IN THE SUPREME COURT OF FLORIDA

CASE NO. 82,795

STANDARD HAVENS PRODUCTS, INC.,

Appellant,

vs.

FERNANDO BENITEZ and ALINA BENITEZ, his wife,

Appellees.
_____/

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

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INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Fernando Benitez ("Benitez") was injured on the job when he stepped into a moving auger while inside an Alpha/Mark III baghouse manufactured by Standard Havens Products, Inc. ("Standard Havens"). This product liability action was commenced by Plaintiffs, Appellants, Fernando Benitez and Alina Benitez, in the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida. (R1-2-6-14)[1] The plaintiffs sued Standard Havens Products, Inc., the manufacturer of a product known as the Alpha Mark III Baghouse, alleging negligence, breach of warranty and strict liability.

Defendant, Standard Havens, removed the case to the United States District Court for the Southern District of Florida. (R1-2) Standard Havens answered, denying the material allegations of the complaint, raised affirmative defenses and filed a Third Party Complaint against Community Asphalt, Benitez's employer. (R1-5) The Third Party Complaint was based upon a contract between Standard Havens and Community Asphalt, whereby Community Asphalt agreed to indemnify Standard Havens for any claims brought against Standard Havens in connection with the installation, erection or start up of Standard Havens' product. (R1-5-8)

After extensive discovery was undertaken, the case proceeded to a five-day trial before the Honorable James C. Paine. At the

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[1] 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. R2-1.

close of the plaintiffs' evidence, Standard Havens moved for a directed verdict, which was denied. (R11-493) Standard Havens' renewed motion for directed verdict at the close of all the evidence was also denied. (R12-753)

During the jury charge conference, Standard Havens objected to a specific portion of the verdict form dealing with the defense of misuse. The verdict form contained question number three, which stated:

> Did Fernando Benitez knowingly misuse the Alpha Mark III baghouse in a manner for which the product was not made and not foreseeable to the Defendant which was a legal cause of his injury?

Standard Havens argued that if the jury answered "yes" to that question, then there would be a verdict for Standard Havens on the claims for negligence and strict liability.

> [Attorney for Standard Havens] If you look at question number 3, on misuse, it doesn't tell the jury what to do if they answer it no, or yes.
>
> [The Court] Well, I don't think we need to tell them that.
>
> [Attorney for Standard Havens] If they answer it no, it is a verdict for the [plaintiff]. If they answer, yes, there was misuse, it was a verdict for the [defendant].
>
> [Plaintiff's attorney] Not on negligence.
>
> [The Court] It is a verdict for the defendant on the claim of strict liability.
>
> [Attorney for Standard Havens] I believe it would apply to both.
>
> [The Court] No, I don't think so.

(R13-797)

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The jury returned a verdict in which it found that there was negligence on the part of the Defendant, Standard Havens and that the product was defective. The jury also found that plaintiff knowingly misused the product in a manner unforeseeable to the manufacturer and that there was negligence on the part of the plaintiff. The jury ascribed seventy percent of the fault to Standard Havens and thirty percent to Benitez. The jury also found, in regard to the indemnity claim, that the percentage of fault attributable to installation, erection or start up of the product was zero. The jury assessed damages for Fernando Benitez in the amount of $1,500,000 and for Alina Benitez in the amount of $250,000. (R8-160) A final judgment was entered in favor of the plaintiffs in the amount of $1,050,000 for Fernando Benitez and $175,000 for Alina Benitez, and in favor of Community Asphalt on the third party complaint. (R8-163)

Standard Havens filed a Motion for Judgment Notwithstanding the Verdict or, in the alternative for new trial, and/or for remittitur. (R8-164) The motions were denied. (R5-202) An appeal ensued to the United States Court of Appeal for the Eleventh Circuit.[2] The Eleventh Circuit held that under Florida law, the plaintiff's unforeseeable misuse of Standard Havens' product barred recovery on plaintiff's strict liability claim. *Benitez v. Standard Havens Products, Inc.*, 7 F.3d 1561 (11th Cir. 1993). The

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[2] Standard Havens subsequently dismissed its appeal as to the third party defendant, Community Asphalt.

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Eleventh Circuit also certified to this Court the following question:

> 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 Eleventh Circuit stated that it did "not intend the particular phrasing of this question to limit consideration of the problems posed by the entire case. The [Florida Supreme] Court is at liberty to consider the problems and issues involved in this case as it perceives them to be." 7 F.3d at 1565.

STATEMENT OF THE FACTS

Fernando Benitez was injured on the job on June 5, 1987 when his leg was caught and partially amputated in a moving auger located in a baghouse manufactured by Standard Havens. Benitez was employed by Community Asphalt, which manufactured hot asphalt mixes. (R9-190) It operated a plant in Pembroke Pines, Florida, where the accident in question occurred. (R9-190) At the time of the accident, Benitez was the supervisor of the plant. (R9-239, 240)

The Asphalt Plant and Baghouse

A baghouse is a pollution control device, which operates like a giant vacuum cleaner. The State of Florida Department of Environmental Resources required a baghouse to control emissions from Community Asphalt's plant. (R9-191) The asphalt plant is a horizontal drum mixer in which hot gases are blown through to dry sand and crushed stone. Once the sand and stone are hot and dry,

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liquid asphalt is added to it to produce asphalt. As the aggregates are dried, dust and products of combustion are produced. Without any type of pollution control device, these elements would be released through a stack into the atmosphere. (R10-229)

Standard Havens' Alpha Mark III Baghouse contains rows of fourteen foot long fabric bags suspended from the ceiling on which the dust from the plant is collected. (R11-541) As hot, dust laden gases come into the baghouse, they disperse and a fan pulls the gases through the baghouse. The dust adheres to the outside of the bags. Periodically the bags must be cleaned through a pulsing process. (R11-541) (R10-230-232) When the bags are "pulsed," jets of air come down from the top of the baghouse into the bags which expands them, causing the dust to fall off into a v-shaped hopper area below. (R10-295) At the bottom of the hopper is a screw conveyor, or augur, which is approximately thirty feet long. (R11-520) The auger moves the dust to a point where it is blown through pipes that run back to the drum, where the dust becomes part of the asphalt mix again. (R10-230-232) The baghouse does not contain any interior lighting system. (R10-312)

Standard Havens provided a protective screen to cover the auger, or screw conveyor. The screen was developed to protect the auger from falling debris and in particular to prevent the fabric bags, which fall occasionally, from jamming the auger. (R11-539) The screen contains large openings, approximately four inches square, to allow the dust that is pulsed from the bags to pass into the screw conveyor. (R11-555) Jack Clements, who was the senior

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design engineer at Standard Havens when the Alpha Mark III Baghouse was designed, testified that the large openings in the screen were designed to prevent "bridging," or dust collection, which would occur if the openings were smaller. (R11-555)

The baghouse is not a work area. (R11-559) In order to prevent casual access, the door to enter the baghouse was located approximately eight feet off the ground. (R11-548) It was, therefore, impossible to enter the baghouse without climbing up a ladder. (R10-320) Jack Clements testified that the entry door was located eight feet off the ground in compliance with standards of the American National Standards Institute ("ANSI"). In particular, the 1976 ANSI standards applicable to screw conveyors provided for guarding of the conveyors and included a provision for "Guarded by Location or Position," which provided that:

> This means that the moving parts are so protected by their remoteness from the floor, platform, walkway, or other working level, or by their location with reference to frame, foundation, or structure as to remove the foreseeable risk of accidental contact by persons or objects. Remoteness from foreseeable, regular, or frequent presence of public or employed personnel may in reasonable circumstances constitute guarding by location.
>
> Section 5.09.2.1 of the standards provides that:
>
> In order to be guarded by location or position, all moving parts which require guarding to protect employees against hazards shall be at least 7 feet (2.14m) above the walkway, roadway, or walking surface or otherwise located so that employees cannot come in contact with the hazardous moving parts while in their workplace station.

(R11-558)

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In addition to guarding by location, away from the work area, when the baghouse was operational, Standard Havens provided (through its Operations and Maintenance Manual) for a lockout procedure to protect workers from injury during maintenance (or nonoperational) periods. The manual, in accordance with applicable ANSI standards, instructed workers to de-energize equipment before working on it and put a padlock, or tag, on the controls at the motor control center so that the equipment could not be inadvertently started by another worker. (R11-549-550, 560)

A ladder was not furnished by Standard Havens as part of the baghouse equipment. (R11-548) A ladder was installed by Community Asphalt after erection of the baghouse was completed. (R10-320) The end of the baghouse closest to the inspection door is the "discharge end," where the air lock is located and the dust comes out of the baghouse. (R10-250) The screw conveyor rests on bearings and runs along the bottom of the baghouse, for a length of nearly thirty feet. When the plant and baghouse are operating, the fan in the baghouse creates a great deal of suction, which makes it difficult to open the inspection door. (R10-300) The hot gases in the baghouse are normally about 350 degrees Fahrenheit, and the fan causes the dust to fly around. (R10-310) Mike Garfer, Senior Vice President of Community Asphalt and Benitez' supervisor, testified that no one would be in the baghouse under those circumstances. (R10-310) Garfer testified that there was no point in having a light in the bag house when no one would be in there because of the heat and flying dust. (R10-328)

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Assembly and Operation of the Baghouse at Community Asphalt

Mike Garfer of Community Asphalt testified at trial about the assembly and operation of the baghouse. Community Asphalt purchased the baghouse from Standard Havens, and pursuant to the contract between the parties, Standard Havens delivered the components of the baghouse with drawings, and Community Asphalt assembled the baghouse. (R10-219-220) The contract also provided for technical assistance from Standard Havens in the installation, erection and start up of the baghouse. (R10-219-222)

The plans furnished to Community Asphalt by Standard Havens included Drawing K2111775, which indicated that the baghouse components included seven sections of protective screening. (R10-263) The drawing also contained the following notation:

> The screen assembly is designed for protection of the screw conveyor from foreign object damage. It is not to be used as a walking surface unless adequate temporary planking is used to cover the screen.

(R10-264)

The contract documents between Community Asphalt and Standard Havens provided that the protective screening would extend the length of the auger. (R10-286) The drawings furnished by Standard Havens provided that the screen assemblies were to rest on the hopper side wall angles and were to be slid into place. (R10-308) If the screens had been put in place with a two inch gap between each of the screen segments, the screen would have covered the entire length of the auger. (R11-564) When the screen assembly was put in place by Community Asphalt without the two-inch gaps,

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it covered the auger, except for approximately 15 inches at the end. (R10-285) This fact was never brought to the attention of anyone at Standard Havens by Community Asphalt. (R10-285)

The baghouse began operation in January of 1987. (R10-312) A section of protective screening was removed on the first day the baghouse was put into operation. The section of the screen closest to the discharge end had been lifted by dust, and when it came down it was jammed into the air lock device. (R10-251-252) Community Asphalt removed that section of the protective screening. (R10-254)

Benitez' Training and Knowledge of Safety Procedures

The baghouse began operation on January 9, 1987. (R10-312) Fernando Benitez was first employed by Community Asphalt in February of 1987. (R10-239) He was made plant operator approximately one month prior to his accident. (R11-433) Benitez was trained for his job as plant operator by three Community Asphalt employees, including Mike Garfer. (R11-434) As part of his training, Benitez testified that Garfer described to him the operation of the baghouse and exactly how things worked. (R11-435)

According to Garfer an operation and maintenance manual for the Alpha Mark III baghouse was received by Community Asphalt at least a couple of months prior to Benitez' accident. (R10-272)[3] In regard to safety procedures, the manual provided:

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[3] Standard Havens' shipping documents showed that two complete manuals were shipped to Garfer by DHL on December 3, 1986, a month before the baghouse began operation. (R12-664)

> Safety first. Most accidents 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.

(R10-275) Garfer testified that the manual was available to Benitez as plant operator. (R10-272) Although Benitez agreed that it would be good common sense to read the manual before working on equipment he was unfamiliar with, he testified that he never read the manual for the baghouse. (R11-443)

According to Garfer all Community Asphalt employees were instructed that whenever they needed to work on motorized equipment they were supposed to go to the motor control center, throw the circuit breaker, and place a lock on it. (R10-276-277) This was known as the "lockout procedure." The baghouse could be locked out entirely, or individual components, such as the fan or the screw conveyor could be locked out. Community Asphalt provided its employees with padlocks for that purpose. (R10-277) According to Garfer, no one at Community Asphalt felt that it was alright to go inside the baghouse with the auger operating. (R10-291) Garfer testified that if Benitez was going to enter the baghouse to check on something, he would be expected to lock out the screw conveyor before doing so. (R10-299) As part of his training to become

plant operator, Benitez was specifically instructed on the lockout procedure. (R10-278) Benitez testified that prior to his accident he knew that he should lock out equipment before he did any work in or near it. (R11-472) Benitez also testified that he knew the purpose of the lockout procedure was for safety and that the procedure applied to all equipment, including the baghouse. (R11-473)

The Accident

Benitez testified that on the date of the accident, June 5, 1987, the plant had been shut down at the end of the day. He went into the baghouse in preparation for changing the bags the next day. He noticed that there was dust on the walls. (R11-438-439, 475) Benitez decided to clean the walls. Garfer testified that there was no operational or maintenance reason to remove dust from the walls of the baghouse. (R10-301) Jack Clements, who was Standard Havens' senior design engineer at the time the Alpha Mark III baghouse was developed, testified that dust typically collected on the walls of the baghouse, but that did not pose any problem in regard to operation of the baghouse. (R11-546) On the date of the accident, Benitez advised Garfer that he intended to go into the baghouse to clean the walls. (R10-302) Garfer told Benitez that it was unnecessary. (R10-303) Garfer testified that it was "unsafe" to enter the baghouse with the auger on and it never crossed his mind that Benitez would do it. (R10-303)

Prior to entering the baghouse, Benitez testified that he locked out all the circuit breakers except for the auger. (R11-

440) He deliberately turned the auger on. (R11-475) He stated that he covered his mouth and nose with a rag, climbed up the ladder and went into the baghouse with a rake. (R11-439-440)

When he entered the baghouse, the first thing Benitez noticed was that a piece of protective screening, immediately inside the door, was missing, and the moving auger was exposed. (R11-444, 476) He stepped over the auger where the piece of screen was missing and stood on the first section of screening. (R11-444, 477) The auger was operating and the blades were spinning beneath the screen. (R11-446) Benitez faced the wall, put the rake above his head and pulled the dust down toward him. (R11-446, 480) In regard to visibility, Benitez testified that, "It was dim, very dim. You could hardly see." (R11-447, 448) He continued raking and stepping to his left. (R11-447) Benitez testified that when he reached the end, he stepped down and felt a lot of pain and the auger was pulling him down. (R11-447) His leg was partially amputated and he now wears a prosthesis. He returned to work about five months after the accident and at the time of trial was doing the same job as before the accident. (R11-445)

The Expert Testimony

Plaintiff's expert, John B. Schroering was an engineer, specializing in mechanical and safety engineering. (R10-330) In regard to the Alpha Mark III Baghouse, Schroering, on direct examination, gave three opinions, without explanation or elaboration. First, the auger was not properly guarded. Second, there was no "interlock" on the door to the baghouse. An interlock

is a switch that would deactivate all equipment when the door was opened. (R10-340) Third, there was no warning in regard to the condition of the baghouse. (R10-340)

On cross-examination Schroering conceded that during operation, the baghouse was guarded by its location:

> A. [Schroering] Well, when it is operating, you can't get in it anyway, as I understand because of the high temperature, and environmental conditions, and the negative pressure of opening the door. Certainly, when it is off --
>
> Q. [Attorney for Standard Havens] No, I am speaking when it is on.
>
> A. No one is likely to be in there.
>
> Q. Right, during that phase, it is guarded by its location, is it not, from a practical matter?
>
> A. You could say that, yes.

(R10-352)

As to Standard Havens' lock out procedure, Schroering's only objection to it was that it was not "fail safe." When asked about the procedure, Schroering conceded that a lock out procedure had a lot of merit:

> Q. Lock out is one of the best methods to protect individuals from injury?
>
> A. It is a method. I wouldn't say it is the best. I wouldn't approve it as best.
>
> Q. Well, you say you wouldn't say that that was the best, but in the order of safety devices, isn't the lock out system recognized as the first system that you should employ in order to protect people during maintenance periods?
>
> A. That is a system to use, yes.
>
> Q. And that is the one primarily talked about by people in the industry, is it not?

A. ANSI put out a brand new standard on lock out procedure. I am not faulting a lock out procedure. It has a lot of merit.

(R10-355)

In regard to his opinion that the lock out was not "fail safe" Schroering testified:

A. The method you provide for locking out isn't fail safe.

***

The method you describe for locking out, telling somebody to put a padlock on is not a fail safe method.

Q. If people do put a padlock on it, and de-energize it, there is no way that they would come in contact with a moving auger. You agree with that?

A. Yes.

Q. If you talk about a[n] interlock system. If somebody is deliberately intending to go inside the baghouse with the auger operating, it is always possible to bypass an interlock system, is it not?

A. You are talking about like a switch on the access door?

Q. Sure.

A. It is possible to bypass it, yes.

(R10-353)

In regard to a warning, Schroering did not testify as to what type of warning should have been provided. He simply stated that: "There was nothing to warn that I could see, or insufficient warnings that this condition existed in there, a warning not to enter, or -- In my opinion, also, warnings were insufficient." (R10-340) On cross, Schroering stated: "A warning is a warning. It is no fail safe means, just like a warning, telling somebody to put a lock on, that is not a fail safe means." (R10-354)

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Schroering acknowledged that Standard Havens' manual called for de-energizing equipment before working around it, and stated: "That is a way to do it, but not fail safe." (R10-356)

Standard Havens' expert, Victor Petershack, is a mechanical engineer. Petershack is a member of the American Society of Mechanical Engineers, and serves on its board of directors of codes and standards, which oversees safety standards work, including conveyor safety standards. (R12-678) He is a member of the committee which drafted the ANSI standards for conveyors. (R12-679) In regard to ANSI standard B20.1, applicable to conveyors, Petershack was the chairman of the subcommittee that spent five or six years writing the standard, which was promulgated in 1976. (R12-679-680)

Prior to testifying, Petershack examined the baghouse at Community Asphalt and reviewed Standard Havens' operations and maintenance manual, as well as a set of the plans and drawings for the baghouse. (R12-682-685) The ANSI standards applicable to screw conveyors are set out in ANSI B20.1 - 1976. The standard provides that a screw conveyor must be locked out before any work is to be performed on the conveyor. (R12-686) This standard is accepted and used by Occupational Safety and Health (OSHA). (R12-686, 689) The standard does not provide for use of an interlock system, and Petershack testified that it is preferable to guard by a physical guard or by location. (R12-687)

Petershack testified that the design of the Alpha Mark III Baghouse, and specifically the screw conveyor, met all the safe

practice provisions of the ANSI B-20.1, 1976, which includes standards for maintenance (nonoperational) as well as operational procedures. (R12-691) In particular, the screw conveyor is guarded by its location because it is totally enclosed by the baghouse and the inspection door to the baghouse is eight feet off the ground. It is specifically provided in the standard that any parts that could cause injury that are above seven feet in the air can be guarded by location. (R12-691) Petershack testified that the area within the baghouse was definitely not a work area. (R12-693) The only purpose for being in the baghouse is to perform maintenance. (R12-701) In this case there was a guard (the baghouse) that totally surrounded the screw conveyor and a closed inspection door. (R12-691) The safety standard specifically provides for a lock out to prevent injury to a worker doing maintenance. (R12-692) There are no other procedures suggested by ANSI. (R12-697) Petershack testified that it would be a violation of the safety standards and not good judgment to take the dust off the baghouse walls with the auger running. (R12-712)

QUESTION CERTIFIED

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?

ISSUES

I.

WHETHER A MANUFACTURER CAN BE FOUND NEGLIGENT (OR STRICTLY LIABLE) WHERE IT DESIGNED A PRODUCT WITH SAFETY FEATURES IN COMPLIANCE WITH ALL APPLICABLE INDUSTRY STANDARDS AND WHERE AN ACCIDENT WAS CAUSED BY PLAINTIFF'S DELIBERATE DISREGARD OF A DESIGNED SAFETY FEATURE THAT INDISPUTABLY WOULD HAVE PREVENTED THE ACCIDENT HAD IT BEEN EMPLOYED.

II.

WHETHER A MANUFACTURER CAN BE FOUND LIABLE ON A CLAIM FOR NEGLIGENCE WHERE THE JURY SPECIFICALLY FOUND THAT PLAINTIFF KNOWINGLY MISUSED THE PRODUCT IN A MANNER UNFORESEEABLE TO THE MANUFACTURER.

SUMMARY OF ARGUMENT

I.

Standard Havens was entitled to a judgment as a matter of law in the case at bar because its baghouse was designed with safety features that indisputably would have prevented the accident in question. Specifically, the baghouse, including the auger, was guarded by its location away from the work area and by the fact that the inspection door was eight feet off the ground. That precluded casual or incidental contact with the auger by workers when the baghouse was in operation. In addition, during non-operational, or maintenance periods, Standard Havens' manual provided for a lockout procedure, whereby a worker was instructed to de-energize and lock out any machinery before working on or around it.

The plaintiff, who admitted he had been trained in the lockout procedure and knew it was for his safety, disregarded the procedure and deliberately turned the auger on before entering the baghouse. As plaintiff's own expert admitted, if the lockout procedure had been followed, plaintiff's accident would never have occurred.

Under Florida law, a manufacturer has no duty to design a product with backup safety features to guard against an accident in the event a consumer deliberately disregards available, effective safety procedures. Florida courts have repeatedly held that a manufacturer has no duty to design a fail-safe product. To

impose such a duty would make the manufacturer an insurer of its product, which is contrary to Florida law.

In addition, the proximate cause of plaintiff's injury was his own knowing, unforeseeable misuse of the product by deliberately turning on the auger prior to entering the baghouse in violation of company rules and contrary to the instructions in Standard Havens' manual. Even if there was evidence of alleged negligence on the part of Standard Havens because its product could be misassembled so that there was a gap in the screening over the auger, that alleged negligence was not the proximate cause of injury. Plaintiff's unforeseeable misuse was an independent, intervening and superseding cause of his injury. In addition, plaintiff's conduct materially changed the zone of danger created by any negligence on the part of Standard Havens. The danger that plaintiff's leg would be severed by a moving auger was a danger created by the plaintiff's conduct, and that conduct was the proximate cause of injury. Standard Havens was, therefore, entitled to a judgment as a matter of law.

II.

If, as the trial court contended, there were factual issues in regard to misuse to be determined by a jury, the jury in the case at bar resolved those factual issues in favor of Standard Havens. The jury specifically found that the plaintiff knowingly misused the product in a manner that was neither intended nor foreseeable by the manufacturer. The trial court incorrectly concluded that a knowing, unforeseeable misuse only barred a claim

for strict liability, but not for negligence. Logically, if unforeseen product misuse precludes liability under the harsher standard of strict liability (where no negligence in failing to foresee is required), it must surely preclude liability for negligence.

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ARGUMENT

I.

A MANUFACTURER CANNOT BE FOUND NEGLIGENT (OR STRICTLY LIABLE) WHERE IT DESIGNED A PRODUCT WITH SAFETY FEATURES IN COMPLIANCE WITH ALL APPLICABLE INDUSTRY STANDARDS AND WHERE AN ACCIDENT WAS CAUSED BY PLAINTIFF'S MISUSE OF THE PRODUCT BY DELIBERATELY DISREGARDING A DESIGNED SAFETY FEATURE THAT INDISPUTABLY WOULD HAVE PREVENTED THE ACCIDENT HAD IT BEEN EMPLOYED.

This case raises the issue of the scope of the misuse defense in a product liability case brought under Florida law. The type of misuse involved in this case was the plaintiff's knowing and deliberate disregard of a designed safety feature -- a "lockout" procedure. Standard Havens' baghouse was designed so that its moving parts, including the auger, were to be "locked out", or de-energized and padlocked prior to entry of a worker into the baghouse to perform maintenance work. Standard Havens' manual specifically instructed workers performing maintenance on the product to de-energize all moving equipment and plaintiff admitted that his employer trained him in the lockout procedure.

On the date of the accident, after the plant and baghouse had been shut down for the day, plaintiff intentionally turned on the auger and entered the baghouse to perform maintenance work which his employer had told his was unnecessary. When he reached an area at the end of the baghouse where there was no screening over the auger, his leg came in contact with the moving auger and was severed below the knee. Plaintiff's own expert conceded that if the equipment had been locked out (as provided for in Standard Havens' manual), this accident could not have occurred. (R10-353)

In the case at bar, the manufacturer was not liable, as a matter of law, because (A) a manufacturer has no duty to design a product with backup safety features that would make a product fail safe; (B) the sole proximate cause of plaintiff's injury was his misuse of the product by deliberately disregarding a designed safety feature which indisputably would have prevented his injury; and (C) plaintiffs have conceded that failure to warn is not an issue in this case.

A. A manufacturer has no duty to design a product with backup safety features that would make a product fail safe.

The manufacturer, Standard Havens, designed its baghouse with safety features to prevent workers from coming in contact with moving equipment, such as the auger. Standard Havens provided the following safeguards for both operation and maintenance periods:

1. Guarding by location. It designed and manufactured the baghouse so that the moving parts of the equipment (i.e. the auger) operated inside a large metal container (the baghouse) with an inspection door which could not be opened during normal operations (when temperatures were in excess of 300 degrees Fahrenheit) and, further, which was eight feet off the ground, thus, not accessible to workers.

This safety feature was in compliance with ANSI standard B-20.1, 1976, for conveyors (including screw conveyors) that provides for guarding by location. Guarding by location means that the moving equipment is protected by its remoteness from the working area. In the case at bar, even plaintiffs' expert conceded

that the baghouse was not a work area. (R10-351) In addition, section 5.09.2.1 of ANSI Standard B-20.1 provides that in order to be guarded by location or position, "all moving parts which require guarding to protect employees against hazards shall be at least 7 feet (2.14m) above the walkway, roadway, or walking surface or otherwise located so that employees cannot come in contact with the hazardous moving parts while in their workplace station." (R11-558) In order to enter the baghouse it was necessary to climb up a ladder to enter the inspection door, which was eight feet above the ground.

2. Designing so that maintenance was unnecessary during operation. Standard Havens designed the baghouse in such a manner that it was unnecessary to perform maintenance while the auger was operating.

3. The lockout procedure. Standard Havens designed the baghouse and instructed its customers so that during those rare occasions when a worker had to enter the baghouse to perform maintenance, the equipment would be turned off and locked out. The lockout procedure was also in compliance with ANSI Standard B-20.1. It was undisputed that Community Asphalt instructed all of its employees on the lockout procedure, and Benitez acknowledged that prior to his accident he knew that he should lock out equipment before he did any work in or near it. (R10-278; R11-472)

A manufacturer has no duty to provide backup safety features to prevent injury in the event a worker misuses its product by

disregarding a safety procedure. Under Florida law it is well established that a manufacturer has no duty to design a fail-safe product. *Knox v. Delta International Machinery Corp.*, 554 So. 2d 6, 7 (Fla. 3d DCA 1989) (manufacturer under no duty to produce a fail safe product); *Perez v. National Presto Industries, Inc.*, 431 So. 2d 667, 668 (Fla. 3d DCA), *rev. denied*, 440 So. 2d 352 (Fla. 1983) (no duty to design product that will never wear out); *Voynar v. Butler Manufacturing Co.*, 463 So. 2d 409, 412 (Fla. 4th DCA), *rev. denied*, 475 So. 2d 696 (Fla. 1985) (manufacturer has no duty to produce a foolproof product); *Husky Industries, Inc. v. Black*, 434 So. 2d 988, 991 (Fla. 4th DCA 1983) (manufacturer has no duty to make a product accident proof); *Royal v. Black and Decker Manufacturing Co.*, 205 So. 2d 307 (Fla. 4th DCA), *cert. denied*, 211 So. 2d 214 (Fla. 1968); *see also Mendez v. Honda Motor Co.*, 738 F. Supp. 481 (S.D. Fla. 1990) (failure to design a product so that it cannot be misused is not a design defect under Florida law).

A good illustration of the rule is contained in *Royal v. Black and Decker Manufacturing Co., supra*. In that case a worker at a construction site was electrocuted when he attempted to connect the plug of a power drill into an extension cord. "The plug of the drill was apparently not unusual in any respect, but, allegedly, it could have been designed in such a fashion as to make more remote the possibility of a direct or accidental contact with the energized prongs." 205 So. 2d at 308. The worker's widow sued the manufacturer on theories of negligence, breach of warranty and

strict liability. In affirming the dismissal of the complaint, the court stated:

> The plaintiff would have liability imposed for the failure to make the plug accident-proof. It is not in itself a breach of duty to supply materials which are reasonably safe and customarily used, even though the material might conceivably be made more safe, nor must the manufacturer make his product "more" safe when the danger to be avoided is obvious to all.

205 So. 2d at 310.

The reason courts have held that a manufacturer has no duty to design a fail-safe product is that the manufacturer is not an insurer of its products. *West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 90 (Fla. 1976); *Perez v. National Presto Industries, Inc.*, 431 So. 2d 667, 669 (Fla. 3d DCA), *rev. denied*, 440 So. 2d 352 (Fla. 1983).

In the case at bar, Plaintiff's own expert conceded that if the equipment had been locked out (as provided for in Standard Havens' manual), this accident could not have occurred. (R10-353) It was undisputed that Standard Havens' safety features for its baghouse complied with all applicable standards of the American National Standards Institute (ANSI) and the Occupational Safety and Health Administration (OSHA).

In the case at bar, plaintiff's own expert, John B. Schroering testified that the auger was in fact guarded by its location and that Standard Havens' lockout system was a recognized and accepted safety measure. The entire gist of Schroering's testimony was that Standard Havens' designed safety features were not "fail safe."

Although Schroering testified that there should have been some type of guard over the auger, Schroering acknowledged that, "You could use this guarding by location, yes." (R10-348) As to using a guard or grate over the auger, Schroering also conceded that it was not necessary to have a guard or grate when the baghouse was in operation, because the auger was guarded by its location.

> A. [Schroering] Well, when it is operating, you can't get in it anyway, as I understand because of the high temperature, and environmental conditions, and the negative pressure of opening the door. Certainly, when it is off--
>
> Q. No, I am speaking when it is on.
>
> A. No one is likely to be in there.
>
> Q. Right, during that phase, it is guarded by its location, is it not, from a practical matter?
>
> A. You could say that, yes.
>
> Q. So, in other words, when there is nobody in there, no reason for a guard, right?
>
> A. Right.

(R10-351) Schroering testified that the only time a grate or guard would be necessary was when the auger was not operating. Obviously, however, if the auger is not operating there is no danger of coming in contact with a moving auger.

> Q. And you mentioned the fact that there should be some type of guard over the auger when it is not in operation, is that correct?
>
> A. I think as a matter of policy the auger should have been guarded with a fixed guard, yes.

(R10-352)

As to Standard Havens' safety feature of a lockout system, Schroering testified that: "I would say that is certainly one primary safety requirement, yes." (R10-149) Schroering, however, testified that there should have been an "interlock" on the door to the baghouse, which would deactivate all equipment when the door was opened. (R10-340) Schroering's only criticism of the lockout procedure was that it was not "fail safe." He testified that:

> The method you provide for locking out isn't **fail safe**. You have to foresee that somebody is going to go in there, if you had a method where you open the door, and it kicks off the electricity, that is **fail safe**, and saying something, people forget, it is human nature, and they are going to forget, or not lock out. This has to be foreseen by the manufacturer. They should realize this might happen. If it does, this is an unsafe condition. The method you describe for locking out, telling somebody to put a pad lock on is not a **fail safe** method.

(R10-353) Schroering also stated that Standard Havens' lock out procedure had a lot of merit.

> Q. Lock out is one of the best methods to protect individuals from injury?
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> A. It is a method. I wouldn't say it is the best. I wouldn't approve it as best.
>
> Q. Well, you say you wouldn't say that that was the best, but in the order of safety devices, isn't the lock out system recognized as the first system that you should employ in order to protect people during maintenance periods?
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> A. That is a system to use, yes.
>
> Q. And that is the one primarily talked about by people in the industry, is it not?
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> A. ANSI put out a brand new standard on lock out procedure. **I am not faulting a lock out procedure. It has a lot of merit.**

(R10-355)

Schroering further conceded that even an interlock system is not fail safe and can be bypassed. (R10-354)

> Q. Are you aware of the fact that Standard Havens in the operation and maintenance manual stated in their safety clause that is should be, the equipment should be de-energized, and tagged out before working around it, or going into it?
>
> A. I don't remember the exact wording, but I believe you are right, yes.
>
> Q. All right. That is certainly an acceptable method for Standard Havens to instruct its customers, is that true?
>
> A. It is a way to do it, but not **fail safe.**
>
> Q. Well, Mr. Schroering if someone deliberately wants to go inside with a moving auger, is there any system that is fail safe?
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> A. With enough ingenuity, probably not.

(R10-356)

It is evident, based on the testimony of plaintiffs' own expert, that if Benitez had followed the lockout procedure, he would never have had his leg severed by the moving auger. A manufacturer cannot be liable when it manufactures a product with an easily available safety feature that would have prevented exactly the type of injury that occurred. In this case, disregard of the safety feature -- a lockout procedure -- required deliberation, effort and time. This is not a case where a safety procedure was overlooked due to temporary forgetfulness or a momentary loss of concentration. Prior to Benitez' accident, the baghouse had been shut down for the day. In order to be in the baghouse with the auger running, Benitez had to go to the motor control and deliberately turn on the auger. He had to then walk

to the baghouse, climb an eight foot ladder, and pull open a heavy door. Just inside the door, the moving auger was running and exposed because Benitez' employer had removed a section of the screening. Benitez then had to maneuver his way past the exposed auger to begin raking dust from the walls.

Standard Havens had no duty to provide a backup safety feature in the event a worker deliberately disregarded the lockout procedure. *Knox v. Delta International Machinery Corp., supra; Perez v. National Presto Industries, Inc., supra; Voynar v. Butler Manufacturing Co., supra; Husky Industries, Inc. v. Black, supra; Royal v. Black and Decker Manufacturing Co., supra.* In *Knox,* the plaintiff injured his fingers while using a jointer machine, which had been designed with a safety guard. The plaintiff was injured after the guard was removed from the machine and the court recognized that there was no duty to design a machine so that its safety features could not be bypassed, stating:

> The fact that the safety guard could be, and was in the instant case, detached from the machine, resulting in the loss of two of the plaintiff James Knox's fingers, did not, as urged, render the machine unreasonably dangerous so as to permit a jury finding to that effect. This is so because a manufacturer is, **as a matter of law**, under no duty to produce a fail-safe product, so long as the product poses no unreasonable dangers for consumer use. Producing an otherwise safe jointer machine with a detachable safety guard poses no such unreasonable dangers.

554 So. 2d at 7 (Emphasis added). In the case at bar, the action of the plaintiff in violating the lockout procedure is no different than the removal of the safety guard in *Knox*.

In *Mendez v. Honda Motor Co.*, 738 F.Supp. 481 (S.D. Fla. 1990), plaintiff was injured in an accident when the shock absorbers he improperly installed on his motorcycle fractured. The plaintiff brought negligence and strict liability claims against the distributor of the motorcycle. In dismissing the complaint, the court stated:

> [T]he manufacturer's failure to make it impossible for an untrained, inexperienced person to mount shock absorbers incorrectly is, **as a matter of law**, not a design defect. Plaintiff clearly misused the motorcycle by installing the shock absorbers, without referring to the owner's manual or any other source of information, upside down. We cannot say that the failure to design a product so that it cannot be misused is a design defect under Florida law.
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> The law is clear that, in Florida, the manufacturer is not to assume the role of insurer. *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976).

738 F.Supp. at 484 (Emphasis added).

Under Florida law a manufacturer has no duty, ***as a matter of law,*** to design a fail safe product that will prevent injury to a consumer who disregards or fails to use a safety feature provided by the manufacturer. *Kroon v. Beech Aircraft Corp.*, 628 F.2d 891 (5th Cir. 1980) (no duty to design aircraft so that it would be rendered inoperable if pilot failed to perform a standard pre-flight safety check to determine if controls were locked); *Mendez, supra,* (no duty to design product so that it could not be misused by person who failed to read manufacturer's manual); *Knox, supra,* (no duty to design product so as to prevent injury if safety guard is removed). It is obvious that in *Kroon*, *Mendez,* and Knox the courts concluded that a consumer's misuse of a product by

deliberately disregarding a designed safety feature was **unforeseeable as a matter of law.** That is necessarily so because if a manufacturer has a duty to design a product so as to prevent an unforeseeable misuse, then the manufacturer would be made an absolute insurer of its products. Even with the adoption of the harsher standard of strict liability, Florida courts have repeatedly emphasized that a manufacturer is not an insurer of its products. *See, e.g., West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 90 (Fla. 1976); *Perez v. National Presto Industries, Inc.*, 431 So. 2d 667, 669 (Fla. 3d DCA), *rev. denied*, 440 So. 2d 352 (Fla. 1983).

In *McCain v. Florida Power Corp.*, 593 So. 2d 500 (Fla. 1992), this Court held that in negligence cases the question of foreseeability, as it relates to the element of duty, is a **question of law** for the court. *Id.* at 503. Based on the numerous Florida decisions holding that a manufacturer has no duty to make a "fail safe" product, it is clear that a manufacturer discharges its duty to prevent foreseeable harm to a consumer if it manufactures a product with a safety feature that would have prevented the accident in question. The manufacturer has no further duty, as a matter of law, to foresee that a consumer will misuse its product by disregarding that safety feature and to design its product so that it is fail safe.

B. <u>The sole proximate cause of plaintiff's injury was his misuse of the product by deliberately disregarding a designed safety feature which indisputably would have prevented his injury</u>.

In addition, it is evident that the proximate cause of plaintiff's injury was his knowing misuse of the product by intentionally turning on the auger prior to entering the baghouse, in violation of company policy, in flagrant disregard of his training, and contrary to the instructions in Standard Havens' manual. A plaintiff's knowing misuse of a product is, as a matter of law, the proximate cause of injury and a manufacturer may not be held liable for negligence where a consumer's injuries are caused by that misuse. *Kroon v. Beech Aircraft Corp.*, 628 F.2d 891 (5th Cir. 1980); *Watson v. Lucerne Machine & Equipment, Inc.*, 347 So. 2d 459 (Fla. 2d DCA), *cert. denied,* 352 So. 2d 176 (Fla. 1977).

In *Kroon,* the manufacturer equipped an aircraft with a "gust-lock" system so that the moveable aircraft parts would not be damaged by wind. The plane could not take off with the gust-lock engaged, although it could be moved on the ground. Release of the gust lock was a part of the pre-takeoff check. *Kroon*, an experienced pilot, did not check the controls before attempting to takeoff. As a result, *Kroon* was forced to abort the takeoff, which seriously damaged the plane. *Kroon* alleged that the manufacturer was negligent in failing to design the gust lock system in a manner that would make the plane inoperable when the controls were locked. The district court entered a summary judgment for the manufacturer and the Fifth Circuit, applying Florida law, affirmed, stating:

> To be sure, the gust lock system could have been designed differently, and had it been designed so that the aircraft could not be moved with the lock engaged, this accident could not have happened. In this sense, the design of the lock system was a cause of the accident. On the facts of this case, however, the design was not a proximate cause of the accident. The district court aptly analogized the circumstances of this accident to a situation in which a pilot takes off with only a gallon of fuel in his tanks. Such accidents can and do happen; and no doubt an airplane could be designed to make such an accident impossible. It would, however, strain reason to suggest that the failure to make the aircraft foolproof in that detail proximately causes the resulting disaster if an experienced pilot familiar with the particular aircraft were to take off without checking to see if he had sufficient fuel.
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> * * *
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> On this occasion, Kroon was careless, and his carelessness was the only legal cause of the accident. If there was any fault in the design of the gust lock system, it was clearly no more than a remote condition that furnished Kroon with the opportunity to be careless.

628 F.2d at 893-94. Similarly in the case at bar, Benitez's knowing misuse of the baghouse was the proximate cause of his injuries. Although plaintiffs asserted that there should have been an interlock on the baghouse door, the failure to provide an interlock cannot be the proximate cause of injury where the injury would have been avoided if Benitez had used the lockout safety feature that was provided.

Plaintiffs argued before the Eleventh Circuit that plaintiff's misuse of the product by disregarding the safety procedure of the lockout was not the sole proximate cause of injury. The gist of plaintiffs' argument was that there was evidence of negligence on the part of Standard Havens because the

screening in the baghouse did not fully extend over the auger, thereby creating a gap where the auger was exposed.

Even if there was evidence from which a jury could find that Standard Havens was negligent because the screening in the baghouse could be misassembled in such a manner that there was a gap which left a portion of the auger exposed, that negligence was not the proximate cause of plaintiff's injury. The proximate cause of injury was plaintiff's unforeseeable and highly unusual conduct in misusing Standard Haven's product. Plaintiff's conduct was an efficient independent, intervening cause which broke the chain of causation between the defendant's alleged negligence and plaintiff's injury. Further, plaintiff's accident was not within the scope of danger created by defendant's alleged negligence.

If an independent efficient cause intervenes between the negligence of the defendant and the injury, and the original negligence does not contribute to the force or effectiveness of the intervening cause, the original negligence is not regarded as a proximate cause of the injury, even though the injury might not have occurred but for the original negligence. *Tampa Electric Co. v. Jones*, 138 Fla. 746, 190 So. 26 (1939); *Pope v. Pinkerton-Hays Lumber Co.*, 120 So. 2d 227, 231 (Fla. 1st DCA), *cert. denied*, 127 So. 2d 441 (Fla. 1961). Where a negligent act creates a condition that is subsequently acted on by another unforeseeable, independent, and distinct agency to produce the injury, the original act is the remote and not the proximate cause of injury, even though the injury would not occur except for the act. A

defendant's negligence is not the proximate cause of an injury that results from the intervention of a new and independent cause that is not reasonably foreseeable by the defendant, is not a consequence of the defendant's negligence, operates independently of his negligence, and is the efficient cause of the injury in the sense that the injury would not occur in its absence. *Benedict Pineapple Co. v. Atlantic Coast Line R. Co.*, 55 Fla. 514, 46 So. 732 (Fla. 1908).

In addition, where an intervening act causes an injury that was not a foreseeable result of the defendant's original act of negligence, courts refuse to extend liability for remote injuries. *Department of Transportation v. Anglin*, 502 So. 2d 896 (Fla. 1987); *Stahl v. Metropolitan Dade County*, 438 So. 2d 14 (Fla. 3d DCA 1983). As stated by the court in *Stahl*:

> Not every negligent act of omission or commission gives rise to a cause of action for injuries sustained by another. It is only when injury to a person...has resulted directly and in ordinary natural sequence from a negligent act without the intervention of any independent efficient cause, or is such as ordinarily and naturally should have been regarded as a probable, not a mere possible, result of the negligent act, that such injured person is entitled to recover damages as compensation for his loss.

Id. at 19, (quoting *Pope v. Pinkerton-Hays Lumber Co.*, 120 So. 2d 227, 229 (Fla. 1st DCA), *cert. denied*, 127 So. 2d 441 (Fla. 1961), citing *Seaboard Air Line Ry. v. Mullin*, 70 Fla. 450, 70 So. 467 (1915). "Natural and probable" consequences are "those that a person by prudent human foresight can anticipate as likely to result from an act, because they happen so frequently from the

commission of such an act that in the field of human experience they may be expected to happen again." *Pope, supra*, at 230.

In the case at bar, plaintiff's intervening conduct was unforeseeable as a matter of law, and that unforeseeable conduct materially altered the zone of danger created by defendant's alleged negligence, thereby causing an unforeseeable injury. Benitez misused Standard Havens' product by failing to follow an elementary procedure designed for his own safety. He disregarded the instructions in Standard Havens' manual, violated company policy and failed to use good common sense. Benitez deliberately re-energized the auger and entered the baghouse to perform a job (raking dust off the walls) that his employer told him was unnecessary. His supervisor testified that it never crossed his mind that Benitez would enter the baghouse with the auger running. Even if Benitez was intent on raking dust off the walls, there was no reason to have the auger running while he did it. The moving auger did not in any way facilitate dust removal from the walls. Benitez could have followed the lockout procedure, raked the dust into the hopper, left the baghouse and then turned on the equipment to auger the dust that had fallen into the hopper out of the baghouse.

Upon entering the baghouse to perform an unnecessary job, with the auger on for no reason, the first thing Benitez saw was the exposed, moving auger, because his employer had removed a piece of the screening immediately inside the door. Benitez maneuvered his way past the moving, exposed auger and proceeded to walk

sideways in the dark down the length of the baghouse until he encountered the moving auger which he had turned on.

The pattern of conduct shown by the testimony in this case was certainly highly unusual and unforeseeable as a matter of law. It was also independent of, and not set in motion by, any alleged negligence on the part of Standard Havens. Obviously, the presence of a gap in the screening did not cause Benitez to turn on the auger. In addition, the injury sustained by Benitez -- the severance of his leg by the moving auger -- was not even remotely within the zone of risk created by an exposed, non-moving auger. It was not only improbable, but in fact impossible, for Benitez' leg to have been severed by a non-moving auger. The risk of that injury was created by Benitez when he intentionally turned on the auger prior to entering the baghouse.

In *Barati v. Aero Industries, Inc.*, 579 So. 2d 176 (Fla. 5th DCA), *rev. denied*, 591 So. 2d 180 (Fla. 1991), a negligence and strict liability case, the court held as a matter of law that although there was evidence the product in question was defective, the "efficient intervening cause" of plaintiff's injuries was his "improvident choice of method to repair the mechanism." In *Barati*, plaintiff was injured when he attempted to repair a tarpaulin-pulling mechanism on a trailer. Plaintiff alleged that the product was defective because when the mechanism was used to haul garbage, the cable often slipped off the pulley, causing the tarpaulin to fall on top of the load being hauled, and the cable to fall upon the ground. As plaintiff was attempting to repair the unit, the

defect manifested itself. The cable slipped off the pulley and went slack and the plaintiff fell backwards off a ladder. Plaintiff admitted that use of a ladder was not required and that standing on scaffolding would have been a better choice. The court held, "We think his improvident choice of method to repair the mechanism was the efficient intervening cause of his injuries". 579 So. 2d at 178.

In *Derrer v. Georgia Electric Co.*, 537 So. 2d 593 (Fla. 3d DCA), *rev. denied*, 545 So. 2d 1366 (Fla. 1989), the defendant power companies negligently caused a traffic light to become inoperable and the plaintiff was injured in an intersectional collision. In *Derrer*, similar to the case at bar, the jury found the defendants 70% negligent and the plaintiff 30% comparatively negligent. The trial court entered a judgment for the defendants notwithstanding the verdict, and the appellate court affirmed. The court held that although the defendants' negligence was a cause-in-fact of the accident, plaintiff's "oblivious behavior in not realizing she was entering an intersection was not a reasonably foreseeable consequence of the defendant's negligence in causing the traffic light to become inoperable." *Id.* at 594. The court stated that "such a bizarre occurrence is . . . beyond the scope of any fair assessment of the danger created by the inoperable traffic light." *Id.*

In *Miranda v. Home Depot, Inc.*, 604 So. 2d 1237 (Fla. 3d DCA 1992), a store customer was injured when she pushed her head and torso through a ladder to pick up merchandise that was blocked by

the ladder. On withdrawing from the ladder, she struck her head on a cross bar of the ladder. The court recognized that in a previous case it had held that there were fact issues presented in regard to negligence when a customer at the same store chain climbed a ladder to reach merchandise and fell. The court stated that the risk created by the presence of the ladder was that a customer would climb it and fall. In the case before it, however, the court stated that: "It was neither probable nor foreseeable that someone would injure themselves in this manner. Thus, there was no breach of duty in failing to guard against the injury which occurred." *Id.* at 1239.[4]

In the case at bar neither Benitez' conduct in turning on the auger nor the injury sustained was a probable, foreseeable result of a gap in the protective screening at the end of the baghouse.

> Florida courts, in accord with courts throughout the country, have for good reason been most reluctant to attach tort liability for results which although caused-in-fact by the defendant's negligent act or omission, seem to the judicial mind highly unusual, extraordinary, bizarre, or, stated differently, seem beyond the scope of any fair assessment of the danger created by the defendant's negligence.

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[4] *See also, Hohn v. Amcar, Inc.*, 584 So. 2d 1089 (Fla. 5th DCA 1991) (placement of coal dust storage bin near kiln by architectural firm which designed coal fuel system was not proximate cause of explosion where plant management modified bin and jerry-rigged a connection and plaintiff was injured when tubing was disconnected, allowing coal dust to escape and explode); *Hoffman v. Bennett*, 477 So. 2d 43, 44 (Fla. 3d DCA 1985) (builder who negligently left dangerous chemicals on church premises in an unguarded condition was not liable to plaintiffs where third party's negligent action of shaking the chemicals from his wet hands into plaintiff's face and eyes was a superseding intervening cause).

Stahl v. Metropolitan Dade County, 438 So. 2d at 19, quoted in *Department of Transportation v. Anglin*, 502 So. 2d at 899. Where reasonable persons could not differ, the question of intervening cause in one for the court. *Department of Transportation v. Anglin*, 502 So. 2d at 899.

In discussing "Unforeseeable Results of Unforeseeable Causes," the authors of *Prosser and Keeton on the Law of Torts* state:

> [O]nce the defendant's negligence is established, because injury of some kind was to be anticipated, intervening causes which could not reasonably be foreseen, and which are no normal part of the risk created, may bring about results of an entirely different kind.
>
> It is here at least that the line is drawn to terminate the defendant's responsibility. The courts have exhibited a more or less instinctive feeling that it would be unfair to hold the defendant liable. The virtually unanimous agreement that the liability must be limited to cover only those intervening causes which lie within the scope of the foreseeable risk, or have at least some reasonable connection with it, is based upon a recognition of the fact that the independent causes which may intervene to change the situation created by the defendant are infinite, and that as a practical matter responsibility simply cannot be carried to such lengths.

W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts*, § 44, p. 311 (5th ed. 1984).

In the case at bar, the proximate cause of injury was Benitez' unforeseeable conduct in misusing Standard Havens' product, which resulted in an unforeseeable injury.

C. Plaintiffs have conceded that failure to warn is not an issue in this case.

In its initial brief filed with the Eleventh Circuit, Standard Havens argued that it was also entitled to a directed verdict because the evidence clearly showed that plaintiff was warned never to enter the baghouse with the auger running. In their answer brief, plaintiffs never mentioned or responded to the warning issue, thereby conceding that Benitez was, in fact, warned. That concession is understandable in light of the trial testimony and well established case law.

Benitez testified at trial that he knew he should lock out equipment before he did any work on or near it. He also testified that he knew the purpose of the lockout procedure was for safety. (R11-472, 473) Standard Havens cannot be held liable for failing to put a sign on the baghouse door that warned workers to lockout the equipment before entering, when Benitez was already warned.

It is well established under Florida law that a manufacturer will not be held liable for failure to warn of a product-connected danger where the danger is obvious or the product user has actual knowledge of the danger. *Cohen v. General Motors Corp.*, 427 So. 2d 389 (Fla. 4th DCA 1983); *Talquin Electric Cooperative, Inc. v. Amchem Products, Inc.*, 427 So. 2d 1032 (Fla. 1st DCA 1983); *Clark v. Boeing Co.*, 395 So. 2d 1226 (Fla. 3d DCA 1981); *Wickham v. Baltimore Copper Paint Co.*, 327 So. 2d 826 (Fla. 3d DCA 1976), *cert. denied*, 339 So. 2d 1173 (Fla. 1976); *May v. Allied Chlorine & Chemical Products, Inc.*, 168 So. 2d 784 (Fla. 3d DCA 1964); *see also, Loughan v. Firestone Tire & Rubber Co.*, 749 F.2d 1519, 1525

(11th Cir. 1985); *Kroon v. Beech Aircraft Corp.*, 628 F.2d 891 (5th Cir. 1980) (applying Florida law).

In analyzing this issue, some courts have focused on the element of "duty," and held that there is no duty to warn of a danger where a product user has actual knowledge of the danger. *See, e.g., Clark v. Boeing Co.*, 395 So. 2d 1226 (Fla. 3d DCA 1981); *May v. Allied Chlorine & Chemical Products, Inc.*, 168 So. 2d 784 (Fla. 3d DCA 1964). Other courts have focused on the element of "causation," and held that the failure to warn cannot be the proximate cause of an injury where the plaintiff has actual knowledge of the danger. Under either analysis, there can be no finding of negligent failure to warn in the case at bar because the plaintiff testified that he knew he should lock out equipment before he did any work on or near it and that the purpose of the lockout procedure was for safety. (R11-472, 473)

II.

A MANUFACTURER CANNOT BE FOUND LIABLE ON A CLAIM FOR NEGLIGENCE WHERE THE JURY SPECIFICALLY FOUND THAT PLAINTIFF KNOWINGLY MISUSED THE PRODUCT IN A MANNER UNFORESEEABLE TO THE MANUFACTURER.

In the case at bar, the trial court, in denying Standard Havens' motion for directed verdict, concluded that there were factual questions to be resolved by the jury as to whether Benitez knowingly misused Standard Havens' product. In addition, the trial court concluded that if the jury found a knowing, unforeseeable misuse, there would be a verdict for Standard Havens on the claim for strict liability, but not the claim for negligence.

The court instructed the jury on misuse as follows:

> The Defendant contends that Fernando Benitez's injury occurred as a result of his knowing "misuse" of the Alpha/Mark III Baghouse. A manufacturer is entitled to expect a normal use of his product. If the Plaintiff's injury occurred because he knowingly used the product in a manner for which the product was not made or adapted, and not reasonably foreseeable to the Defendant, then the Plaintiff cannot recover. It is for you to decide whether the Plaintiff was knowingly using the product at the time of the accident in a manner for which the product was not made or adapted, and whether this use was reasonably foreseeable to the Defendant.

(R4-159-14)

Question number 3 on the verdict form asked the jury to determine:

> Did Fernando Benitez knowingly misuse the Alpha/Mark III baghouse in a manner for which the product was not made and not foreseeable to the Defendant which was a legal cause of his injury.
>
> The jury answered, "Yes." (R4-160-2)

As found by the Eleventh Circuit, the trial court's ruling in regard to misuse as a complete defense to a strict liability claim was correct. *Benitez v. Standard Havens, Inc.*, 7 F.3d 1561 (1993). Under Florida law, it is well established that a manufacturer is not strictly liable for injuries caused by a knowing misuse of its product. *High v. Westinghouse Electric Corp.*, 610 So. 2d 1259, 17 F.L.W. S350 (Fla. 1992) (strict liability inapplicable where product is not used for its intended purpose); *Talquin Electric Cooperative, Inc. v. Amchem Products, Inc.*, 427 So. 2d 1032, 1033 (Fla. 1st DCA 1983) (knowing misuse of a product does not render manufacturer liable); *Clark v. Boeing Co.*, 395 So. 2d 1226, 1229 (Fla. 3d DCA 1981) (knowing misuse of product creates no liability on the part of the manufacturer); *Watson v. Lucerne Machinery &*

Equipment, Inc., 347 So. 2d 459 (Fla. 2d DCA), *cert. denied*, 352 So. 2d 176 (Fla. 1977) (knowing misuse is sole cause of plaintiff's injury); *see also Mendez v. Honda Motor Co.*, 738 F. Supp. 481, 484 (S.D. Fla. 1990) (failure to design a product so that it cannot be misused is not a design defect under Florida law).

If a knowing unforeseeable misuse is a complete bar to a strict liability claim, then it is also a complete bar to a negligence claim. Logically, if unforeseen product misuse precludes liability under the harsher standard of strict liability (where no negligence in failing to foresee is required), it must surely preclude liability for negligence. The fact that a knowing misuse is a complete defense to a negligence claim has been recognized in at least two cases applying Florida law. *Kroon v. Beech Aircraft Corp.*, 628 F.2d 891 (5th Cir. 1980); *Voynar v. Butler Manufacturing Co.*, 463 So. 2d 409 (Fla. 4th DCA 1985), *rev. denied*, 475 So. 2d 696 (Fla. 1985).

Kroon was a product liability action based on allegations of negligence, breach of warranty and strict liability. The court noted that under any of those theories a plaintiff must show that the defendant's conduct was a proximate cause of the injury. 628 F.2d at 893. The court concluded that the plaintiff's misuse of the product was the sole cause of his injury, thereby negating recovery under any of the theories alleged.

In *Voynar v. Butler Manufacturing Co.*, 463 So. 2d 409 (Fla. 4th DCA 1985), *rev. denied*, 475 So. 2d 696 (Fla. 1985) a product liability action was brought based on theories of negligence and

strict liability. In that case, the defendant manufacturer requested three special instructions at trial:

> A supplier of a product who knows or has reason to know that the product is likely to be dangerous in normal use has a duty to warn those who may not fully appreciate the possibility of such danger. However, there is no duty to warn of an obvious danger.
>
> [from *Cohen v. General Motors Corp.*, 427 So. 2d 389 (Fla. 4th DCA 1983).]
>
> A knowing misuse of a manufacturer's product creates no liability on the part of the manufacturer. Under that circumstance, the sole cause of the injury is the misuse of the product.
>
> [from *Clark v. Boeing Co.*, 395 So. 2d 1226 (Fla. 3d DCA 1981).]
>
> It is not itself a breach of duty to supply materials which are reasonably safe and customarily used, even though the material might conceivably be made more safe, nor must the manufacturer make his product "more" safe when the danger to be avoided is obvious to all.
>
> [from *Clark v. Boeing Co., supra*.]
>
> The court stated that:
>
> The . . . instructions deal with related, but different legal issues and are not inconsistent. Furthermore, they are accurate statements of the law. To have given all instructions would have been the most correct course.

463 So. 2d at 413.

It is apparent that the knowing, unforeseeable misuse of a product must be a complete defense in a product liability action based on negligence. Because the trial court did instruct the jury on comparative negligence as a defense to plaintiff's negligence claim in the case at bar, the trial court may have been of the opinion that misuse was no longer a complete defense, but should be treated as an aspect of comparative negligence. *Cf. Auburn*

Machine Works Co., Inc. v. Jones, 366 So. 2d 1167, 1170-72 (Fla. 1979) (holding that patent danger rule merged into comparative negligence); *Blackburn v. Dorta,* 348 So. 2d 287, 292-93 (Fla. 1977) (holding that implied assumption of the risk merged into comparative negligence).

In *Auburn* and *Blackburn*, this Court ruled that the defenses of patent danger and assumption of the risk are treated as an aspect of comparative negligence. However, those defenses are drastically different than misuse. With patent danger and assumption of the risk, the plaintiff assumes a risk created by the manufacturer; with misuse, the plaintiff assumes a risk of his own creation.

Another reason why *Auburn* and *Blackburn* do not mean that misuse should be treated as an aspect of comparative negligence is that since those cases were decided, Florida courts have continued to hold that misuse or an unintended use is a complete defense in strict liability actions. *High v. Westinghouse Electric Corp.,* 610 So. 2d 1259 (Fla. 1992) (strict liability inapplicable where product is not used for its intended purpose); *Talquin Electric Cooperative, Inc. v. Amchem Products, Inc.,* 427 So. 2d 1032, 1033 (Fla. 1st DCA 1983) (knowing misuse of a product does not render manufacturer liable); *Clark v. Boeing Co.,* 395 So. 2d 1226, 1229 (Fla. 3d DCA 1981) (knowing misuse of product creates no liability on the part of the manufacturer). If misuse does not merge into comparative negligence in a strict liability case, then it should not merge into comparative negligence in a negligence case.

Plaintiffs relied upon the decision of the Eleventh Circuit in *Mosher v. Speedstar Div. of AMCA Int'l, Inc.*, 979 F.2d 823, 825 (11th Cir. 1992). As pointed out by the Eleventh Circuit in its opinion in the case at bar, however, *Mosher*, is distinguishable. In *Mosher* there was no issue of unforeseeable misuse. The record showed, and the court found, that the misuse by Mosher was clearly foreseeable. In the case at bar, on the other hand, the record showed and the jury found, that the misuse by Benitez was unforeseeable.

A manufacturer has no duty to design a product that is safe for an unforeseeable misuse. Where an injury results from an unforeseeable misuse, the proximate cause of injury is the unforeseeable misuse. It is axiomatic that without foreseeability of injury, there can be no liability for negligence.

In discussing the defense of misuse, the authors of *Prosser and Keeton on the Law of Torts* state:

> There has always been considerable doubt and uncertainty about when intervening misconduct will constitute a superseding cause in any kind of a negligence case and the same is true with products liability. There is a tendency for courts to hold that intervening conduct or misconduct of a kind that is rare and unusual, and in that sense not reasonably foreseeable, will sever the chain of causation. This is a debatable position unless the intervening conduct changes entirely the nature of the occurrence from the kind that one would reasonably anticipate from the nature of the defect that was proved. However, the majority American position seems to be that an unforeseeable misuse of a product that is a proximate cause of an accident (thereby concurring with product defect to cause it) is a superseding cause. Sometimes in so holding, the court simply means by "unforeseeable" that which is "rare and "unusual". But more often this is said to mean that the use must be one that a maker could not be expected to guard against

> in the designing of his product. So if the product was defective as designed for its ordinary and reasonably foreseeable uses or if defective because of a flaw in it, but a use was made of the product that the maker could not be expected to guard against, then the accident was not proximately caused by the product defect.

W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts*, § 102, p. 711 (5th ed. 1984).

Although that discussion is contained in a section of the text dealing with "Proximate Cause and Strict Liability in Tort," it is clear that proximate cause is an essential element whether plaintiff's case is based on negligence or strict liability. It is just as clear that the absence of proximate cause is fatal to plaintiff's claim under either theory.

In the case at bar, the jury found that plaintiff knowingly misused the product in a manner that was neither intended nor foreseeable by the manufacturer. That misuse was the proximate cause of plaintiff's injury. Consequently, plaintiff should not be permitted to recover against the manufacturer on his claim for negligence. A manufacturer cannot be found negligent for failing to foresee an unforeseeable injury. If a manufacturer is found liable for an injury caused by a knowing, unforeseeable misuse, then the manufacturer would be an insurer of its products.

CONCLUSION

Appellant would urge the Court to answer the certified question in the affirmative.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of this corrected brief was served by U.S. Mail this 27th day of April, 1994 upon G. William Bissett, Esq., Hardy, Bissett & Lipton, P.A., P.O. Box 9700, Miami, Florida 33131-9700, and Donald T. Norton, Esq., Cohen & Cohen, 2525 North State Road 7, Hollywood, Florida 33021-3206.

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