RECORD NO. 17-1075

In The

United States Court Of Appeals

For The Fourth Circuit

DEBORAH MEEK HICKERSON,

Plaintiff - Appellant,

v.

YAMAHA MOTOR CORPORATION U.S.A.; YAMAHA MOTOR COMPANY, LTD.,

Defendants - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA AT ANDERSON

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

This products liability case centers on a defectively designed product, a dangerous jet ski which Yamaha, the Appellee, failed to equip with simple seat straps for passengers to hold or with its "safety contour" seat to help them stay on the craft. The District Court excluded the Appellant's expert testimony on the jet ski's warning defects without a *Daubert* reliability analysis and found the craft's warnings adequate as a matter of law. That Court then ruled that the jet ski's warnings cured its defective design, and it granted summary judgment.

Yamaha initially resorts to product misuse arguments, allegedly supported by the attachment to its brief, which are largely irrelevant to this appeal. Although irrelevant here, however, this issue offers a clear window into how this case is bursting with factual disputes on its central issues--not just on the safety of the craft's design and adequacy of its warnings, but also on the cause of the injuries and possible defenses—rendering it hardly ripe for summary judgment.

Evidence showed that Ms. Deborah Hickerson was riding on Yamaha's "pocket rocket" jet ski, sitting on Yamaha's "standard" seat instead of its optional "safety contour" seat with a small seat-back.[1] (J.A. 1007, 1009.) Positioned entirely on the rear seat (J.A. 1032, 1123), Ms. Hickerson was the rear passenger, riding with

[1] Contrary to Yamaha's assertion, these colorfully descriptive terms are Yamaha's, not Ms. Hickerson's. (J.A. 1011, 1013.)

another adult female and two small minors, well within its weight limits. (J.A. 904, 1142.) The craft was operated by a minor, consistent with South Carolina law[2] and with Yamaha's *recommendation* on minor driving (J.A. 903). When the driver asked if everyone was ready, all replied "yes." (J.A. 1038.) Holding the waist of the girl in front of her when the driver accelerated, Ms. Hickerson fell backwards into the powerful jet thrust, causing severe injuries. (J.A. 2, 1040.)[3]

In addition to the central issue of the jet ski's design safety, this appeal concerns the propriety of the District Court's exclusion of the opinions of Dr. Kasbekar (Ms. Hickerson's expert). He opined that Yamaha's "safety contour" seat would have prevented her injuries, but the jury was never allowed to decide this issue. Dr. Kasbekar further testified (1) that warnings on the craft were inadequate, and (2) that an alternative, adequate warning—in direct view of the rear passenger—would have alerted passengers to the risk.

The District Court, *in limine*, found Dr. Kasbekar qualified to testify on both the craft's design and warning defects but excluded his proposed *adequate* warning opinion, finding it unreliable. Although the District Court's *in limine* ruling failed

[2] S.C. Code Ann. § 50-21-870 (allowing persons under the age of 16 to operate a jet ski with supervision of an adult who is not under the influence).

[3] Ms. Hickerson consumed two glasses of wine five hours before the accident. She was wearing a normal two-piece swimsuit, and Yamaha admits that users do not always wear wetsuits on jet skis. (J.A. 1118, 1148.)

to exclude Kasbekar's opinions that the *actual* warnings were inadequate, the Court granted Yamaha summary judgment, finding the warnings adequate as a matter of law.

Subsequently, in denying Ms. Hickerson's Motion to Reconsider, the District Court asserted, for the first time, that it had ruled, *sua sponte*, in its summary judgment order, that Kasbekar's *inadequacy* opinions were also unreliable, incorrectly assuming them to have been based on his proposed adequate warning. A fair *Daubert* analysis, however, would have revealed that Dr. Kasbekar's warnings inadequacy opinion was actually based instead on reliable indicia of (1) industry custom, (2) safety standards, and (3) testing.

Ms. Hickerson appealed because, *inter alia*, the District Court failed to conduct a meaningful *Daubert* reliability analysis of Dr. Kasbekar's warnings inadequacy opinion, and also because the District Court misinterpreted South Carolina product liability law as holding that a product's warnings insulate a product manufacturer from its duty of safe design.

II. SUMMARY OF ARGUMENT

While Yamaha misleadingly reframes many of Ms. Hickerson's arguments, it wholly fails to address other salient issues. The following sections reveal the lack of merit in Yamaha's positions.

A. South Carolina law requires manufacturers to design their products with reasonable safety as well as offering warnings and instructions.

Yamaha delays until the end of its brief a response to the *principal* facet of this case—Yamaha's decision not to reduce the dangers in their highly dangerous "pocket rocket" jet ski with even a single safety improvement (seat straps or its own "safety contour" seat). Yamaha failed to make either of these minor and inexpensive safety improvements it knew would protect passengers, who frequently fall backwards off their powerful machines, from the appalling risks about which it (inadequately) warned.

As every state, South Carolina's Supreme Court recognizes the crucial importance of requiring manufacturers to design their products with reasonable safety. Despite Yamaha's frail arguments, it is apparent that the South Carolina high court would reject the statutory misinterpretation of its intermediate appellate courts that allows manufacturers of *every* type of product to avoid *all* duties of design safety with warnings of whatever dreadful hazards a product may contain, no matter how easily and inexpensively those hazards may be designed away.

B. Dr. Kasbekar's opinions that the warnings were inadequate should not have been excluded without a *Daubert* reliability analysis.

As the District Court recognized, Dr. Kasbekar offered two separate sets of warning opinions. First, he opined that the warnings on the craft were *inadequate*. Second, he offered an alternative, *adequate* warning of orifice injuries, located on

the seat in view of at-risk passengers. In its December 2016 Reconsideration order, the District Court acknowledged that it had indeed failed to exclude Dr. Kasbekar's inadequacy opinions in its *in limine* order, when it did use a reliability analysis to exclude his proposed *alternative*, adequate warnings. In its subsequent Order granting Yamaha summary judgment, the District Court, *sua sponte*, excluded Dr. Kasbekar's warning inadequacy opinions without any further *Daubert* analysis, erroneously assuming that Kasbekar's warning *inadequacy* opinions were necessarily based on his arguably unreliable *adequate* warning opinions.

C. A jury can reasonably determine that the warnings were inadequate without expert testimony.

Ms. Hickerson also argued below that the adequacy of the location and form of the warnings in this case presented a simple jury question, without expert testimony. South Carolina law only requires expert testimony for matters that lie "beyond the common knowledge of the jury." *Babb v. Lee County Landfill SC, LLC*, 747 S.E.2d 468, 481 (S.C. 2013). By mandating expert testimony on the inadequacy of the warnings here, the District Court ignored this basic principle.

It should be self-evident that jurors could easily determine themselves—based on their experience and common sense—whether vitally important danger information blocked by the driver or placed on the very back end of a jet ski (cleverly hidden among many more prominent statements), rather than on the seat, might not

fairly be expected to catch the attention of passengers most at risk who most needed to see and understand this information.

III. ARGUMENT

A. South Carolina law does not hold that warnings alone protect manufacturers from their dangerously defective product designs.

While many of Yamaha's arguments on comment *j* to RESTATEMENT (2D) OF TORTS § 402A may appear facially plausible, they do not refute or even engage (except to mischaracterize) most of Ms. Hickerson's salient arguments, including the fact that this Court should apply design defect law the South Carolina Supreme Court embraces and surely would apply here. As previously explained, because lower South Carolina appellate courts have rotely misinterpreted the meaning of comment *j* in the 402A statute by reading that comment out of context (the *unavoidably dangerous* context of comments: *i*, *j*, and *k*), the South Carolina Supreme Court would surely allow design defect claims in most cases even if a manufacturer provided adequate warnings.

1. *Erie*-guessing a State's Supreme Court Position.

Since Yamaha appears to have missed this section of our opening brief, we remind it that, in diversity, a federal court applies the law of the state's ***highest*** court. *Private Mortg. Inv. Servs., Inc. v. Hotel & Club Assocs., Inc.*, 296 F.3d 308, 312 (4th Cir. 2002). If the highest court of the state has not ruled on the issue, a federal court then must predict how that court would rule. *Id.* While a state's intermediate

appellate court opinions often are the best indicia of state law, a federal court may disregard such decisions if it concludes that the state high court would rule differently. *Id.* In predicting how a state high court would rule, a federal court may "consider, *inter alia*: restatements of law, treatises, and well considered *dicta*." *Id.*

Since we folded these three factors into another format in our opening brief, it may be helpful now to reveal the problems in Yamaha's basic arguments by directly addressing the guiding factors for deciding how a state supreme court would rule, as set forth by this Court in *Private Mortg. Inv. Servs.*, above, and amplified by a couple self-evident preliminary factors:

a. Constitutional considerations (separation of powers).

It is beyond cavil that courts must interpret statutes as the legislature intended. In particular, this means that a court must interpret specific statutory provisions—particularly if their literal reading appears inconsistent with the thrust of the act—in the greater context of the statute as a whole. *See, e.g., City of Columbia v. Niagara Fire Ins. Co.*, 154 S.E.2d 674, 676 (S.C. 1967) ("The true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in the light of its manifest purpose. [C]ourts may not give to particular words a significance clearly repugnant to the meaning of the statute as a whole, or destructive of its obvious intent." (Citations omitted.)

Here, of course, the idea of the last sentence of comment *j*—that a manufacturer's only duty is to warn—must be read in the greater context of comments *j*, *k*, and *i* (which address only one topic: the duties of manufacturers of *unavoidably* dangerous products). Yamaha does not even attempt to address our arguments on this fundamental principle of statutory interpretation.

By definition, the manufacturer of an *unavoidably* ("inherently") dangerous product (like tobacco, alcohol, or a pharmaceutical drug) cannot design away the danger, which leaves only a duty to warn. That is all the pertinent phrase in comment *j* means, *in context*, **not** that producers of *every* type of product have no duty of safe design—even dangerous products, like jet skis, that can be made safer for passengers by simple seat straps or a "safety contour" seat. So, if a manufacturer of an *unavoidably* dangerous product provides an adequate warning (and avoids manufacturing defects from, say, contamination), it cannot fairly be held responsible for the harm from a risk the user chose to encounter *and which the manufacturer was powerless to reduce by a safer design*.

Since comment *j* was intended to mean, and when read in context obviously means, that it only applies to unavoidably dangerous products, it has no bearing on this case. Accordingly, South Carolina's recognition of a manufacturer's responsibility for harm caused by design defects means that the Plaintiff's design defect claims are sound and must be presented to a jury for resolution. *See*, *e.g.*,

Watson v. Ford Motor Co., 699 S.E.2d 169, 174 (S.C. 2010) (recognizing three separate defect claims: manufacturing, design, and warnings); *Branham v. Ford Motor Co.*, 701 S.E.2d 5, 14–16 (S.C. 2010) (holding manufacturer subject to liability for design defect claims per RESTATEMENT (3D) OF TORTS § 2(b) (which explicitly rejects, in comment *l*, Yamaha's theory that warnings trump design)).

While § 402A on its face does not address the relationships between the three separate types of defect, the South Carolina General Assembly indirectly addressed this topic in S.C. Code Ann. § 15-73-30. Further, the South Carolina Supreme Court often turns to 402A developments in other courts across the nation, and from the THIRD RESTATEMENT, for interpreting the 402A statute, as discussed below. Yamaha failed to meaningfully engage any of these arguments.

b. Prior rulings by state supreme court.

The South Carolina Supreme Court is likely to follow its own prior rulings. As previously explained, the South Carolina Supreme Court fully recognizes the existence of the three conventional, separate (and largely independent) types of defect. *See, e.g., Watson v. Ford Motor Co.*, 699 S.E.2d 169, 174 (S.C. 2010). Moreover, the South Carolina Supreme Court indirectly recognized the subservience of warnings to design defects by replacing 402A's definition of "defective condition unreasonably dangerous" (the "consumer expectations" test, per cmts. *g* and *i*) with the modern design defect definition of the THIRD RESTATEMENT § 2(b) (the "risk-

utility" test). *See Branham v. Ford Motor Co.*, 701 S.E.2d 5, 14 (2010). As further discussed below, the South Carolina Supreme Court turns to the law of other jurisdictions to help it understand the evolving law of the § 402A statute, which law is crystal-clear on rejecting a wrong-headed interpretation of comment *j*, as most pointedly revealed in the PRODUCTS LIABILITY RESTATEMENT § 2(b) cmt. *l*.

c. Restatement of law.

Yamaha simply rejects, without explaining how or why, Ms. Hickerson's explanation of the contextual meaning of comment *j*. As explained above, and in our opening brief, SECOND RESTATEMENT § 402A comment *j* truly applies only to *unavoidably* dangerous products, not to "pocket rockets" which easily could and should have been equipped with simple safety devices. But this does not mean that the 402A statute does not apply here, since the South Carolina Supreme Court draws from the evolving 402A law of other states in figuring how to rule on new 402A issues in South Carolina. *See, e.g., Fields v. J. Haynes Waters Builders, Inc.*, 658 S.E.2d 80, 91 n.3 (S.C. 2008):

> As this Court has noted, authority from other jurisdictions interpreting the principles espoused in the Restatement (Second) of Torts § 402A is persuasive in this determination since the General Assembly, in adopting § 15–73–10, codified the Restatement section nearly verbatim.

As already fully explained, almost every 402A state that has ruled on the issue takes the position that, regardless of comment *j*, *design defects* trump *warnings*, not the other way around.

The Defendant simply ignores the fact that § 2(b) of the THIRD RESTATEMENT, followed by *Branham*, definitively endorses this position—that, in addition to providing warnings of dangers (and instructions on how to avoid them), a manufacturer *also* must seek to reduce those dangers by physical improvements, if such design alterations are feasible and otherwise reasonable:

> In general, when a safer design can reasonably be implemented and risks can reasonably be designed out of a product, adoption of the safer design is required over a warning that leaves a significant residuum of such risks. . . . Warnings are not . . . a substitute for the provision of a reasonably safe design.

RESTATEMENT (3D) OF TORTS: PRODUCTS LIABILITY 2(b) cmt. *l.* Here, of course, Yamaha easily could have added seat straps for passengers to grab or equipped its "pocket rocket" with its "safety contour" seat—as a standard (rather than optional) safety item. But Yamaha convinced the District Court not to let Ms. Hickerson present these basic principles of design defect to a jury.

In short, Yamaha's argument that the silence of South Carolina's General Assembly on several lower court out-of-context misinterpretations of a portion of a sentence in a single RESTATEMENT comment (only indirectly related to the far more important statutory thrust of strict products liability) entirely misses the logical

interpretive arguments above. In the end, the South Carolina Supreme Court would allow Ms. Hickerson's design defect claims under both the 402A statute and the THIRD RESTATEMENT § 2(b) design defect provision it adopted in *Branham*.

d. Treatises.

Because South Carolina's lower courts have misread comment *j* as stating that manufacturers of all products can use warnings to avoid designing their products safely, the South Carolina Supreme Court would most likely turn to the only careful study of why this portion of comment *j*—unless read properly in context—conflicts with common sense, the THIRD RESTATEMENT, and the nearly-universal position of other courts. That study, which remains unchallenged, was first published in a law journal article in the early 2000s[4] and now is available in a nutshell and two treatises, the most recent of which is DAVID G. OWEN, *PRODUCTS LIABILITY LAW* § 6.2, at 338–55 (West 3d ed. 2015) (PRODUCTS LIABILITY LAW).[5]

e. Well-considered dicta.

In addition to using THIRD RESTATEMENT § 2(b) to frame the design defect notion embedded in the 402A statute, dicta in the Supreme Court's other rulings

[4] *See* David G. Owen, *The Puzzle of Comment j*, 55 HASTINGS L.J. 1377 (2004).

[5] PRODUCTS LIABILITY LAW refines and updates the discussion in 1 DAVID G. OWEN AND MARY J. DAVIS, OWEN & DAVIS ON PRODUCTS LIABILITY §§ 6:2-6.4 (Thomson Reuters 4th ed. 2014). "[W]arnings will only rarely satisfy a manufacturer's duty of safe design . . . ." *Id*. § 6:4, at 530.

states that it considers rulings in other 402A states "persuasive." *Fields v. J. Haynes Waters Builders, Inc.*, 658 S.E.2d 80, 91 n.3 (S.C. 2008) ("As this Court has noted, authority from other jurisdictions interpreting the principles [of] § 402A is persuasive in this determination since the General Assembly, in adopting § 15–73–10, codified the Restatement section nearly verbatim."). A prominent treatise observes:

> With the exception of a handful of decisions that have misinterpreted comment *j* as negating the general duty of safe design, a great majority of courts, some explicitly rejecting comment *j* on this point, hold that the separate forms of defect give rise to separate obligations [such that], except in certain limited contexts, it is abundantly clear that a manufacturer is subject to liability for a product's *manufacturing* defects, no matter how clear the product's warnings or how perfect its design; for *warning* defects, no matter how perfect the product's manufacture or how impeccable its design; and for *design* defects, no matter the precision of its manufacture or the abundance of its warnings. This latter point may be the most significant, because of the lingering, perverse effects of comment *j*'s long tentacles in a number of jurisdictions.[6]

The South Carolina Supreme Court almost surely would draw from decisions in the great majority of courts that have considered this issue—including *this* Court—that Yamaha has a duty of safe design independent of its duty to warn and instruct:

> [W]e conclude that the Supreme Court of Appeals of West Virginia would hold that despite the fact that users can be and were instructed regarding how to use the quick-release hub, that does not

[6] PRODUCTS LIABILITY LAW § 6.2, at 351–52 (many citations omitted).

> protect the seller, as a matter of law, from liability for failing to adopt a design that would have provided significantly better protection than any warning could. *See* David G. Owen, *Warnings Don't Trump Design: The Rise and Fall of § 402A Comment j*, 153 Products Liability *Advisory* 1 (Nov.2001); Howard Latin, *"Good" Warnings, Bad Products, and Cognitive Limitations*, 41 U.C.L.A. L.Rev. 1193, 1295 (June 1994) ("Good product warnings may be useful, indeed necessary, in many accident-prevention settings but their value is inherently limited and they consequently should not be treated as legally acceptable alternatives to safer product designs and marketing strategies.").

Eskridge v. Pac. Cycle, Inc., 556 Fed. Appx. 182, 189 (4th Cir. 2014) (per curium; not binding precedent). *See also Marshall v. Lowe's Home Centers, LLC*, No. 4:14-cv-04585-RBH, 2016 WL 4208090, at *20 n.29 (D.S.C. Aug. 10, 2016) ("Contrary to Defendants' [position on the comment *j* line of cases], Plaintiff correctly recognizes a design defect claim is separate and distinct from a warning defect claim."); *Williams v. Pioneer Mach., Inc.*, No. 2004–UP–119, 2004 WL 6249103, *4 (S.C. Ct. App. Feb. 25, 2004) (although the warning defect claim was properly barred because the danger was open and obvious, the design defect claim was for the jury). Several district courts in Pennsylvania agree, including *Richetta v. Stanley Fastening Sys., L.P.*, 661 F. Supp. 2d 500, 510–11 (E.D. Pa. 2009), and *Ryle v. NES Rentals*, No. CIV.A. 3:04-CV-2800, 2006 WL 931862, at *3 n.2 (M.D. Pa. Apr. 11, 2006), both fully analyzing the issue.

2. Yamaha's Secondary Arguments and Inventions.

The discussion to this point rebuts Yamaha's most basic arguments as to why the South Carolina Supreme Court would shield it from the duty of manufacturers to employ reasonable safety measures—certainly adequate warnings, but especially simple design improvements—to help reduce foreseeable dangers to users of its products. This section briefly addresses a few of Yamaha's other, secondary, exaggerated and misleading arguments and assertions.

a. "Wrong-headed" judges.

Yamaha transforms the characterization of an out-of-context, plainly wrong, illogical interpretation of statutory language as "wrong-headed" into an insult to South Carolina's judges. If this were not so transparently false, it might be troublesome.

b. South Carolina is "plaintiff-friendly."

In our opening brief, we asserted that legislative adoption of § 402A (and its comments) in 1974 was "plaintiff-friendly," *not* that the state is now plaintiff-friendly. That said, South Carolina courts are indeed *RESTATEMENT*-friendly, having looked to the RESTATEMENT (3D) OF TORTS to update the 402A statute, as explained above.

c. New argument on comment *j*.

Yamaha makes a half-hearted claim that Ms. Hickerson is only now challenging the lower courts' misinterpretation of comment *j* because the precise language of her arguments below was not identical to its language in her opening brief. The whole thrust, however, of Ms. Hickerson's design defect arguments to the District Court was that comment *j* does not protect Yamaha here, that manufacturers can avoid design responsibility only for dangers that cannot be reduced by simple design measures. While her arguments below were sometimes cast in terms of "inherent" rather than "unavoidable" dangers, and were otherwise expressed, she pressed her arguments a number of times to the District Court that comment *j*'s only-duty-to-warn statement applies only to dangers that cannot be reduced by improving a product's design. This was the upshot of Ms. Hickerson's various design defect liability arguments below, if somewhat differently phrased.[7] This Court has shown

[7] The proceedings below make it evident, from both Appellants' opposition to Yamaha's motions in limine and to the District Court's August 14, 2016 Summary Judgment Order, that Ms. Hickerson not only raised but *pressed* her oppositions in a variety of ways to Yamaha's and the District Court's incorrect interpretation of comment *j*. *See, e.g.*, J.A. 152 ¶¶ 70–71, 159–60, 355; *see also*, J.A. at 1215, 1227-29, 1092, and 1286-89).

Even if the misinterpretation of comment *j* were indeed a new issue, which it plainly is not, this Court would likely apply the correct interpretation anyway in figuring how the South Carolina Supreme Court would rule on the design defect issue. *See* § III(A)(1), above.

little patience with dubious new-issue-argued-on-appeal claims when an issue is fairly (if generally) raised in the District Court.[8]

Moreover, Yamaha itself should be deemed to have *forfeited* this argument, as explained in subsection (e), footnote 10.

d. Plaintiff argues that existing state law is bad policy.

This is another crafty argument that facially may appear correct but is misleading. In explaining why the District Court's use of a faulty interpretation of comment *j* was error, Yamaha asserts that Ms. Hickerson must show this Court that the South Carolina Supreme Court would adopt a contrary view. As detailed above, there are many reasons why South Carolina law *already* (if by implication) embraces a correct, contextual interpretation of comment *j*. And it should be evident that the South Carolina Supreme Court, if and when it may choose to address this comment *j* issue head-on, would consider and be persuaded by the manifest policy arguments in favor of interpreting comment *j* properly—as not relieving manufacturers of their basic duty of safe design. *See, e.g.*, *Fields v. J. Haynes Waters Builders, Inc.*, 658 S.E.2d 80, 91 (S.C. 2008) ("In determining whether [an issue falls] within the

[8] *See Peters-Martin v. Navistar Intern. Transp. Corp.*, 410 Fed. Appx. 612, 620 n.7 (4th Cir. 2011) ("Appellees contend that we should not even consider this alternative theory because it was not advanced in the district court. 'As this court has repeatedly held, issues raised for the first time on appeal generally will not be considered,' except 'in very limited circumstances, such as where refusal to consider the newly-raised issue would be plain error or would result in a fundamental miscarriage of justice.' *Muth v. United States*, 1 F.3d 246, 250 (4th Cir. 1993).").

meaning of the [402A] statute, this Court has focused on [*inter alia*] the policy arguments in favor of imposing strict liability in a given situation.").

e. Dubious Citations and Quotations.

A number of Yamaha's citations and quotations provide an unfair picture of the law. For example, Yamaha quotes an off-the-cuff speech by an esteemed, former defense lawyer, the late Steve Morrison, quoting his published remarks to the effect that comment *j* "has been adopted or cited with approval in twenty-eight states."[9] What Yamaha neglects to mention is that this speech cites cases based on the law of only *seven* states (*not* 28), all but three of which (federal district court opinions from Maryland, Kansas, and South Carolina (*Allen*) cite comment *j* for issues *unrelated* to Ms. Hickerson's case (most citing the comment for the "heeding presumption," a doctrine that serves to *protect* plaintiffs rather than the other way around). And at least one of the three cases on point (Kansas law) was reversed on appeal. *Delaney v. Deere & Co.*, 219 F.3d 1195 (10th Cir. 2000) (ruling that granting summary judgment on comment *j* was improper).

Additionally, Yamaha incompletely quotes *Muth v. United States*, 1 F.3d 246, 250 (4th Cir. 1993), for the proposition that "issues raised for the first time on appeal generally will not be considered." (Appellee Br. at 42.) A complete quote reveals

[9] (Appellee Br. at 47.) (citing STEVE G. MORRISON, *Warning v. Design in Products Litigation: Third Time's Not Always a Charm*, 10 KAN. J.L. & PUB. POL'Y 86 (2000) at 86, n.1)

that this Court went on to state: "*Exceptions* to this general rule are made only in very limited circumstances, such as where refusal to consider the newly-raised issue would be plain error or would result in a fundamental miscarriage of justice (emphasis added)." *Id.*

This omission from the quotation is troublesome, since these exceptions—had Ms. Hickerson truly argued a new issue on appeal—might well protect her from the new-issue doctrine. But, as explained above, Ms. Hickerson in fact pursued her arguments below, in any number of ways, that comment *j* did not bar the design defect claim.[10]

Surely it is too much to demand that all citations be perfect, and mistakes in cited and quoted authority may be inevitable. But, since we noticed these particular examples of dubious authority, we note them here.

[10] Preventing a plaintiff improperly from presenting her basic claims to the jury, as happened here, may well fall within these exceptions. *See, e.g.*, *Stewart v. Hall*, 770 F.2d 1267, 1271 (4th Cir. 1985). *See generally* 9C WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 2558 at 672 (West 3d ed. 2008; 2017 Supp. at 2) ("following the adoption of the 2003 amendments to Rule 51 and the codification of the plain error exception in subdivision (d)(2), courts of appeal now engage in a plain error review as a matter of course").

Indeed, Yamaha's withholding of the "plain error" and "miscarriage of justice" exceptions in its *Muth* quotation is a serious enough omission that it should forfeit its ability to rely on that doctrine here.

B. The District Court should not have excluded Dr. Kasbekar's opinions on warning inadequacy without a *Daubert* reliability analysis.

The District Court should not have found the jet ski warnings adequate as a matter of law by excluding Dr. Kasbekar's opinions as to their *in*adequacy without a *Daubert* reliability analysis. While Yamaha asserts that the District Court *did* conduct a *Daubert* analysis on Dr. Kasbekar's inadequate warning opinions, it cites principally to the *District Court's Order on Hickerson's Motion to Reconsider* (December 16, 2016), which supports Ms. Hickerson's argument that the District Court failed to subject the warnings *adequacy* opinions to a *Daubert* analysis before it granted summary judgment on August 16, 2016. (Appellee Br. at 26-27.)

1. Yamaha attempts to collapse Dr. Kasbekar's two warning opinions into one.

Contrary to Yamaha's assertions, the District Court properly recognized that Dr. Kasbekar offered two *separate* types of warning opinions:

> There appears to be no dispute that two lines of testimony--Dr. Kasbekar's opinion testimony as to the adequacy of the PWC's warnings and his opinion testimony regarding his proposed warning system--are at issue; that the court correctly determined that Dr. Kasbekar was qualified to opine on these matters . . . . (J.A. 1464-75.)

In addition to Dr. Kasbekar's opinions on his proposed *adequate* warning (for which the Court *did* apply a reliability analysis, in its *in limine* ruling), Kasbekar also separately opined that the warning labels on the jet ski were *in*adequate, based on (1) industry practice, (2) industry standards, and (3) his testing. He stated,

unchallenged, that Yamaha's warning, containing a *white* wet suit bottom, failed to conform to industry competitors who warn with a *black* wetsuit, more accurately reflecting an actual wetsuit. (J.A. 411-412.)

Next, observing that ANSI standards are reliable industry standards, Dr. Kasbekar opined that the Yamaha label was too congested in view of ANSI Z535, the industry standard. (J.A. 413-14.) Yamaha argues that he was not really offering opinions based on ANSI (Appellee Br. at 28.), conveniently excerpting an incomplete part of Kasbekar's deposition. A few sentences later, however, Dr. Kasbekar stated "I think the label would be better if there were less warnings. . . . I'll tell you some of the language that doesn't belong in there." (J.A. 416.)

Third, Dr. Kasbekar opined that the orifice warning did not fully and properly inform users how to avoid dangers from the jet thrust, because his own on-water testing revealed that wetsuits might not fully guard against such injuries. (J.A. 563-64.) Moreover, he asserted that the warning's reference to clothing providing "equivalent protection" to a wetsuit is confusing. (J.A. 552-553.)

Because the District Court recognized the distinctness of both categories of Dr. Kasbekar's warning opinions, Yamaha fails in its attempt to "boil down" his separate warning opinions to a single "third warning" located on the jet ski seat.

2. The District Court neither analyzed nor excluded Dr. Kasbekar's warning inadequacy opinions in its *in limine* order.

Yamaha relies substantially on the District Court's *in limine* order, which states that "Dr. Kasbekar's proposed warning system has not been tested . . . cites no studies . . . and lacks scientific data." (J.A. 1252.) The Court then proceeds to conduct a *Daubert* reliability analysis—but *solely* on Dr. Kasbekar's opinion that proposed an alternative, *adequate* warning. (J.A. 1252-53.)

Concluding that "Dr. Kasbekar's proposed warning system opinion is not 'based upon sufficient facts or data' and is not 'the product of reliable principles and methods' under Fed. R. Evid. 702," (J.A. 1254) the District Court excluded Dr. Kasbekar's alternative warning opinion. (*Id.*)

Contrary to Yamaha's assertions, the *in limine* Order is devoid of any *Daubert* reliability analysis as to Kasbekar's separate opinion that the jet ski warnings themselves were inadequate.

3. The District Court's summary judgment, finding Yamaha's warnings adequate as a matter of law, was based on an incorrect assumption.

The District Court's *in limine* ruling was partially favorable to Ms. Hickerson, in failing to exclude her expert's opinion that the jet ski warnings were inadequate, so it was not appealed. Yamaha had a pending summary judgment motion, the crux

of which was that Hickerson's inadequate warnings claim, without expert testimony, must fail. (J.A. 49.)

Since the District Court qualified Dr. Kasbekar to opine on both design and warning defects, because that court had ruled his design defect testing was reliable, and because that court failed to exclude his warning inadequacy opinions, Ms. Hickerson was shocked at the Court's summary judgment ruling that the jet ski warnings were adequate as a matter of law.

All the District Court said as to why Dr. Kasbekar's *inadequacy* opinions failed to meet Rule 702's reliability standards follows:

> While this court determined that Dr. Kasbekar was qualified as an expert to issue [warning] opinions, (ECF No. 104 at 6-7), it concluded that his proposed warnings system--which he developed *ostensibly* to ground his expert testimony that the product's warnings were "inadequate and insufficient"—should be excluded due to its unreliability under the standards of Fed. R. Evid. 702 (emphasis added). (J.A. 1268.)

This assertion is hardly a fair reliability evaluation of this expert's considered opinions on how the warnings were inadequate, and does not appear to exclude the *inadequacy* opinions. The District Court made this "ostensible" assumption after having specifically referenced at least one reliable basis for the inadequacy of the warnings—their failure to meet ANSI standards. (J.A. 1254.)

4. The District Court's explanations of its confusing rulings.

Ms. Hickerson's Rule 59 Motion to Reconsider the Court's summary judgment argued that neither the *in limine* nor summary judgment orders had expressly excluded Dr. Kasbekar's "inadequacy" opinions. In its Reconsideration decision, the District Court acknowledged that its *in limine* "order did not specifically exclude testimony from Dr. Kasbekar that the PWC's warnings were inadequate," (J.A. 1457) and it further recognized, while excluding Dr. Kasbekar's opinions proposing alternative adequate warnings, that "it is not clear that [the *in limine* order] excluded his opinion testimony as to the adequacy of the warnings." (*Id.*)

Next, the District Court stated that its summary judgment order was "the first instance in which this court conclusively determined that the [inadequate warnings opinion] testimony would be excluded." (J.A. 1464.) Yamaha failed to appeal the *in limine* order, and the Court effectively acknowledged in its Reconsideration order that it had revisited the issue, *sua sponte*, on Yamaha's summary judgment motion.

The District Court explained on Reconsideration that it found Dr. Kasbekar's *inadequacy* opinions unreliable because he failed to support them with relevant research and studies. (J.A. 1466.) Yet, the District Court overlooked the fact that this reliability analysis was addressed to a different set of opinions (on Kasbekar's

proposed *adequate* warning), an opinion that the court had previously acknowledged was distinct from his *in*adequacy opinions.

Yamaha argues that this shows that the District Court reviewed *both* categories of opinions for reliability. (Appellee Br. at 26.) Yet, this after-the-fact purported analysis fails altogether to recognize the *actual*, legitimate bases for Dr. Kasbekar's inadequacy opinions, highlighting the need for meaningful reliability analyses of both sets of opinions. Ms. Hickerson never argued that her expert sought to support his *inadequacy* opinions with either his proposed warning opinions or through "research and studies." Instead, his inadequacy opinions are based on other, credible indicia of reliability—like ANSI industry standards, industry practices (warnings on competitor products), and his product testing.

Thus, contrary to Yamaha's arguments, the District Court failed to conduct a proper *Daubert*/Rule 702 reliability analysis on Kasbekar's warning "inadequacy" opinions.

C. The District Court should not have ruled that a jury could not determine that the warnings were inadequate without expert testimony.

South Carolina law is clear that expert testimony is required, but only on subjects outside the common knowledge and experience of the jury. *See, e.g.*, *Babb v. Lee County Landfill SC, LLC*, 747 S.E.2d 468, 481 (S.C. 2013). Ms. Hickerson argued that, while expert testimony was proper and would be helpful, it was

unnecessary on the simple issue of whether Yamaha's warnings were adequate or not. (J.A. 1222) A jury could easily understand how a verbose warning positioned where it was blocked from any view by at-risk passengers on a jet ski might well be inadequate. (*Id.*) The District Court reasoned that expert testimony was required because "the adequacy of warnings in products liability actions tend to implicate the study of human factors and other industry standards," areas that "are generally beyond the common knowledge of a jury." (J.A. 1267.)

Yamaha asserts that the District Court's expert testimony ruling here was appropriate because it refused to draw a bright-line rule and by asserting that warning experts may not be required in every case. (Appellee Br. at 34.) Surely experts are needed in many product warning cases, such as medical device and pharmaceutical cases, warnings directed at professional users, and cases involving children's toys. But Yamaha's no-bright-line-here argument ignores the District Court's over-broad ruling requiring expert testimony in "products liability actions"—*not* whether the actual warning adequacy issues to be decided *in this case* were outside the common knowledge and experience of a jury.

The District Court should have analyzed the issues of mis-location (blocked by driver (App Br. at Ex. 4)) and verbosity (numerous statements), etc. (J.A. 903, 416) to conclude that the warning issues here were well within the competence of

jurors who confront numerous warnings of risks in many types of products (some very dangerous, like cars) on a daily basis.

Instead, the District Court required expert testimony because product accident cases "tend to implicate the study of human factors and other industry standards." True, but juries well understand basic human factors (how people interact with products) for many types of products, such that expert testimony was unnecessary with respect to the location and content of the jet ski warnings in this case.

D. An adequate warning way well have prevented the accident here.

Finally, Yamaha argues that Ms. Hickerson failed to challenge the District Court's finding that an adequate warning might not have prevented her injuries (App. Br. at 17), claiming that the summary judgment order asserts that Ms. Hickerson presented no evidence of causation on her warning claims. (J.A. 1271.)

But, the District Court noted Ms. Hickerson's forthright testimony that she was "unsure" whether reading Yamaha's (inadequate) warnings would have changed her behavior, but recognized that Ms. Hickerson "did ultimately intimate in her deposition that had she read the warning on protective clothing, she would 'change how [she] got on a jet ski today.'" (J.A. 1271.)

The Court did not specifically find that Hickerson could not prove causation on her warning claims, presumably because this was not supported by, and would

have required the District Court to weigh, the factual testimony on causation. This is why Ms. Hickerson did not brief this issue in her opening brief.

V. CONCLUSION

For the foregoing reasons, Appellant Deborah Meek Hickerson respectfully requests this Court to reverse the District Court's grant of summary judgment for a trial on all its claims.

Respectfully submitted,

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Counsel for Appellant

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