat. (1987)], under which a claimant's contributing fault, such as the type of user conduct relied upon to support the product misuse defense here involved, "diminishes proportionately the amount awarded," but "does not bar recovery."

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[3] In this regard, we would point out that the Eleventh Circuit advised this Court that it "[did] not intend the particular phrasing of this question to limit consideration of the problems posed by the entire case" and that this Court "is at liberty to consider the problems and issues involved in this case as it perceives them to be."



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The federal district court below utilized such a proportionate reduction approach in entering judgment for the plaintiffs. His ruling should be approved, and the judgment brought up for review affirmed.

## STATEMENT OF THE FACTS

### (A) Preface

The vice in the factual statement contained in Standard Havens' initial brief is its failure to honor the fundamental appellate principle that when an appeal challenges a trial court's denial of a directed verdict the facts must be presented in the light most favorable to the non-moving party. In its recitation of the facts, Standard Havens has excised from the trial transcript only that evidence which supports its position. Standard Havens does not even acknowledge the existence in the record of any evidence adverse to its position. By presenting what is essentially a closing jury argument, Standard Havens apparently hopes that this Court will impermissibly re-weigh the trial evidence and conclude that the evidence points so strongly and favorably in its favor that no jury of reasonable individuals could find against it. This Court, however, is well aware that it cannot legally re-weigh the evidence; its only task is to determine whether sufficient evidence was adduced at trial from which a jury of reasonable individuals could have arrived at the verdict rendered. In order to demonstrate the propriety of the trial court's denial of Standard Havens' motion for directed verdict and to demonstrate the propriety of the jury's ultimate verdict, we

thus feel constrained to present this Court with our own statement of the facts.

(B) Overview of Proceedings Below

Plaintiffs initiated this civil action against Standard Havens seeking the recovery of damages on the basis of theories of strict products liability and negligence. The case was tried to a jury beginning on April 8, 1991. A verdict was returned on April 12th finding that Standard Havens' negligence in the design, manufacture, and marketing of the baghouse was "a legal cause" of plaintiff's damages, that the baghouse was defective and unreasonably dangerous when sold and such condition was "a legal cause" of plaintiff's damages, that Standard Havens was 70% and Fernando Benitez was 30% responsible for causing the accident at issue, and that Fernando Benitez' total damages were $1,500,000.00 and his wife's were $250,000.00 (R. 4-160)[4]. On April 26, 1991 judgment was entered for plaintiffs as reduced by 30% in the amount of $1,050,000.00 for Fernando and $175,000.00 for Alina (R. 4-163).

Standard Havens filed a timely motion for judgment notwithstanding the verdict, or in the alternative, for a new trial and/or remittitur, along with a supporting memorandum of law (R. 4-164). Plaintiffs filed a memorandum of law in opposition to the post-trial motions (R. 4-176). One year later the trial court entered an order denying Standard Havens' motions. (R. 5-202). A

[4] Record references are to the record transmitted by the United States Court of Appeals for the Eleventh Circuit. References to the documents in the court file are to the volume, document number and page number, i.e. R-1-1-1; references to the trial transcript are to the volume and page number, i.e. R. 2-1.

timely appeal to the Eleventh Circuit ensued (R. 5-205).

### (C) "Ultimate Facts" Regarding Product Defect and Risk of Harm

In contrast to Standard Havens' one-sided view of the case, the record contains abundant evidence from which a jury of reasonable persons could determine the existence of the following "ultimate facts": (1) that Standard Havens was on notice that workers such as Mr. Benitez would occasionally be required to enter the baghouse to perform various inspection and maintenance tasks; (2) that those workers could foreseeably come into inadvertent contact with the auger mechanism situated at the bottom of the baghouse if it was not physically enclosed and could otherwise become injured if not provided with a reasonably safe walking surface inside the baghouse without holes or gaps; (3) that worker injury due to tripping hazards or contact with the auger's spiral blade was foreseeable, with one of the gravest risks being inadvertent worker contact with an operating auger; (4) that although there were several ways in which some level of worker protection from the auger mechanism could be obtained (such as warning placards, guarding "by location" and utilization of "lock out" procedures), the most effective method to protect workers from the dangers and risks associated with an unsafe walking surface and inadvertent contact with the auger mechanism was by including in the design of the baghouse a protective enclosure running the entire length of the auger mechanism; (5) that the design and erection plans for the subject baghouse created a situation where a 12" to 18" opening or gap could exist in the walking surface and

protective screen enclosure situated over the auger mechanism; (6) that the existence of the 12" to 18" opening in the auger mechanism's protective enclosure admittedly "shouldn't have been there," and posed a significant risk of bodily harm to any worker who might foreseeably be inside the baghouse for inspection or maintenance reasons; (7) that only a few simple, inexpensive changes in Standard Havens' existing design and its baghouse erection plans[5] would have caused the entire length of the auger mechanism to be physically guarded so as to provide a safe walking surface for workers; (8) that those recommended design and erection plan changes which would have rendered the baghouse reasonably safe were technologically feasible, very inexpensive, and would not have adversely affected the operation or level of performance of the baghouse itself; and (9) that if Standard Havens had utilized the recommended safer alternative design to provide a safe walking surface, to guard the entire length of the auger mechanism, and to provide adequate erection plans, Mr. Benitez' leg never would have been able to come into inadvertent contact with

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[5] While Standard Havens asserts in its brief that "plaintiffs have conceded that failure to warn is not an issue in this case" (IB at 22), such assertion is not entirely accurate. Specifically, plaintiffs have argued throughout this case that the erection plans supplied by Standard Havens to Community Asphalt were inadequate because of their failure to advise Community Asphalt that the seven sections of the protective enclosure for the auger had to be placed and installed with a 2" gap between them and should be affixed so as not to shift. (R. 13-798-806, 833-42). If the protective enclosure sections were not erected in such a fashion, then the potential for the creation of a sizeable opening or gap existed (such as occurred here). On this point, the jury specifically found that Community Asphalt had properly erected the baghouse in accordance with Standard Havens' deficient plans, yet a gap in the enclosure still occurred. (R. 9-160-Q. # 6.)

the auger and be chewed off.

The "evidentiary facts" contained in the record were more than sufficient to support the "ultimate facts" just outlined, which ultimate facts provided a sound basis for the jury to conclude that Standard Havens was at least partially responsible for Mr. Benitez' unfortunate accident. This being so, it simply cannot be said that Standard Havens was entitled to entry of a judgment in its favor as a matter of law.

### (D) "Evidentiary Facts" Regarding Product Defect, Negligence, Risk of Harm and Causation

First, the evidence adduced during trial indicated that Standard Havens was on notice that workers would occasionally be required to enter the baghouse itself to perform inspection and maintenance tasks. The necessity for occasional worker presence inside the baghouse structure itself was unquestionably anticipated by Standard Havens since its design included an "inspection door" through which entry into the baghouse was gained. Since this "inspection door" was located at a height which required the use of a ladder to be reached, Standard Havens argued that the auger was "guarded by location" allegedly in compliance with an ANSI standard (R. 10-341-47). Such an argument is obviously unavailing in a situation such as here involving a worker attempting to perform maintenance activities on the interior of the baghouse.[6]

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[6] Throughout trial, numerous witnesses (as well as the attorneys in their questioning) referred to the entry door as "an inspection door" and "an access door." (R. 9-160-61; 10-254, 259-60; 12-708-10). This is one reason why the jury apparently found it hard to accept Standard Havens' argument that the auger "was (continued...)



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Standard Havens' own user's manual (Plaintiffs' Exh. 4), as well as the testimony of multiple witnesses disclosed that periodic maintenance and inspections would require the presence of workers inside the baghouse from time to time. These inspection and maintenance items included periodically inspecting and replacing, if necessary, the multiple bearings supporting the auger mechanism, the occasional retrieval of dislodged filtration bags, occasional instances when the auger mechanism malfunctioned or otherwise became jammed, and the cleaning and inspection of the paint coating lining the inside of the steel walls of the baghouse (R. 10-235, 284, 290-99, 321-22). Any dust accumulation inside of the baghouse walls had to be removed in order for the inspection of the lining to be performed (R. 10-284, 321-22; R. 12-620-21). This was an important maintenance item because, as plaintiff's supervisor (Mr. Garfer) explained, he had heard some "real horror stories" about rusting baghouses (R. 10-284, 321-22). Even Standard Havens' own expert, Mr. Petershack, acknowledged that the occasional presence of workers inside the baghouse was "perfectly foreseeable." (R. 12-714-15).

Standard Havens was on actual notice of the foreseeability of occasional worker presence inside the baghouse, of the necessity of providing them a safe walking/working surface, and of the danger posed by an unsafe walking surface and by an auger which is not completely enclosed. In 1984 or 1985 an accident occurred in New

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[6](...continued)
guarded by location" and that Fernando Benitez "shouldn't have been in there."

Jersey with a Standard Havens' baghouse where an individual by the name of Mr. Santos got his left leg caught in the auger, as a result of which his leg was traumatically amputated and he bled to death (R. 12-605-48).[7]

The evidence further established the foreseeability of tripping hazards and of inadvertent worker contact with the auger mechanism situated at the bottom of the baghouse structure. The seven protective screen panels placed over the auger provided the only flat surface upon which workers could walk, since the side walls of the baghouse sloped towards the auger at a 60° angle (R. 10-224-25, 297).[8] Simple analysis of the product's design and a consideration of the disastrous consequences of the Santos and Benitez accidents demonstrated that the presence of a worker trip hazard and inadvertent worker contact with any unprotected portion of the auger would likely cause some physical injury.

Both plaintiffs' and Standard Havens' expert witnesses agreed that the most effective method of protecting workers from the dangers and risks associated with trip hazards and inadvertent

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[7] We anticipate that Standard Havens will argue that the Santos accident is so dissimilar as to be non-probative. However, Standard Havens argued the same point to the federal district court judge without success both during trial (R. 12-596-610, 629-30) and post trial (R. 5-8-9). On its subsequent appeal to the Eleventh Circuit, Standard Havens decided to forgo even raising the issue. Thus, the evidence is before the Court and should not be ignored.

[8] Indeed, the evidence reflected that Standard Havens' own employees went inside the baghouse with Community Asphalt employees and stood on the protective screen covers. (R. 10-281-86, 297-99, 317-19, 329). Even though Standard Havens argued that the screen panels were not "a walking surface" unless first "planked" with boards, its own employees failed to adhere to this "planking" rule. (R.10-297, 329; R. 12-619-27).

contact with the auger mechanism was by utilizing in the design a level physical enclosure running above the entire length of the auger mechanism (R. 10-335-39, 351-62; R. 12-687, 691-92, 704-6). Had Standard Havens' erection plans properly advised Community Asphalt that the seven screen enclosure panels should be installed with a 2" gap between each panel and that each panel should be secured into place (as certain other Standard Havens' erection plans did specify [R. 10-207-12, 242]), then the dangerous 12" to 18" gap in the walking surface into which Fernando Benitez inadvertently stepped would never have existed. (R. 10-335-39, 362-67).

In this case, the existence of a 12" to 18" gap or opening in the auger's protective enclosure posed a significant risk of bodily harm to any worker who happened to be inside the baghouse performing inspection or maintenance tasks. Although Standard Havens argues to the Court that its baghouse cannot be found to have been defective even though the auger was left partially unprotected due to the inadequate erection plans, the evidence demonstrated that Standard Havens actually intended for the auger to be totally enclosed by the protective screen panels.[9] And, Standard Havens' own expert, Victor Petershack, acknowledged that the preferable safe design is a physical guard that totally

[9] We would note in passing that Standard Havens continues to advance here the argument which it unsuccessfully urged below, i.e. - that its design of the baghouse only included the steel grating panels "to protect the auger" from foreign objects ("not as a guard against injury") (R. 4-164). By its verdict, the jury obviously found Standard Havens' argument to be unpersuasive in the face of the other compelling evidence in the case.

encloses the screw conveyor, unless such a guard would adversely affect the machine's operation. (R. 12-687, 690-92, 704-6).[10] Indeed, with respect to the 12" to 18" gap, Standard Havens' own attorney conceded to the jury in closing that "[i]t shouldn't have been there, no doubt about it." (R. 13-822-23).[11]

Plaintiffs' expert witness, John Schroering, testified that the design of Standard Havens' baghouse departed from reasonably safe and sound engineering practices at the time of its manufacture and sale since, among other things, the walking surface was unsafe and the auger was not adequately and properly guarded. He testified that the seven grating sections provided did not cover the entire length of the auger shaft when installed according to the inadequate erection plans, thus leaving the 12" to 18" unprotected opening. Additionally, those sections of grating were not properly designed so as to be secured in place. (R. 10-335-39, 351-52, 358-68).

Standard Havens' expert opined that the auger at issue was

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[10] While Standard Havens tries to paint its expert as being highly qualified (IB at 15), it understandably neglects to advise the Court that he conceded at trial that, unlike plaintiffs' expert, he was not an expert on baghouses or how they operate, and he had no idea if plaintiffs' expert's alternative design would affect operation of the baghouse. (R. 12-680-81, 699, 704-6).

[11] The evidence at trial was in conflict on the question of who was responsible for the creation of the 12" to 18" gap. Standard Havens blamed Community Asphalt (R. 13-822-26), while Community Asphalt and plaintiffs blamed Standard Havens' faulty design and inadequate erection plans and instructions (R. 13-800-806, 833-34, 838-39, 842). The jury resolved the conflict by its verdict in favor of Community Asphalt (R. 9-160-Q#6). That determination is no longer subject to challenge here, since Standard Havens voluntarily dismissed its appeal as to Community Asphalt in the Eleventh Circuit.



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adequately guarded because "in this case we have a guard [the baghouse] that totally surrounds the screw conveyor ...." (R. 12-691-92). Standard Havens also argued to the jury that it provided enough screen sections to cover the entire length of the auger if those sections had been installed so as to leave a 2" gap between each section (R. 13-824-25). This method of installation was not, however, specified on the engineering/erection drawings supplied to Community Asphalt, as it was on erection drawings for other baghouses designed by Standard Havens (R. 10-207-12, 242). And, contrary to the assertion in its brief at 9, Standard Havens actually viewed and was aware of the manner in which Community Asphalt installed the seven screen sections. Yet, it voiced no concern. (R. 10-222-27, 280-86). After Benitez' accident, Community Asphalt itself remedied the dangerous condition in the precise manner which was advocated by plaintiffs' expert (R. 9-30-32; R. 12-642-43).

The testimony from plaintiffs' expert additionally established that the design required by sound engineering practices was not only technologically feasible, but it would not have adversely affected the operation or level of performance of the baghouse (R. 10-335-36, 358-61). Indeed, a simple change in the existing erection plans would have eliminated the hazard. Plaintiffs' expert did not feel that the protective screens which he recommended be placed over the auger had to be of such a small mesh that the level of performance of the baghouse would be adversely affected.

## (E) Plaintiff's Contributing Fault

Based upon all the evidence before it, particularly that pertaining to the manner in which Mr. Benitez' accident occurred, the jury was entitled to conclude that if Standard Havens had sent Community Asphalt erection plans which utilized the recommended safer alternative design to provide a safe walking surface and to enclose the entire length of the auger mechanism, then plaintiff's leg never would have been able to make contact with and be drawn into the auger. Faced with such adverse evidence, Standard Havens was forced into arguing: (1) that Mr. Benitez never should have been in the baghouse in the first place; (2) that there was no need for him to have been raking dust off the walls of the baghouse; (3) that he should have "locked out" and rendered inoperable the auger before entering the baghouse; and (4) that plaintiff's actions in this regard were the "sole proximate cause" of the accident at issue.[12] (R. 13-816-22, 826-32). While the jury certainly could have agreed with Standard Havens' argument, it was also entitled to conclude, as it did, that Mr. Benitez' actions were only a contributing, not the sole, legal cause of the accident.

On the fateful day when he lost a portion of his leg to Standard Havens' product, Fernando Benitez had only been working

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[12] Although Standard Havens argues here that Mr. Benitez' actions were, as a matter of law, "the sole legal cause" of his injuries, its attorney argued to the jury that:

> . . . 99 percent of what happened to Mr. Benitez, his unfortunate accident, was a result of his deliberate violation of the safety rules in starting that auger. (R. 13-827).

for Community Asphalt for approximately five months. He was 23 years old at the time and held only a high school diploma. When he first began with Community Asphalt, he was hired as a truck driver, but because of his enthusiasm, initiative and hard working ethic, he was very quickly promoted to the position of plant supervisor (R. 10-239-41; R. 11-430). Prior to the date of his accident, plaintiff had never entered the baghouse itself, although he had looked inside through the inspection door (R. 11-441). He had never been provided with a copy of Standard Havens' user's manual to review; he gained knowledge of the equipment through his training by others and by hands-on experience.[13] (R. 11-422-43).

After initial start-up of the baghouse and for several months before Mr. Benitez' accident, Community Asphalt had problems with the baghouse having restricted "breathing" and with high levels of dust accumulating in its interior. (R. 10-237-39, 248, 288-89, 292, 321-22; R. 11-434-37). One of the problems, a substantial build up of dust on the bags, might have been related to hydrocarbon contamination of the inside of the baghouse. Hydrocarbons emissions are associated with the production of asphalt. (R. 10-288-89, 296). Another reason for the breathing problems was postulated to be related to the entry of moisture/ humidity into the baghouse. The dust being forced through and filtered by the baghouse contained calcium carbonate, which when

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[13] In its brief, Standard Havens states that Community Asphalt received its user's manual one month before the baghouse went on line (IB at 9). There was, however, testimony indicating that the manual was not received by Community Asphalt until many months later (R. 10-228, 270-72, 316).

exposed to moisture or humidity would transform into a substance similar in consistency to cement. This resulting substance would gradually accumulate in the interior of the baghouse. (R. 10-233-34, 237-39, 288-89; R. 11-547). It was important to remedy this problem since when air flow becomes restricted by the accumulation of materials in the baghouse interior, the rate of production at the asphalt plant would decrease. (R. 10-237-39).

Shortly prior to the date of plaintiff's accident, it had been decided to put new bags in the interior of the baghouse to reduce the "breathing" problems. (R. 11-434-39). It was in preparation for this bag change that plaintiff entered the baghouse. He explained his thought process in the following fashion:

> Q: Why did you go into the hopper [baghouse] on the day of your accident?
>
> A: There were quite a few inches of dust stuck to the walls of the hopper. We were preparing to change bags out the next day. In my logic, my common sense, we were putting in new bags, and we had all the excess dust that shouldn't be there. It should have fallen into the auger, and it shouldn't be there. When we crank up, high velocity gas is going to pick this dust up, and throw it on the new bags.
>
> Q: So what was your decision what to do?
>
> A: I felt I needed to remove that dust before we put in the new bags, and started the whole system up.
>
> (R. 11-438-39).

Before proceeding to the interior of the baghouse, plaintiff left the auger itself in operation so that it would continuously remove the accumulated dust from the baghouse as he raked it off

the walls (R. 11-438-40). This movement of the dust materials collecting at the bottom of the baghouse is what the auger was designed to do, and plaintiff did not believe that leaving the auger on would present any danger to him since he thought the entire length of the auger was enclosed, guarded, and protected by the wire mesh protective screen panels on which he stood while working (R. 11-446-48).[14]

Unfortunately, plaintiff was unaware of, and therefore failed to guard against the defect at issue in this case. He did not know that at the opposite end of the baghouse towards which he was working there existed a 12" to 18" opening in the protective screen; as far as he was concerned, it was "perfectly safe" to be performing the cleaning task in the manner he did (R. 11-442-48). Plaintiff ultimately stepped into the 12" to 18" opening, with the result that the rotating auger grabbed his leg and traumatically amputated it just below the knee. In describing how he viewed the plaintiff's actions, the trial judge stated:

> It could be argued with a good deal of strength that Mr. Benitez ... went in there the way it sounds to me if I were a juror, in a very conscientious way to do a job to make

[14] There was evidence from which the jury could reasonably have concluded that if Mr. Benitez had not left the auger on to constantly remove the materials which fell to the bottom of the hopper as he was raking his way down the baghouse, then the auger would probably have encountered problems when turned on after he had finished raking and exited the baghouse. There was evidence that problems had previously occurred when too much dust was being moved along the bottom of the baghouse by the auger. If too much dust materials were being moved they would have a tendency to accumulate at the discharge end of the baghouse and lift up the protective screen panel at that point, setting off an alarm. (R. 10-249-59).

> this work right .... If I were a juror in this case, I would decide he didn't know he was misusing this property. (R. 12-760-61).

Based upon plaintiff's contributing fault, Standard Havens argued three separate, but clearly interrelated, affirmative defenses at trial: comparative negligence, misuse, and assumption of the risk. (R. 4-159). The various details of plaintiff's conduct on the day in question upon which Standard Havens relied were the same, however, with respect to each of the three defenses. (R. 13-814-32). For example, both Standard Havens' "misuse" and its general "comparative negligence" affirmative defenses focused upon Standard Havens' contention that the plaintiff "intentionally operated the Alpha/Mark III baghouse contrary to its operation and its maintenance manual." (R. 9-159).

Standard Havens defended by arguing that the auger was "guarded by location," that it had designed the baghouse in such a manner that it was unnecessary to perform maintenance while the auger was operating, and most importantly, that the plaintiff had violated the "lockout procedure." (IB at 22-23). As already indicated, however, there was evidence from which the jury could have determined that guarding by location was simply inadequate in view of the conceded fact that maintenance would on occasion have to be performed by workers inside of the baghouse. Without a safe walking surface and without a proper enclosure for the entire length of the auger, workers were exposed to a risk of injury by tripping and falling or by coming into contact with the blade of the auger.

With respect to the "lockout procedure," the only evidence of any instructions or warning provided by Standard Havens was a short paragraph in its operation and maintenance manual, which provided:

> Safety first. Most accident are caused by maintenance or operational errors. Several simple rules can prevent injury and suffering.
>
> 1. Do not work on energized equipment. Always de-energize all power supplies, and tag men working on equipment.
>
> 2. Always operate equipment with all guards and safety equipment functioning.
>
> 3. Never attempt to clean, oil, adjust any machine while it is in motion.
>
> 4. Avoid entering baghouse when there are noxious gases, or high temperatures inside.

The instructions and warnings just quoted are only directed towards locking out electrical equipment which itself is being cleaned, oiled or adjusted. There is no statement in the manual that the lockout procedure applied when one was merely working "in the vicinity of" electrical equipment, not "on it." In this case, it is undisputed that Mr. Benitez was not attempting to clean, oil, or adjust the auger while it was in motion. It should also be noted the manual provides that one should only avoid entering the baghouse "when there are noxious gases, or high temperatures inside." The manual provides no warning against entering the baghouse when the auger is in operation.

With respect to the effectiveness of a "lockout procedure" in protecting worker safety, even Standard Havens' own expert acknowledged that mechanical lockout and electrical interlock devices can be bypassed. He therefore opined that engineers would

rather guard a potentially dangerous auger by a "physical enclosure." (R. 12-687). In sum, there were numerous questions for the jury to resolve in this case concerning whether Standard Havens' manual was adequate to warn that the auger had to be locked out whenever anyone entered the baghouse, even though no work was being performed on the auger itself. (R. 10-274-78, 288, 296, 299, 348-58).

### (F) The Verdict and Standard Havens' Post Trial Motions

Based upon the evidence it heard during the seven-day trial and upon the court's instructions on the law, the jury determined: (1) that there was negligence on the part of Standard Havens in designing the baghouse and in preparing the erection plans which was "a legal cause" of the accident; (2) that the baghouse was defective and unreasonably dangerous when it left the possession of Standard Havens, which condition was "a legal cause" of the accident; (3) that there was "misuse" and "negligence" on the part of plaintiff which was "a legal cause" of the accident; and (4) that Standard Havens was 70% responsible and plaintiff was 30% causally responsible for the accident (R. 4-160). Standard Havens filed a motion for new trial and a motion for entry of judgment notwithstanding the verdict. In moving for judgment notwithstanding the verdict, Standard Havens argued: (1) that it was "not negligent as a matter of law;" and (2) that "plaintiff's negligence was the sole proximate cause of his injuries." (R. 4-164). Following consideration of Standard Havens' post-trial motion and plaintiffs' response thereto, the trial court held that

the jury verdict on liability was sufficiently supported by the evidence, and therefore refused to vacate the final judgment for plaintiffs (R. 5-202).[15]

## SUMMARY OF ARGUMENT

### I.

Standard Havens is not entitled to entry of a judgment in its favor as a matter of law. Viewing the evidence in the light most favorable to plaintiffs, the trial court properly denied Standard Havens' post trial motion for judgment notwithstanding the verdict, rejecting the argument that it was "not negligent as a matter of law" and/or that "Fernando Benitez' negligence was the sole proximate cause of his injuries."

The evidence established that the existence of a 12" to 18" opening in the screen panels placed above the auger located in the bottom of the v-shaped baghouse hopper constituted an unreasonably dangerous condition and a zone of risk as to all workers who utilized the screen panels as a walking surface during contemplated inspection and maintenance procedure. The evidence further

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[15] We recognize that most of Standard Havens' arguments and the Eleventh Circuit's opinion itself focus on a products liability claim based upon a negligence theory alone. However, it must not be overlooked by the Court: (1) that the final judgment entered in this case did not specify whether it was based upon plaintiffs' negligence theory, plaintiffs' strict products liability theory, or both; and (2) that the record contains no written order entering a judgment notwithstanding the verdict for Standard Havens on the strict products liability cause of action. Thus, this Court must analyze the liability issues raised on this appeal with reference to both negligence and strict products liability cases of action. Standard Havens apparently recognized this procedural shortcoming in its initial brief to the Eleventh Circuit. (IB in 11th Cir. at 23 n.2).

established that the faulty design and inadequate erection plans for the baghouse created this dangerous condition. Indeed, Standard Havens' own attorney conceded to the jury in his closing that "[i]t shouldn't have been there [the opening], no doubt about it."

The evidence additionally established that only a few simple inexpensive changes in Standard Havens' existing design and baghouse erection plans would have caused the entire length of the auger mechanism to be physically guarded so as to provide a safe walking surface. Those recommended design changes were technologically feasible, very inexpensive, and would not have affected the operational performance of the baghouse itself.

Given the totality of the evidence in this case, the jury was certainly entitled to conclude under Florida law that Standard Havens' negligence and its defective and unreasonably dangerous product were a contributing legal cause of plaintiff's accident and injuries. Similarly, the jury was entitled to conclude that plaintiff's negligence and product misuse were only a contributing, not the sole legal cause of his accident and injuries. Plaintiff did not lock out the auger because he was not working on it, because he felt it was fully guarded and therefore "perfectly safe," and because he wanted it operating in order to remove from the baghouse the layers of dust buildup he was scraping off the walls. As the trial court aptly observed, plaintiff "went in there, the way it sounds to me if I were a juror, in a very conscientious way to do a job to make this work right."

It is undisputed that Standard Havens' negligence and its defective design and erection plans resulted in the existence of a 12" to 18" opening in the walking surface inside the baghouse. The existence of this opening created a generalized zone of risk to all maintenance workers inside the baghouse. For purposes of establishing causation, the precise manner in which plaintiff's accident occurred and the mere fact that the auger was operating at the time of his inadvertent contact with it does not eliminate liability. For liability to arise under Florida law is only necessary that "the tortfeasor be able to see that some injury will likely result in some manner as a consequence of his negligent acts." The plaintiff here encountered the specific product condition which arose by virtue of Standard Havens' negligence and inadequate design and erection plans -- the 12" to 18" opening in the protective screen panels. It makes no legal difference that plaintiff encountered a rotating auger when his foot stepped through the 12" to 18" opening, as opposed to his merely tripping, being cut, or otherwise sustaining some lesser type of injury. Causation is still sufficiently established.

II.

Standard Havens' alternative argument that so-called "unforeseeable product misuse" is an absolute defense to both strict products liability and negligence claims under all circumstances is contrary to Florida law. In support of its misuse argument, Standard Havens asserts "that if the equipment [auger] had been locked out ... this accident could not have occurred." By

the same token, if Standard Havens had not distributed a defectively designed and unreasonably dangerous product with inadequate erection plans which directly led to the existence of a 12" to 18" opening in the walking surface covering the auger, then plaintiff would not have encountered any hazard and sustained any injuries, regardless of whether he followed the lockout procedure. Thus, this Court is simply confronted with a typical claim involving comparative fault or causation.

The principles set forth in Florida's "Comparative Fault" Act accordingly govern. In that Act, our legislature decreed that in strict products liability and negligence actions seeking recovery of damages for personal injuries "any contributory fault chargeable to the claimant diminishes proportionately the amount awarded ... but does not bar recovery." §768.81(2), Fla. Stat. (1987). The instant case, which involves comparative causation or comparative fault is to be distinguished from those authorities relied upon by Standard Havens, wherein the plaintiff's comparative fault in the nature of "unforeseeable misuse" either created the product defect in the first instance or constituted the sole proximate cause of the accident. The instant case is distinctly different. Here the jury properly found that: (1) the product was defective and unreasonably dangerous; (2) the defendant was negligent; (3) the defective product condition and the manufacturer's negligence were both "a" contributing legal cause of plaintiff's accident; and (4) the plaintiff's product misuse and contributory fault likewise constituted only "a" legal cause of the accident, not its "sole"

cause.

In such circumstances, where both the manufacturer's negligence and product defect and the plaintiff's misuse combine to cause the damaging event, recovery will not be barred but will be proportionately limited. See, General Motors Corp. v. Hopkins, 548 SW.2d 344 (Tex. 1977). Florida courts have previously determined that a product user's contributory fault includes within its scope acts in the nature of product misuse. Being a form of contributory fault, product misuse should only be utilized "in determining the apportionment of the negligence of the manufacturer of the alleged product and the negligence of the consumer." Auburn Mach. Works Co., Inc. v. Jones, 366 So.2d 1167 (Fla. 1979).

Here, Standard Havens' negligent acts and omissions created the specific product condition and danger at issue -- a sizeable opening in the screen panels covering the auger screw, an opening which even its own attorney conceded "shouldn't have been there." The existence of that sizeable opening in the walking surface inside the baghouse constituted a potential hazard to workers who could trip and fall, get cut, or break bones. Plaintiff's contributory fault in leaving the auger operational simply acted in combination with an existing product defect of which he was unaware; such negligence by plaintiff was not the "sole" cause of the accident. Where, as here, an existing product defect combines with a claimant's misuse and results in an accident, an actionable products liability claim should be found to exist, and comparative negligence principles should then be applied to apportion causation

and the ultimate responsibility among all the participants. This is the only result which is consistent with Florida's Comparative Fault Statute and with the form of pure comparative fault recognized in this Court's own decisions.

## ARGUMENT

### Preface

In the argument to follow, we intend to demonstrate to the Court that the specific question certified by the Eleventh Circuit should not be answered as posed. We submit that the Eleventh Circuit's narrow phrasing of the question certified fails to attach any, much less the proper, significance to the various specific liability findings made by the jury in its verdict, which findings stand on an equal footing with the "misuse" finding.

The only appropriate phrasing of the question raised by the specific jury verdict findings on liability in this case is:

> Does a jury finding of unforeseeable product misuse which is only "a," not the "sole," legal cause of a user's accident totally bar any recovery by the user, even though the same jury found the product was defective and unreasonably dangerous, the defendant manufacturer was negligent, and both the product defect and the manufacturer's negligence were "a" legal cause contributing to the user's accident?

We intend to demonstrate that the question raised by this case, as rephrased, should be answered in the negative and that when the answer is applied to the facts here, the final money judgment entered for the plaintiffs should be affirmed. We will begin our discussion of the law and the facts by addressing the preliminary issue of whether the plaintiffs established a prima

facia products liability claim.

I.

THE TRIAL COURT PROPERLY DENIED STANDARD HAVENS' MOTION FOR ENTRY OF JUDGMENT NOTWITHSTANDING THE VERDICT WHERE THERE WAS SUFFICIENT COMPETENT EVIDENCE TO SUPPORT THE JURY'S FINDING THAT STANDARD HAVENS WAS NEGLIGENT, THAT IT HAD PLACED INTO THE STREAM OF COMMERCE A DEFECTIVE AND UNREASONABLY DANGEROUS PRODUCT, AND THAT SUCH NEGLIGENCE AND PRODUCT DEFECT WERE A CONTRIBUTING LEGAL CAUSE OF THE ACCIDENT WHEREIN PLAINTIFF SUSTAINED INJURY.

(A)

Applicable Standard Of Review

In this products liability action, the trial court properly denied Standard Havens' motions for directed verdict and motion for entry of judgment notwithstanding the verdict. The competent evidence presented at trial established a prima facie case under theories of both strict products liability and negligence. Contrary to Standard Havens' assertion in this Court, the evidence did not "indisputably demonstrate" that the "baghouse was safe for its intended use," nor did it "indisputably demonstrate" that "the [sole] proximate cause of the accident ... was the plaintiff's misuse of the product." If one properly views the evidence in the case in the light most favorable to plaintiffs, then one will readily see Standard Havens' appellate position for what it really is - nothing more than "pure jury argument." The jury and the federal district court rejected the arguments. This Court should do likewise.

We will initiate our analysis of this argument point by

articulating several incontrovertible principles of appellate law which govern disposition of cases involving directed verdicts. First, it is not the function of an appellate court to re-evaluate or re-weigh the evidence and substitute its judgment for that of the jury. Helman v. Seaboard Coast Line R Co., 349 So.2d 1187 (Fla. 1977). Second, if there is any competent evidence to support a verdict, that verdict must be sustained regardless of the district court's opinion as to its appropriateness. Helman v. Seaboard Coast Line R Co., 349 So.2d 1187 (Fla. 1977); Florida East Coast RY Co. v. Shulman, 481 So.2d 965, 967 (Fla. 3d DCA 1986), and cases cited therein.

Moreover, it is fundamental that the evaluation of conflicting testimony is properly a jury function, and it is the province of the jury to pass upon the credibility of the witnesses and to apprise the weight of the evidence. Nelson v. Ziegler, 89 So.2d 780 (Fla. 1956); Brookbank v. Mathieu, 152 So.2d 526, 528 (Fla. 3d DCA 1963). Thus, in order for a directed verdict to be given by the court, there must be a complete absence of conflicting evidence and uncertainty. Shaw v. Puleo, 159 So.2d 641 (Fla. 1964).

Under our constitution it is for the jury to determine what is or what is not negligence in a particular case if there is a dispute, conflict, or uncertainty in the testimony and evidence, or if the facts are such that reasonable persons may fairly arrive at different conclusions. Sterling v. Sapp, 229 So.2d 850 (Fla. 1969). As aptly noted in Hernandez v. Motrico, Inc., 370 So.2d 836 (Fla. 2nd DCA 1979), "if there is room for a difference of opinion

between reasonable men as to the proof of facts from which an ultimate fact is sought to be established, or where there is room for differences as to the inferences that might be drawn from conceded facts, the matter should be submitted to the jury." [370 So.2d at 838]. With these principles firmly in mind, we shall now address Standard Havens' contention that the trial court erred in denying its motion for a directed verdict on liability.

(B)

**Sufficient Evidence Was Presented At Trial To Establish Plaintiffs' Strict Liability And Negligence Claims**

The duty of a manufacturer under Florida law is to exercise reasonable care in designing its product and providing instructions for use so as to eliminate "foreseeable dangers." In Florida, the concept of "foreseeability" is called into play at two separate levels of analysis, one relating to the duty element, and the other relating the causation element. As to the first level involving duty, this Court has stated:

> . . . As to duty, the proper inquiry for the reviewing appellate court is whether the defendant's conduct created a foreseeable zone of risk, not whether the defendant could foresee the specific injury that actually occurred.
>
> * * *
>
> . . . Thus, if there is any general and foreseeable risk of injury . . ., the courts are not free to relieve the defendant of [its] duty.
>
> Certainly, the [defendant] is entitled to give the fact-finder all available evidence about intervening causes, precautions taken against the risk, the fact that no similar injury has occurred in the past, and the comparative negligence of the plaintiff, among

> other matters . . . . But, the mere fact that such evidence exists - even if it ultimately may persuade the fact-finder - does not relieve the [defendant] of its duty.

McCain v. Florida Power Corp., 593 So.2d 500, 504 (Fla. 1992). Accord, Powers v. Ryder Truck Rental, Inc., 625 So.2d 979 (Fla. 1st DCA 1993); Stazenski v. Tennant Co., 617 So.2d 344 (Fla. 1st DCA 1993).

The duty issue is thus resolved by determining whether the defendant manufacturer created a generalized and foreseeable risk of harm to others. In this case, the evidence established that the existence of a 12" to 18" opening in the screen panels placed above the auger located in the bottom of the v-shaped baghouse hopper constituted an unreasonably dangerous condition and a zone of risk as to all workers who utilized the screen panels as a walking surface during contemplated inspection and maintenance procedures. Thus, having created a zone of risk, the question the jury was called upon to determine was whether the creation of that zone of risk (the 12" to 18" opening) resulted from Standard Havens' failure to exercise reasonable care in designing and distributing its product. The jury had before it sufficient competent evidence to support its verdict that the 12" to 18" opening existed because of Standard Havens negligence, that Standard Havens had placed into the stream of commerce a defective and unreasonably dangerous product, and that such actions constituted a contributing legal cause of plaintiff's damages.

These liability findings by the jury are entitled to great weight, especially when one considers that its conclusions were

rendered in the face of a jury charge which instructed it that:

> . . . [T]he failure of a manufacturer of a product to adopt the most modern, or even a better safe guard, does not make the manufacturer legally liable to a person injured by that product. The manufacturer is not a guarantor that nobody would get hurt in using its product, and a product is not defective or unreasonably dangerous merely because it is possible to be injured while using it. There is no duty upon the manufacturer to produce a product that is "accident proof." What the manufacturer is required to do is make a product which is free from defective and unreasonably dangerous conditions. (R. 4-159).

Plaintiffs never suggested, as Standard Havens argues, that the law required it to design an "accident-proof" or "fail safe" product. Plaintiffs and their expert suggested nothing more than what Florida law requires -- that Standard Havens exercise reasonable care in designing and distributing its product so as to eliminate "unreasonable dangers." The proper test of "unreasonable danger" is:

> ... [W]hether a reasonable manufacturer would continue to market his product in the same condition as he sold it to the plaintiff with knowledge of the potential dangerous consequences of the trial just revealed. Auburn Mach. Works Co., Inc. v. Jones, 366 So.2d 1167-1171 (Fla. 1979).

In contrast to Standard Havens' one-sided view of the case, the record contains abundant evidence from which a jury of reasonable persons could determine the existence of the following "ultimate facts": (1) that Standard Havens was on notice that workers such as Mr. Benitez would occasionally be required to enter the baghouse to perform various inspection and maintenance tasks;

(2) that those workers could foreseeably come into inadvertent contact with the auger mechanism situated at the bottom of the baghouse if it was not physically enclosed and they could otherwise become injured if not provided with a reasonably safe walking surface inside the baghouse without holes or gaps; (3) that worker injury due to tripping hazards or contact with the auger's spiral blade was foreseeable, with one of the gravest risks being inadvertent worker contact with an operating auger; (4) that although there were several ways in which some level of worker protection from the auger mechanism could be obtained (such as warning placards, guarding "by location" and utilization of "lock out" procedures), the most effective method to protect workers from the dangers and risks associated with an unsafe walking surface and inadvertent contact with the auger mechanism was by including in the design of the baghouse a protective enclosure running the entire length of the auger mechanism; (5) that the design and erection plans for the subject baghouse created a situation where a 12" to 18" opening or gap could exist in the walking surface and protective screen enclosure situated over the auger mechanism; (6) that the existence of the 12" to 18" opening in the auger mechanism's protective enclosure admittedly "shouldn't have been there," and posed a significant risk of bodily harm to any worker who might foreseeably be inside the baghouse for inspection or maintenance reasons; (7) that only a few simple, inexpensive changes in Standard Havens' existing design and its baghouse erection plans would have caused the entire length of the auger

mechanism to be physically guarded so as to provide a safe walking surface for workers; (8) that those recommended design and erection plan changes which would have rendered the baghouse reasonably safe were technologically feasible, very inexpensive, and would not have adversely affected the operational performance of the baghouse itself; and (9) that if Standard Havens had utilized the recommended safer alternative design to provide a safe walking surface, to guard the entire length of the auger mechanism, and to provide adequate erection plans, Mr. Benitez' leg never would have been able to come into inadvertent contact with the auger and be severed.

(C)

**Sufficient Evidence Was Presented At Trial To Establish That The Product Defect And Standard Havens' Negligence Were At Least A Contributing Legal Cause Of Plaintiff's Accident**

In this case, the evidence clearly revealed that the design and inadequate erection plans for Standard Havens' baghouse allowed for the existence of a situation leading to disastrous consequences. Nevertheless, Standard Havens argues that it was the negligence of plaintiff himself which was "the sole proximate cause" of his accident. While the jury certainly could have agreed with Standard Havens' argument, it was also entitled to conclude, as it did, that Mr. Benitez' actions were only a contributing, not the sole, legal cause of his injuries. He did not lock out the auger because he was not working on it, because he felt it was fully guarded and therefore "perfectly safe," and because he wanted it operating in order to remove from the baghouse the layers of

dust build-up he was scraping off the walls. In commenting on the plaintiff's actions, the trial court aptly observed that "He went in there, the way it sounds to me if I were a juror, in a very conscientious way to do a job to make this work right ...."

Given the totality of the evidence in this case, the jury was certainly entitled to conclude under Florida law that Standard Havens' negligence and its defective and unreasonably dangerous product were a contributing legal cause of plaintiff's accident and injuries. In analyzing the causation and foreseeability of injury issue, Standard Havens understandably wants to restrict the Court's focus solely to the nature of the danger created by the auger "in operation." Nevertheless, it is undisputed that Standard Havens' negligence and its defective design and erection plans resulted in the existence of a 12" to 18" opening in the protective screen enclosure above the auger. The existence of the opening created a generalized zone of risk to workers inside the baghouse. For purposes of establishing causation, the precise manner in which plaintiff's accident occurred and the mere fact that the auger was operating at the time of the plaintiff's inadvertent contact with it does not eliminate liability.

There "may be more than one proximate cause of an injury, and any analysis which would focus only on one cause could lead to an incorrect result." Stazenski v. Tennant Co., 617 So.2d 344, 346 n.3 (Fla. 1st DCA 1993). In determining whether the actions of the defendant are a proximate cause, the test focuses upon the extent to which the defendant's conduct foreseeably and substantially

caused the accident at issue. McCain, 593 So.2d 500, 502 (Fla. 1992). As aptly noted in McCain, "it is immaterial that the defendant could not foresee the precise manner in which the injury occurred or its exact extent." [593 So.2d at 503]. The causation rule applicable to this case was stated in Crislip v. Holland, 401 So.2d 115 (Fla. 4th DCA 1981):

> In order for injuries to be a foreseeable consequence of a negligent act, it is not necessary that the initial tortfeasor be able to foresee the exact nature and extent of the injuries or the precise manner in which the injuries occurred. Rather, all that is necessary in order for liability to arise is that the tortfeasor be able to see that some injury will likely result in some manner as a consequence of his negligent acts. [401 So.2d at 1117].

The recent case of Stazenski v. Tennant Co., 617 So.2d 344 (Fla. 1st DCA 1993) provides an excellent example of the proper application of these principles. There, the plaintiff was injured when he fell from an elevated forklift and struck his wrist on a sharp edge of an industrial sweeper. The worker sued, alleging that the defect in the sweeper was a proximate cause of his injuries and that the manufacturer was liable for those injuries. Summary judgment was entered for the manufacturer, but was reversed on appeal. The appellate court found that the sweeper's sharp edges constituted an unreasonably dangerous condition as to anyone who might come into contact with the product. The appellate court specifically noted that it was not necessary that the tortfeasor be able to foresee the exact nature and extent of the injuries or how they were caused. Instead all that was required for liability to

attach under Florida law was that the tortfeasor be able to foresee that some injury will likely result in some manner as a consequence of the condition created by the defendant. Thus, the negligent behavior of the plaintiff prior to coming into contact with the sweeper did not constitute an intervening cause which would relieve the manufacturer of liability. The appellate court properly found the case raised issues for determination by the fact finder.

Here, the evidence showed that the plaintiff encountered the specific product condition which arose by virtue of Standard Havens' negligence and inadequate design and erection plans -- the 12" to 18" opening. For purposes of analyzing the causation issue, it makes no legal difference that plaintiff encountered the rotating auger when his foot stepped into the 12" to 18" opening, as opposed to his tripping, being cut, breaking a leg, or otherwise sustaining some lesser type of injury. For, as was said in Holley v. Mt. Zion Terrace Apartments, Inc., 382 So.2d 98 (Fla. 3d DCA 1980), quoting from comment b to Restatement (Second) of Torts, § 449 (1965):

> The happening of the very event the likelihood of which makes the actor's conduct negligent and so subjects the actor to liability cannot relieve him from liability. The duty to refrain from the act committed or to do the act omitted is imposed to protect the others from this very danger. To deny recovery because the other's exposure to the very risk from which it was the purpose of the duty to protect him resulted in harm to him, would be to deprive the other of all protection and to make the duty a nullity. [382 So.2d at 101].

In this case, a worker's inadvertently stepping into the 12" to 18" opening in the protective screen panels above the auger was



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the "very event the likelihood of which makes [Standard Havens' conduct] negligent." To deny recovery to the plaintiff here because of his "exposure to the very risk from which it was the purpose of the [manufacturer's] duty to protect him resulted in harm to him, would be to deprive [plaintiff] of all protection and to make the duty [of Standard Havens] a nullity."

In sum, the evidence presented to the jurors in this case was clearly legally sufficient to support their finding that the baghouse was negligently and defectively designed and distributed, that it was in an unreasonably dangerous condition when sold, and that it reached the user without substantial change. The lay and expert testimony presented at trial was clearly sufficient to establish that the design defect and inadequate erection plans rendered the baghouse unreasonably dangerous because "the risk of danger in the design outweighed the benefits." Finally, the jury had before it more than sufficient evidence upon which to base its conclusion that Standard Havens' negligence and the defective condition of the baghouse contributed substantially to producing the accident at issue, even though the defective condition operated in combination with plaintiff's own negligence.

II.

PRODUCT MISUSE OF THE TYPE INVOLVED IN THIS CASE, WHICH WAS ONLY "A" LEGAL CAUSE, NOT THE "SOLE" LEGAL CAUSE OF A USER'S ACCIDENT, MERELY "DIMINISHES PROPORTIONATELY THE AMOUNT AWARDED," BUT "DOES NOT BAR RECOVERY."

Standard Havens alternatively argues that all of the evidence in the case which supports the jury's verdict as to design defect,

negligence, and legal cause should be ignored and that judgment should be entered in its favor, as a matter of law, solely because the jury also answered a verdict interrogatory question finding that plaintiff had "misused" the baghouse. Standard Havens' argument that so-called "unforeseeable product misuse" is an absolute defense to both strict products liability and negligence claims under all circumstances is contrary to Florida law. Analysis of Standard Havens' arguments and evidence relating to its misuse defense discloses one theme, i.e. "that if the equipment [auger] had been locked out . . . this accident could not have occurred." (IB at 25). Although Standard Havens sought to extract itself from liability on the basis of this singular theme, it argued the theme in several different ways. (R. 13-814-832). First, it argued that regardless of the existence of the 12" to 18" opening in the screen enclosure above the auger, the auger itself should have been locked out before plaintiff went inside the baghouse. Due to the existence of this safety feature, Standard Havens argued, the baghouse was not defective and unreasonably dangerous. Utilizing the same evidence, Standard Havens then proceeded to argue that it should be exonerated from liability because plaintiff's failure to utilize the lockout procedure constituted both misuse and comparative negligence, which were the sole legal cause of the accident. (R. 13-826-32). Standard Havens' argument to this Court presents the same two-prong strategy -- the lockout procedure rendered the design reasonably safe and/or plaintiff's failure to utilize the lockout procedure either

constituted the "sole proximate cause" of the accident or constituted "unforeseeable misuse" exonerating it from any liability.

In response, we would initially point out the obvious: If Standard Havens had not distributed a defectively designed and unreasonably dangerous product with inadequate erection plans which directly led to the existence of a 12" to 18" opening in the user walking area and the protective covering of the auger, then plaintiff would not have encountered any hazard and would not have sustained any injuries, regardless of whether he followed the lockout procedure. Thus, this Court is simply confronted with a typical claim involving comparative fault or causation.

In such situations, the principles set forth in Florida's "Comparative Fault" Act govern. Section 768.81, Florida Statutes (1987), provides in pertinent part that:

> (2) EFFECT OF CONTRIBUTORY FAULT. - In an action to which this section applies, contributory fault chargeable to the claimant diminishes proportionately the amount awarded as economic and non-economic damages for an injury attributable to the claimant's contributory fault, but does not bar recovery. Section 768.81(2), Fla. Stat.

Our legislature has thus decreed that in strict products liability and negligence actions seeking the recovery of damages for personal injuries, "any contributory fault chargeable to the claimant diminishes proportionately the amount awarded . . . but

does not bar recovery."[16] The instant case, which involves comparative causation or comparative fault, is to be distinguished from those cases relied upon by Standard Havens, wherein the plaintiff's comparative fault in the nature of "unforeseeable misuse" created the product defect in the first instance or constituted the sole proximate cause of the accident.[17] The instant case is distinctly different. In this case, there was sufficient evidence to establish, and the jury so found, that: (1) the product was defective and unreasonably dangerous; (2) the defendant was negligent; (3) the defective product's condition and the manufacturer's negligence were both "a" contributing legal cause of plaintiff's accident; and (4) the plaintiff's product misuse and contributory fault similarly constituted "a" legal cause of the accident, not its "sole" cause. The appropriate principle governing such cases is set forth in General Motors Corp. v. Hopkins, 548 SW.2d 344 (Tex. 1977):

> [I]f the product is found to have been

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[16] Section 768.81(4)(a), Fla. Stat. provides that §768.81 "applies to negligence cases . . . [which] includes, but is not limited to, civil actions for damages based upon theories of negligence, strict liability, [and] products liability . . . ."

[17] See, e.g., Barati v. Aero Industries, Inc., 579 So.2d 176 (Fla. 5th DCA), rev. den., 591 So.2d 180 (Fla. 1991) (sole proximate cause case); Perez v. National Presto Industries, Inc., 431 So.2d 667 (Fla. 5th DCA), rev. den., 440 So.2d 352 (Fla. 1983) (sole proximate cause case); Clark v. Boeing Co., 395 So.2d 1226 (Fla. 3d DCA 1981) (no defect and sole proximate cause case); Watson v. Lucerne Machine & Equipment, Inc., 347 So.2d 459 (Fla. 2nd DCA), cert. den., 352 So.2d 176 (Fla. 1977) (sole proximate cause case); Royal v. Black & Decker Manufacturing Co., 205 So.2d 307 (Fla. 3d DCA), cert., den. 211 So.2d 214 (Fla. 1968) (no defect case); Kroon v. Beach Aircraft Corp., 628 F.2d 891 (5th Cir. 1980) (applying Florida law; sole proximate cause case).

> unreasonably dangerous when the defendant placed it in the stream of commerce, and if that defect is found to have been a producing cause of the damaging event, and if the plaintiff has misused the product . . . ; and if that misuse is a proximate cause of the damaging event, the trier of fact must then determine the respective percentages (totalling 100%) by which these two concurring causes contributed to bring about the event...
>
> The defense in a products liability case, where both defect and misuse contribute to cause the damaging event, will limit the plaintiff's recovery to that portion of his damages equal to the percentage of the cause contributed by the product defect. [548 SW.2d at 352].

This principle is the only one which is consistent with this Court's adoption of pure comparative negligence in Hoffman v. Jones, 280 So.2d 431 (Fla. 1973), its recasting of the assumption of risk defense from an absolute defense to a defense subject to comparative fault principles in Blackburn v. Dorta, 348 So.2d 287 (Fla. 1977), and its conversion of the open and obvious/patent danger defense from one totally relieving a product manufacturer of any liability to a partial defense subject to comparative fault principles in Auburn Mach. Works Co., Inc. v. Jones, 366 So.2d 1167 (Fla. 1979). Indeed, this Court recently reaffirmed the guiding principal that "[l]iability is to be determined on the basis of the percentage of fault of each participant to the accident" in Fabre v. Marin, 623 So.2d 1182 (Fla. 1993). In this case, plaintiffs are simply asking this Court to rule that Standard Havens should be held legally responsible under the facts and that its liability be determined on the basis of the percentage of causative fault the jury ascribed to it. Section 768.81(2) and existing Florida law

mandate such a result.

The seminal case of West v. Caterpillar Tractor Co., Inc., 336 So.2d 80 (Fla. 1976) first discussed the topic of available defenses in products liability cases based upon §402A of the Restatement (Second) of Torts, and held that:

> ... The defendant manufacturer may assert that the plaintiff was negligent in some specified manner other than failing to discover or guard against a defect, such as assuming the risk, or misusing the product, and that such negligence was a substantial proximate cause of the plaintiff's injuries or damages.

336 So.2d at 90. Accord, Gonzalez v. G. A. Braun, Inc., 608 So.2d 125 (Fla. 3d DCA 1992) ("comparative negligence . . . is a valid defense if the user of the product assumes the risk, misuses the product, or fails to use ordinary due care.") Sears, Roebuck & Co. v. McKenzie, 502 So.2d 940, 941-42 (Fla. 3d DCA 1987) (rejecting defendant manufacturer's claim that "plaintiff's misuse should have been contained in a separate question, independent of any inquiry as to his contributory negligence, because plaintiff's misuse would be a complete defense, whereas his contributory negligence would merely have been set off against defendant's alleged negligence."). Mosher v. SpeedStar Div. of AMCA International, Inc., 979 F.2d 823 (11th Cir. 1992) (reversing judgment for product manufacturer because trial court improperly instructed the jury that under Florida law "abnormal use by the plaintiff which was not reasonably foreseeable by the manufacturer will negate liability").

In West and progeny, the Florida courts have thus determined that a product user's contributory fault includes within its scope

acts in the nature of product misuse. Being a form of contributory fault, product misuse should only be utilized "in determining the apportionment of the negligence of the manufacturer of the alleged product and the negligence of the consumer." See, Auburn Mach. Works Co., Inc. v. Jones, 366 So.2d 1167, 1171-72 (Fla. 1979) (in Florida, defenses such as "product misuse," "assumption of the risk," and the "open and obvious danger doctrine" do "not create an absolute exception to liability on the part of the manufacturer.").

The case of Blaw-Knox Food & Chem. Equip. Corp. v. Holmes, 348 So.2d 604 (Fla. 4th DCA 1977) involved an accident which, as here, occurred during a maintenance procedure. In that case, the appellate court properly held that the evidence presented a jury question as to design defect and proximate cause. In Blaw-Knox, the plaintiff, an employee of a business which made potato chips, fell into a vat of hot oil in the potato chip cooking machine manufactured by the defendant. The potato chip cooker had developed a blockage, which required the plaintiff to walk on a board placed across the vat of hot oil to attempt to dislodge a flow wheel. Plaintiff slipped and fell into the hot oil. In his subsequent lawsuit, he alleged that the manufacturer was negligent in failing to design the machine so that the operational problem he attempted to correct would not occur, in failing to provide safeguard enclosures or other means of worker protection from the cooker, and in failing to properly instruct the purchasers on the operation and maintenance of the cooker and on the warnings which should be given to their employees.

The jury found that the plaintiff in Blaw-Knox was 48% negligent and the manufacturer was 52% negligent. The manufacturer's argument that it was entitled as a matter of law to entry of a judgment in its favor based upon the affirmative defense of assumption of risk and under the patent danger doctrine was rejected by the appellate court. Certainly, if the type of product misuse involved in Blaw-Knox did not prevent recovery, then plaintiff's product misuse in this case should not either. There, as here, the design and operating environment of the machine made it foreseeable that maintenance or repair procedures would require employees or users to put themselves into a position of potential danger in order to carry out their work responsibilities. The burden on Standard Havens to have remedied the defective, dangerous 12" to 18" opening in the screen panels placed over the auger in the dimly lit interior of its baghouse, where it was foreseeable that maintenance personnel would occasionally be present, was exceedingly small when compared to the risk of harm which could occur. The "allocation of responsibility in such a case is for the jury." Hethcoat v. Chevron Oil Co., 364 So.2d 1243 (Fla. 1st DCA 1978) (Smith J. dissenting), quashed, 380 So.2d 1035 (Fla. 1980).

In this case, the allocation of responsibility for plaintiffs' injuries was properly committed by the trial court to the jury. The jury appropriately allocated the comparative responsibility and causation of the accident as being 70% attributable to Standard Havens and 30% attributable to the plaintiff. When considered in its entirety in the light most favorable to the plaintiffs, the



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evidence adduced satisfies the proper standards of defect, unreasonable danger, negligence and causation in the products liability area. Fair-minded people would be entitled to conclude that Standard Havens, as "a reasonable manufacturer, should not have continued to market its baghouse in the same condition" as it was sold to plaintiff's employer "with knowledge of the potential dangerous consequences the trial just revealed." Auburn Mach. Works Co., Inc. v. Jones, 366 So.2d 1167 (Fla. 1979).

Here, Standard Havens' negligent acts and omissions resulted in the specific product condition and danger at issue -- a sizeable opening in the screen panels covering the auger screw, an opening which even its own attorney conceded "shouldn't have been there." The existence of that sizeable opening in the walking surface inside the baghouse constituted a potential hazard to workers who could trip and fall, get cut, or break bones, without regard to whether the lockout procedure was followed. Plaintiff's contributory fault in leaving the auger operational simply acted in combination with an existing product defect of which he was unaware; such negligence by plaintiff was not the "sole" cause of the accident.[18]

Other courts around the country have found that product "misuse," whether foreseeable or not, is not an absolute bar to

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[18] This factor distinguishes such cases as Knox v. Delta International Machinery Corp., 554 So.2d 6 (Fla. 3d DCA 1989), where the product misuse (removal of a safety guard on a jointer machine) created the danger in the first instance. Plaintiff's misuse here did not create the dangerous product defect -- the 12" to 18" opening in the walking surface inside the baghouse.

liability unless it created the product defect which the plaintiff is alleging, or unless it constituted the sole proximate cause of the accident at issue. See, States v. RD Werner Co., Inc., 799 P.2d 427 (Col. App. 1990) (defective ladder); Elliot v. Sears, Roebuck & Co., 621 A.2d 1371 (Conn. 1993) (defective ladder); Tuttle v. Sudenga Industries, Inc., 1994 Ida.LEXIS (Idaho 1994) (defective auger cover); Coney v. J.L.G. Industries, 454 NE.2d 197 (Ill. 1983) (defective hydraulic aerial platform); Lenherr v. NRM Corp., 504 F.Supp 165 (D. Kan. 1980) (defective squeegee machine); Dooms v. Stewart Bolling & Co., 241 NW.2d 738 (Mich. App. 1976) (defective rubber milling machine). Where, as here, an existing product defect combines with a claimant's misuse, resulting in an accident, an actionable products liability cause of action should be found to exist and comparative negligence principles should then be applied to apportion causation and the ultimate responsibility among all the participants. This is the only result which is consistent with Florida's Comparative Fault Statute [§768.81], and with the form of pure comparative fault recognized in this Court's own decisions, beginning with Hoffman v. Jones. See, e.g., Watson v. Navistar International Transportation Corp., 827 P.2d v.656 (Idaho 1992) (where, in a case involving an individual who lost his leg just below the knee after it became unsnarled in an auger, the court held that defenses of contributory negligence, assumption of risk, product misuse, and failure to follow directions and warnings on a product are all subsumed within the concept of comparative fault, and do not constitute an absolute bar to liability).

## CONCLUSION

As presently worded, the certified question can only be answered with a "yes or no, depending upon the circumstances." Under the circumstances borne out by the record in this case, the plaintiffs knowing "misuse" of the defendant's product, whether unforeseeable or not, should not bar recovery since the jury specifically found that the product's defective, dangerous condition, the defendant's negligence, and the plaintiff's misuse were all contributing legal causes of the accident at issue. In such circumstances, the principles of comparative fault should be applied so as to reduce the extent of plaintiffs' recovery in proportion to the causative impact of his misuse; such misuse should not operate to bar plaintiff from any recovery. This Court should affirm the final judgment entered in favor of plaintiffs on the basis of the jury's verdict.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellees was mailed to Kathleen M. O'Connor, Esq., Thornton, David, Murray, Richard & Davis, P.A., 2950 S.W. 27th Avenue, Suite 100, Grove Professional Bldg., Miami, FL 33133-3704 and Donald T. Norton, Esq., Cohen & Cohen, P.A., 2525 North State Road 7 (441), Hollywood, FL 33021-3206 this 29th day of March, 1994.

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