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

---

REPLY BRIEF OF APPELLANT

THORNTON, DAVID, MURRAY, DAVIS, THORNTON & SREENAN, P.A.
BY: KATHLEEN M. O'CONNOR
Florida Bar No. 333761
Attorneys for STANDARD HAVENS PRODUCTS
2950 S.W. 27th Avenue
Suite 100, Grove Professional Bldg.
Miami, Florida 33133-3704
Telephone: (305) 446-2646
Facsimile: (305) 441-2374

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT IN RESPONSE TO APPELLEES' STATEMENT OF THE CASE AND FACTS 1

ARGUMENT 3

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. 4

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. 11

CERTIFICATE OF SERVICE 15

THORNTON, DAVID, MURRAY, DAVIS, THORNTON & SREENAN, P.A., ATTORNEYS AT LAW
2950 SOUTHWEST 27TH AVENUE, SUITE 100, MIAMI, FLORIDA 33133-3704 • TELEPHONE (305) 446-2646

TABLE OF AUTHORITIES

CASES **PAGE**

Barati v. Aero Industries, Inc.,
579 So. 2d 176 (Fla. 5th DCA),
rev. denied, 591 So. 2d 180 (Fla. 1991) 7, 9, 10

Blaw-Knox Food & Chem. Equip. Corp. v. Holmes,
348 So. 2d 604 (Fla. 4th DCA 1977) 13

Clark v. Boeing Co.,
395 So. 2d 1226 (Fla. 3d DCA 1981) 12

Crislip v. Holland,
401 So. 2d 115 (Fla. 4th DCA 1981),
rev. denied, 411 So. 2d 380 (Fla. 1981) 5

Department of Transportation v. Anglin,
502 So. 2d 896 (Fla. 1987) 9

Derrer v. Georgia Electric Co.,
537 So. 2d 593 (Fla. 3d DCA),
rev. denied, 545 So. 2d 1366 (Fla. 1989) 7

Ellsworth v. Sherne Lingerie, Inc.,
303 Md. 581,
495 A.2d 348 (Md. App. 1985) 13, 14, 15

Gonzalez v. G.A. Braun, Inc.,
608 So. 2d 125 (Fla. 3d DCA 1992) 12

Herrick v. Monsanto Co.,
874 F.2d 594 (8th Cir. 1989) 14

Higgins v. E.I. DuPont De Nemours & Co., Inc.,
671 F. Supp. 1063 (D. Md. 1987),
aff'd, 863 F.2d 1162 (4th Cir. 1988) 14

Hoffman v. Jones,
280 So. 2d 431 (Fla. 1973) 11

Holley v. Mt. Zion Terrace Apartments, Inc.,
382 So. 2d 98 (Fla. 3d DCA 1980) 6, 7

Hurt v. Coyne Cylinder Co.,
956 F.2d 1319 (6th Cir. 1992) 13

Kroon v. Beech Aircraft Corp.,
628 F.2d 891 (5th Cir. 1980) 12

THORNTON, DAVID, MURRAY, DAVIS, THORNTON & SREENAN, P.A., ATTORNEYS AT LAW
2950 SOUTHWEST 27TH AVENUE, SUITE 100, MIAMI, FLORIDA 33133-3704 • TELEPHONE (305) 446-2646

CASES (Continued) **PAGE**

Mosher v. SpeedStar Div. of AMCA International, Inc.,
979 F.2d 823 (11th Cir. 1992) 13

Sears, Roebuck & Co. v. McKenzie,
502 So. 2d 940 (Fla. 3d DCA 1987),
rev. denied, 511 So. 2d 299 (Fla. 1987) 13

Stahl v. Metropolitan Dade County,
438 So. 2d 14 (Fla. 3d DCA 1983) 9

Standard Havens v. Benitez,
7 F.3d at 1561, 1565 (11th Cir. 1993) 13

Stazenski v. Tennant Co.,
617 So. 2d 344 (Fla. 1st DCA 1993) 5, 6

Talquin Electric Cooperative, Inc. v. Amchem Products, Inc.,
427 So. 2d 1032 (Fla. 1st DCA 1983) 12

Watson v. Lucerne Machinery & Equipment, Inc.,
347 So. 2d 459 (Fla. 2d DCA),
cert. denied, 352 So. 2d 176 (Fla. 1977) 12

OTHER AUTHORITIES

Florida Statutes, Section 768.81(2) 11

Restatement (Second) of Torts § 449, comment "b" 6

Restatement (Second) of Torts § 442 7

THORNTON, DAVID, MURRAY, DAVIS, THORNTON & SREENAN, P.A., ATTORNEYS AT LAW
2950 SOUTHWEST 27TH AVENUE, SUITE 100, MIAMI, FLORIDA 33133-3704 • TELEPHONE (305) 446-2646

STATEMENT IN RESPONSE TO APPELLEES' STATEMENT OF THE CASE AND FACTS

A. Statement of the Case

Appellees' statement of the case is not a statement of the case. Instead, it is a presentation of legal argument in which appellees erroneously contend that the jury's verdict was inconsistent and that plaintiff's knowing, unforeseeable misuse of Standard Havens' product should be treated as an aspect of comparative negligence. The jury's verdict is in no way inconsistent with Standard Havens' position that even if there was evidence of negligence and defect, plaintiff's knowing and unforeseeable misuse of the product was the independent, intervening and superseding cause of injury. Unforeseeable misuse is a causation issue, not a comparative negligence issue. Because the case at bar indisputably involves unforeseeable misuse which was the intervening, superseding cause of injury, plaintiffs may not recover, regardless of whether their claims are based on strict liability or negligence.

B. Statement of the Facts

Appellees begin their statement of the facts with what is apparently a boilerplate opening, contending that Standard Havens presented a one-sided statement of the facts in its initial brief. Appellees do not, however, back up their assertion by pointing out any facts that were omitted or misstated in Standard Havens' initial brief.

THORNTON, DAVID, MURRAY, DAVIS, THORNTON & SREENAN, P.A., ATTORNEYS AT LAW
2950 SOUTHWEST 27TH AVENUE, SUITE 100, MIAMI, FLORIDA 33133-3704 • TELEPHONE (305) 446-2646

In addition, appellees' so-called statement of the facts is simply a lengthy presentation of conclusory allegations and argument. At pages 8-10 of the answer brief, captioned "Evidentiary Facts," appellees argue it was "foreseeable" that workers would occasionally be in the baghouse to perform maintenance. While that is true, it was unforeseeable, according to all the testimony, that a worker would ever enter the baghouse with the auger running.

Appellees also assert that a Mr. Santos was injured by a moving auger in 1984 or 1985, however, the evidence clearly showed that Mr. Santos was injured while in the process of disassembling a baghouse, not while performing routine maintenance work.

Appellees also erroneously contend at page 15 of their brief that Benitez was never provided with a copy of Standard Havens' manual for the baghouse and, in footnote 13, that Community Asphalt did not receive a user's manual until many months after the baghouse began operation. In fact, Standard Havens' shipping documents showed that two complete manuals were shipped to Mr. Garfer at Community Asphalt on December 3, 1986, a month before the baghouse began operation. (R12-664) Garfer's recollection was that he did not receive the manuals until sometime after the baghouse began operation. Garfer testified that the manuals were received at least a month or two prior to Benitez's accident, and that the manuals were available for Mr. Benitez's use as plant supervisor. (R10-272) Benitez himself agreed that it would be good common sense to read a manual before working on equipment he

THORNTON, DAVID, MURRAY, DAVIS, THORNTON & SREENAN, P.A., ATTORNEYS AT LAW
2950 SOUTHWEST 27TH AVENUE, SUITE 100, MIAMI, FLORIDA 33133-3704 • TELEPHONE (305) 446-2646

was unfamiliar with, but he testified that he never bothered to read the manual for the baghouse. (R11-443)

At page 17 of the brief, appellees contend that when Benitez entered the baghouse on the date of the accident, he 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 by a protective screen. That assertion has no support in the record and Benitez never testified to any such thing. According to Benitez, he had never even been inside the baghouse prior to the accident. (R11-441) Instead of a protective screen guarding the entire length of the auger, Benitez testified that when he entered the baghouse, the first thing he noticed was that a piece of screening, immediately inside the door, was missing, and that the moving auger was exposed. (R11-444, 476)

ARGUMENT

The issue certified by the Eleventh Circuit Court of Appeals is whether a plaintiff's knowing misuse of a product in a manner neither intended nor foreseeable by the defendant manufacturer bars recovery, as a matter of law, on a products liability claim sounding in negligence.

Unforeseeable misuse is a causation issue, not (as erroneously contended by appellees) a comparative negligence issue. A knowing, unforeseeable misuse is an intervening, superseding cause which severs the chain of causation between alleged negligence on the part of a manufacturer and the plaintiff's injury.

THORNTON, DAVID, MURRAY, DAVIS, THORNTON & SREENAN, P.A., ATTORNEYS AT LAW
2950 SOUTHWEST 27TH AVENUE, SUITE 100, MIAMI, FLORIDA 33133-3704 • TELEPHONE (305) 446-2646

Because unforeseeable misuse is the issue in this case, Standard Havens was entitled (as set forth in Point I of its argument) to a directed verdict where plaintiff's misuse of the product in question was both knowing and unforeseeable as a matter of law. Alternatively (as set forth in Point II of its argument), if there were fact questions about whether the misuse of the product was "unforeseeable" and "knowing," the jury resolved those fact issues against the plaintiffs, and the trial court erred in holding that a knowing, unforeseeable misuse would only bar a claim for strict liability, but not for negligence. Because knowing, unforeseeable misuse is an intervening, superseding cause of injury, plaintiffs may not recover under a negligence or a strict liability claim.

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.

In responding to appellant's first issue on appeal - that Standard Havens was entitled to a directed verdict - appellees have either missed or ignored the point and totally failed to address Standard Havens' argument that the plaintiff's conduct was, as a matter of law, an independent, intervening and superseding cause of injury.

THORNTON, DAVID, MURRAY, DAVIS, THORNTON & SREENAN, P.A., ATTORNEYS AT LAW
2950 SOUTHWEST 27TH AVENUE, SUITE 100, MIAMI, FLORIDA 33133-3704 • TELEPHONE (305) 446-2646

On pages 29-37 of their brief, appellees argue that there was evidence from which a jury could conclude that Standard Havens was negligent and that the baghouse was defectively designed because, as assembled by Community Asphalt, there was a gap in the screening at the end of the baghouse. That misses the point. The point is that, assuming there was such evidence, the plaintiff's own unforeseeable conduct in deliberately 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, was a superseding cause of plaintiff's injury.

In their argument, appellees have placed primary reliance upon the cases of *Crislip v. Holland*, 401 So. 2d 1115 (Fla. 4th DCA 1981), *rev. denied*, 411 So. 2d 380 (Fla. 1981), and *Stazenski v. Tennant Co.*, 617 So. 2d 344 (Fla. 1st DCA 1993). Neither case involved intervening cause, and neither case is applicable here. Both cases hold that a tortfeasor is liable if the tortfeasor is able to see that some injury will likely result in some manner as a consequence of his negligent acts. In a case involving intervening cause, if the defendant has been negligent, it is always foreseeable that some injury will result in some manner. The issue in an intervening cause case, however, is whether the subsequent negligence of another, including the plaintiff, breaks the chain of causation.

The only time the term "intervening cause" is even mentioned in appellees' brief is in the discussion at pages 35-6 of *Stazenski*

THORNTON, DAVID, MURRAY, DAVIS, THORNTON & SREENAN, P.A., ATTORNEYS AT LAW
2950 SOUTHWEST 27TH AVENUE, SUITE 100, MIAMI, FLORIDA 33133-3704 • TELEPHONE (305) 446-2646

v. Tennant Co., 617 So. 2d 344 (Fla. 1st DCA 1993), which did not even involve the any issue of comparative negligence or intervening cause. In *Stazenski*, the plaintiff fell from an elevated platform and struck his wrist on the sharp edge of an industrial sweeper which was manufactured by the defendant. The First District reversed a summary judgment for the manufacturer, holding that it was not necessary for plaintiff to prove that the manufacturer should reasonably foresee that the plaintiff would fall from a forklift onto the sharp edges, but only that it was foreseeable that a person might come into contact with the exposed sharp edges and be injured.

Appellees have completely misrepresented the court's holding in *Stazenski* by stating, at page 36 of the answer brief:

> Thus, the negligent behavior of the plaintiff [Stazenski] prior to coming into contact with the sweeper did not constitute an intervening cause which would relieve the manufacturer of liability.

That assertion is false and misleading because in *Stazenski* the appellate court never mentioned any alleged negligence on the part of the plaintiff, and the court never even discussed "intervening cause." Intervening cause was not even raised as an issue in that case. There was, for instance, no assertion that the plaintiff was the one who sharpened the edges of the machine before he fell on it.

Appellees also rely upon the case of *Holley v. Mt. Zion Terrace Apartments, Inc.*, 382 So. 2d 98 (Fla. 3d DCA 1980) and comment "b" to the Restatement (Second) of Torts § 449. Section

THORNTON, DAVID, MURRAY, DAVIS, THORNTON & SREENAN, P.A., ATTORNEYS AT LAW
2950 SOUTHWEST 27TH AVENUE, SUITE 100, MIAMI, FLORIDA 33133-3704 • TELEPHONE (305) 446-2646

449, entitled "Tortious or Criminal Act the Probability of Which Makes Actor's Conduct Negligent," provides that:

> If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby.

That section has generally been applied in premises liability cases like *Holley, supra*, where a condition or defect on the premises foreseeably increased the risk of a tortious or criminal act by a third party. Here, on the other hand, the presence of a gap in the screening did not create or increase the risk that a worker would turn on the auger prior to entering the baghouse.

The sections of the Restatement (Second) of Torts dealing with intervening cause are Sections 440-453. Appellees ignore Section 442, which sets forth considerations important in determining whether an intervening force is a superseding cause. While the factors are phrased with reference to conduct of a third party, it is well established under Florida law that conduct of the plaintiff may constitute an intervening cause of injury. *See, e.g., Barati v. Aero Industries, Inc.*, 579 So. 2d 176 (Fla. 5th DCA), *rev. denied*, 591 So. 2d 180 (Fla. 1991); *Derrer v. Georgia Electric Co.*, 537 So. 2d 593 (Fla. 3d DCA), *rev. denied*, 545 So. 2d 1366 (Fla. 1989).

In the case at bar, if the Restatement factors are adapted to a situation where the plaintiff's intervening conduct is alleged to be a superseding cause of injury, it is clear that <u>every</u> factor

is present. Factor (a) in determining superseding cause is that the intervening cause "brings about harm different in kind from that which would otherwise have resulted" from the defendant's negligence. In the case at bar, Mr. Benitez' intervening conduct in deliberately turning on the auger brought about a harm drastically different in kind from that which could otherwise result from the mere presence of a gap in the screening. As appellees point out, the risks associated with the gap were "tripping, being cut, breaking a leg, or otherwise sustaining some lesser type of injury." (Brief of appellees, p. 36).

Factor (b) is that the operation of the intervening cause or the consequences thereof "appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation." Clearly, in the case at bar, the consequences were extraordinary, because there was no danger whatsoever that the existence of a gap in the screening would cause Mr. Benitez' leg to be severed.

Factor (c) is that the intervening force is operating independently of any situation created by the defendant's negligence, or it is not a normal result of such a situation. That factor is present because the existence of the gap clearly did not cause Mr. Benitez to turn on the auger. Factor (d) is that the operation of the intervening force is due to the plaintiff's act or failure to act. In the case at bar, the intervening force was plaintiff's deliberate act of turning on the auger. Factor (e) is that the intervening force is due to an act which is wrongful.

Clearly, turning on the auger was wrongful. Lastly, factor (f) is the degree of culpability of the wrongful act which sets the intervening force in motion. Plaintiff's conduct in turning on the auger was not merely negligent. It was an intentional, deliberate and knowing violation of company policy.

The factors set forth in the Restatement are essentially guidelines for determining whether an intervening cause is unforeseeable and, based on those factors, the conduct of the plaintiff in the case at bar was clearly unforeseeable. Under Florida law, even where a defendant's negligence may have been a cause-in-fact of injury, the intervention of an unforeseeable intervening cause breaks the chain of causation. *Department of Transportation v. Anglin*, 502 So. 2d 896 (Fla. 1987); *Stahl v. Metropolitan Dade County*, 438 So. 2d 14, 20-21 (Fla. 3d DCA 1983).

In addition to raising arguments, citing cases and referring to portions of the Restatement of Torts that have no application whatsoever to the case at bar, appellees have totally failed to address the arguments in regard to intervening cause raised in Standard Havens' initial brief and have not even attempted to distinguish a single one of the cases relied upon by Standard Havens. Obviously, appellees have no response to the arguments and cannot distinguish the cases cited.

Appellees cannot distinguish *Barati v. Aero Industries, Inc.*, 579 So. 2d 176 (Fla. 5th DCA), *rev. denied*, 591 So. 2d 180 (Fla. 1991), where although a product was defective, the court held that the intervening cause of injury was plaintiff's improvident choice

of method to repair the defect. The appellees also cannot distinguish *Derrer v. Georgia Electric Co.*, 537 So. 2d 593 (Fla. 3d DCA), *rev. denied*, 545 So. 2d 1366 (Fla. 1989), where, although power companies were clearly negligent in causing a traffic light to become inoperable, the court held as a matter of law that the legal cause of injury was plaintiff's own oblivious conduct in not realizing she was entering an intersection.

In the case at bar, the facts are much worse than those in *Barati* and *Derrer*. Here, plaintiff made a series of deliberate and improvident choices. He deliberately re-energized the auger after the baghouse had been shut down for the day, entered the baghouse to perform an unnecessary maintenance function that did not require operation of the auger, left the auger on even after seeing that a portion of the screen over the auger at the entrance to the baghouse was missing and proceeded to walk sideways in the dark. That pattern of conduct is highly unusual and unforeseeable as a matter of law.

Standard Havens' argument that the plaintiff's conduct was, as a matter of law, the independent, intervening, and superseding cause of injury stands unchallenged and unrefuted in any way by the appellees. Clearly, plaintiff's unforeseeable conduct, which caused an unforeseeable injury, was the sole legal cause of injury in the case at bar as a matter of law, and Standard Havens was entitled to a directed verdict.

THORNTON, DAVID, MURRAY, DAVIS, THORNTON & SREENAN, P.A., ATTORNEYS AT LAW
2950 SOUTHWEST 27TH AVENUE, SUITE 100, MIAMI, FLORIDA 33133-3704 • TELEPHONE (305) 446-2646

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.

The trial court denied Standard Havens' motion for directed verdict based on the conclusion that it was for the jury to determine whether misuse of the product was knowing and unforeseeable. Even though the jury resolved those issues in Standard Havens' favor, the trial court entered a judgment in plaintiffs' favor because the court was of the opinion that a knowing, unforeseeable misuse was a complete bar to recovery in strict liability, but not negligence.[1]

Appellees have argued that the trial court was correct, based on Section 768.81(2), Florida Statutes, which provides that comparative fault diminishes proportionately the amount awarded to a claimant but does not bar recovery. Again, appellees miss the point. Although the adoption of comparative negligence by this Court in *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973), and its subsequent codification in Section 768.81(2) eliminated contributory negligence as a complete bar to recovery, it did not eliminate the doctrine of intervening cause.

Knowing, unforeseeable misuse is a causation issue, not a comparative negligence issue. Because knowing, unforeseeable

---

[1] Plaintiffs never filed any notice of cross-appeal, and despite their arguments to the contrary now, those factual findings by the jury are binding.

misuse is an intervening, superseding cause, it bars recovery regardless of whether the theory of liability is negligence, strict liability or breach of warranty. "Causation" is an essential element under any of those theories. Contrary to the arguments advanced by appellees, it is well established that a knowing, unforeseeable misuse will bar recovery under any theory of liability if the unforeseeable misuse is either: (1) the sole cause of injury; or (2) an intervening, superseding cause of injury. *See, e.g., Barati v. Aero Industries, Inc.*, 579 So. 2d 176 (Fla. 5th DCA) (in strict liability and negligence case, plaintiff's improvident choice of method to repair defect was efficient intervening cause of injury), *rev. denied*, 591 So. 2d 180 (Fla. 1991); *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) (knowing misuse is sole cause of plaintiff's injury), *cert. denied*, 352 So. 2d 176 (Fla. 1977); *Kroon v. Beech Aircraft Corp.*, 628 F.2d 891 (5th Cir. 1980) (applying Florida law) (in negligence, strict liability and breach of warranty case, plaintiff's misuse of product was intervening cause of damage).

None of the cases cited by appellees are on point, because none of those cases involved unforeseeable misuse of a product. *See, Gonzalez v. G.A. Braun, Inc.*, 608 So. 2d 125 (Fla. 3d DCA

THORNTON, DAVID, MURRAY, DAVIS, THORNTON & SREENAN, P.A., ATTORNEYS AT LAW
2950 SOUTHWEST 27TH AVENUE, SUITE 100, MIAMI, FLORIDA 33133-3704 • TELEPHONE (305) 446-2646

1992); *Sears, Roebuck & Co. v. McKenzie*, 502 So. 2d 940 (Fla. 3d DCA 1987), *rev. denied*, 511 So. 2d 299 (Fla. 1987); *Blaw-Knox Food & Chem. Equip. Corp. v. Holmes*, 348 So. 2d 604 (Fla. 4th DCA 1977) (no assertion that plaintiff misused the product).

In addition, appellees contend that in *Mosher v. SpeedStar Div. of AMCA International, Inc.*, 979 F.2d 823 (11th Cir. 1992), the court reversed a judgment for a product manufacturer because the 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." Appellees' statement is misleading because in *Mosher* the court did not rule that the jury instruction was an incorrect statement of Florida law. Instead, the court ruled that the instruction was improper because there was *no evidence* presented of unforeseeable misuse.

Finally, appellees have cited cases from other jurisdictions for the proposition that misuse is not an absolute bar to liability unless the misuse created the product defect or unless it was the sole proximate cause of injury. That is not correct because cases from other jurisdictions, consistent with case law in Florida, hold that misuse is an absolute bar to recovery where the misuse is either: (1) the sole cause of injury; or (2) an intervening, superseding cause. *Ellsworth v. Sherne Lingerie, Inc.*, 303 Md. 581, 495 A.2d 348, 355 (Md. App. 1985) ("Misuse of a product may also bar recovery where the misuse is the sole proximate cause of damage, or where it is the intervening or superseding cause"); *Hurt v. Coyne Cylinder Co.*, 956 F.2d 1319 (6th Cir. 1992) (applying

THORNTON, DAVID, MURRAY, DAVIS, THORNTON & SREENAN, P.A., ATTORNEYS AT LAW
2950 SOUTHWEST 27TH AVENUE, SUITE 100, MIAMI, FLORIDA 33133-3704 • TELEPHONE (305) 446-2646

Tennessee law) (plaintiff's misuse is an intervening cause if manufacturer establishes that intervening act was independent, efficient, conscious and not foreseeable); *Herrick v. Monsanto Co.*, 874 F.2d 594 (8th Cir. 1989) (applying South Dakota law) (misuse is a question of proximate cause); *Higgins v. E.I. DuPont De Nemours & Co., Inc.*, 671 F. Supp. 1063 (D. Md. 1987), *aff'd*, 863 F.2d 1162 (4th Cir. 1988) (plaintiff's unforeseeable misuse was intervening, superseding cause that cut off manufacturer's product liability).

In *Higgins*, *supra*, the court correctly recognized that unforeseeable misuse was an intervening, superseding cause, regardless of the theory of liability asserted.

> Whether the fault of [the manufacturer] in this case is conceptualized as a "design defect" or as a "labelling defect," and whether its liability be predicated upon negligence, strict liability under *Restatement (Second) of Torts* § 402A (1965), or breach of warranty, it is clear that if the Court can say as a matter of law that the plaintiffs' manner of use of the product cut off the chain of proximate causation, the defendant is entitled to summary judgment. In this regard, the Court finds persuasive the commentary in White and Summers, *Uniform Commercial Code* § 11-8 (2d ed. 1980), that no matter how described or under what theory asserted, behavior by the plaintiff that cuts off the chain of proximate causation is a bar to recovery on product liability claims. Maryland law is in agreement with White and Summers in disregarding, with regard to a plaintiff's misbehavior, any strict pigeon-holing exercise regarding the underlying product liability theory.

671 F. Supp. at 1066.

In deciding whether misuse is an intervening or superseding cause, the primary factors considered by courts in other jurisdictions are whether the misuse was unforeseeable, *Ellsworth*, *supra*

at 356; *Higgins*, *supra* at 1067; and whether the misuse was knowing, as opposed to being a result of momentary inattention or carelessness on the part of the product user. *Ellsworth*, *supra* at 356.

Under Florida law, misuse of a product bars recovery where it is the sole cause of injury or where the misuse is an intervening, superseding cause of injury. Based upon the jury's finding that the plaintiff knowingly misused the product in question in a manner neither intended nor foreseeable by the manufacturer, the misuse was an intervening, superseding cause of injury and plaintiffs may not recover under theories of negligence or strict liability.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was duly furnished by mail to G. WILLIAM BISSETT, ESQ., Hardy, Bissett & Lipton, P.A., P.O. Box 9700, Miami, Florida 33131-9700; and to DONALD T. NORTON, ESQ., Cohen & Cohen, 2525 North State Road 7, Hollywood, Florida 33021-3206 this 25th day of April, 1994.

THORNTON, DAVID, MURRAY, DAVIS, THORNTON & SREENAN, P.A.
Attorneys for STANDARD HAVENS PRODUCTS
2950 S.W. 27th Avenue
Suite 100, Grove Professional Bldg.
Miami, Florida 33133-3704
Telephone: (305) 446-2646
Facsimile: (305) 441-2374

BY: Kathleen M. O'Connor
KATHLEEN M. O'CONNOR
Florida Bar No. 333761