APPEAL NO. 17-1075

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DEBORAH MEEK HICKERSON, *Plaintiff-Appellant*

v.

YAMAHA MOTOR CO., LTD and
YAMAHA MOTOR CORP. U.S.A., *Defendants-Appellees*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF SOUTH CAROLINA AT ANDERSON
Case No. 8:13-cv-02311-JMC

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, copies of the Corporate Disclosure Statements filed by Appellees, Yamaha Motor Co., Ltd. and Yamaha Motor Corp., U.S.A., follow.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 17-1075 Caption: Hickerson v. Yamaha Motor Corp., U.S.A. & Yamaha Motor Co., Ltd.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Yamaha Motor Co., Ltd.
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☑ YES ☐ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☑ YES ☐ NO
If yes, identify all such owners:
Yamaha Corporation - 12.21%

09/29/2016 SCC

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/Richard A. Mueller Date: 1/31/17

Counsel for: the Yamaha Defendants

CERTIFICATE OF SERVICE

****

I certify that on 1/31/17 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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1/31/17
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If yes, identify all parent corporations, including all generations of parent corporations:
Yamaha Motor Co., Ltd.

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☑ YES ☐ NO
If yes, identify all such owners:
Yamaha Motor Co., Ltd. is traded on the Tokyo Stock Exchange and owns 100% of the stock of Yamaha Motor Corporation, U.S.A.

09/29/2016 SCC - 1 -

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
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6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/Richard A. Mueller Date: 1/31/17

Counsel for: Yamaha Motor Corporation, U.S.A.

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court abused her discretion when she excluded Plaintiff's expert testimony regarding warnings?

2. Whether, in the absence of any fact or expert testimony from Plaintiff, the District Court erred in granting Summary Judgment to Defendants on the warnings claim?

3. Whether the District Court erred when she concluded that, for this case, South Carolina's 402A Act resolved the remaining issues in the case, because the on-product warnings were adequate as a matter of law, and Plaintiff did not argue that Court of Appeals case law interpreting the 402A Act was bad law?

STATEMENT OF THE CASE

The District Court granted Summary Judgment to Appellees, Yamaha Motor Co. Ltd. and Yamaha Motor Corp., U.S.A., (collectively "Yamaha") on Appellant Deborah Hickerson's (hereinafter "Hickerson") defect claims regarding a 2011 Yamaha VXS WaveRunner personal watercraft ("PWC"), because the warnings (on the specific risk experienced by the Plaintiff) were adequate as a matter of law. J.A. 1262. Hickerson filed the instant appeal.

I. FACTUAL BACKGROUND

Summary: Hickerson's accident occurred on Lake Hartwell during the 4th of July weekend in 2012. On Saturday evening, Hickerson and her friend/co-worker, Michelle Abascal, went out on the subject PWC. J.A. 17, 312-13. Hickerson did not read the PWC's warnings before riding (either this time or any other time she had ridden). J.A. 307, 309, 342. Hickerson's use of the PWC violated multiple on-craft safety warnings, including: wear protective clothing (she wore a thin bikini); never ride after consuming alcohol (she had consumed a couple of glasses of wine); do not ride with more than three people on the craft (she rode as the rear-most, fourth rider on the three-person craft); and do not let persons under age 16 operate the craft (on a 4th of July weekend, a 10-year-old novice was the operator of the "pocket rocket" (Hickerson's words) when

Hickerson fell off). Notwithstanding these multiple errors, even now, Hickerson does not know that she would have done anything differently, had she read the warnings. J.A. 342.

There were multiple warnings: The Yamaha PWC had two separate warnings, which explicitly addressed the risk of orifice injuries, like Hickerson's. These warnings made clear that riders **must wear protective clothing**. The PWC contained the ANSI colored (orange, black, and white) industry-wide Uniform Warning Label, near the handlebars and directly in front of the operator, which stated:

⚠ **WARNING**
WEAR A PERSONAL FLOTATION DEVICE (PFD). All riders must wear a Coast Guard approved PFD that is suitable for personal watercraft (PWC) use.
WEAR PROTECTIVE CLOTHING. Severe internal injuries can occur if water is forced into body cavities as a result of falling into water or being near jet thrust nozzle. Normal swimwear does not adequately protect against forceful water entry into rectum or vagina. All riders must wear a wet suit bottom or clothing that provides equivalent protection. (See Owner's Manual).

See Ex. A at 1; J.A. 716; *see also* J.A. 203, 1263.[1] The PWC had a **second** (also ANSI colored) label at the rear of the craft, by the boarding platform, which stated:

[1] Yamaha established that not only had the Uniform Warning Label been tested, it was accepted by the U.S. Coast Guard (which regulates the design standards for recreational boats under the Federal Boat Safety Act of 1973), NASBLA (National

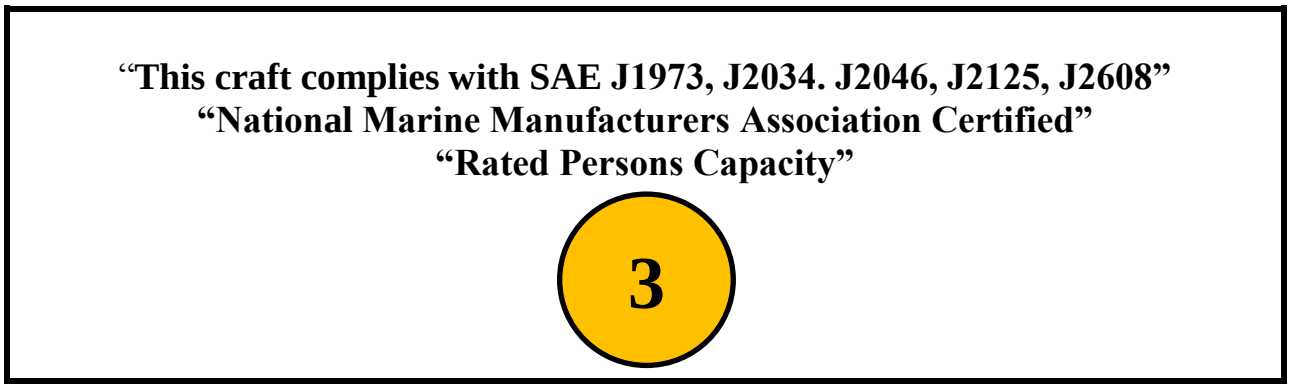
⚠ WARNING
• Severe internal injuries can occur if water is forced into body cavities as a result of being near jet thrust nozzle. • **Wear wetsuit bottom or clothing that provides equivalent protection.** • Do not board PWC if operator is applying throttle.

See Ex. A at 2; J.A. 204, 716, 1263 (emphasis added).[2] One of these warnings is at the front of the seat (on the glove box) and the other is at the rear of the seat (near the boarding platform), a little over three feet directly behind the first warning. *See* Ex. A at 4-6.

Association of State Boating Law Administrators), and the Boating Safety Advisory Council (BSAC), a statutorily authorized safety advisory group to the USCG. J.A. 407-410, 573, 807, 812.

[2] The District Court held that "the plain language of the[se] multiple warnings, both near the front and rear part of the PWC … reasonably advise anyone who rides the PWC, including a passenger, of the very types of dangers Plaintiff endured and moreover provides specific recommendations to prevent such injuries." J.A. 1268-69. Kasbekar also agreed that wetsuits protect against this type of injury. J.A. 692 ("the wetsuit really is kind of the guarding solution").

The PWC also had a warning regarding the number of riders allowed:



See Ex. A at 3; J.A. 714; *see also* J.A. 205. On-craft warnings further made clear that the minimum operator age was 16 and to "Never Ride After Consuming Drugs or Alcohol." J.A. 203, 715. The District Court had a photograph showing Hickerson and Abascal (and the Uniform Warning Label)—with the latter clearly within Hickerson's view. *See* Ex. A at 4; J.A. 717.

None of these warnings were followed: On Saturday evening of the holiday weekend, after a couple of glasses of wine, Hickerson rode the PWC with Abascal. J.A. 303, 313. Hickerson and Abascal initially rode the PWC for nearly an hour, "riding and playing," "doing donuts and throwing [them]selves off of it." J.A. 213, 315-16. When they came back in, Abascal's daughter and niece (both about 10 years old) asked if Hickerson and Abascal would take them out. J.A. 315; 319-320. Another family member warned them that four people was too many people on the PWC, but Hickerson told the girls it was "okay." J.A. 359. They left the dock with four riders and Abascal driving. Later, in the middle of the

lake, they stopped to switch places so that one of the ten year old girls could drive. Hickerson was at the very rear (the fourth person on the three-person craft). J.A. 322. Plaintiff's expert took a surrogate photo depicting what Hickerson claims was the arrangement on the seat—showing the Uniform Warning Label and the general location for the boarding label. J.A. 718. *See* Ex. A at 5.

The novice ten-year-old operator over accelerated; "just pushed the throttle," "took off very fast," and Hickerson came off the seat. J.A. 350. Hickerson does not know if she was holding on to anything (either the hand holds on the seat or the rider in front of her) at the time she fell. J.A. 336-337. Hickerson was not wearing protective clothing. J.A. 331. After the accident, Hickerson told Abascal and others that she fell because she was not "ready" or not situated, when the youngster hit the throttle. J.A. 254-55, 357.

The lawsuit: Based on the above, Hickerson filed suit against Yamaha. *See* J.A. 16-23. She designated one expert witness in support of her claims, Dr. Kasbekar (hereinafter "Kasbekar"), a mechanical engineer.

Kasbekar's views were not "stand alone opinions": Kasbekar opined that Yamaha could not "completely design out" the risk of jet thrust or orifice injury, but that design changes regarding: (1) the warnings; (2) the seat straps; and (3) the

use of a more sculpted Cruiser seat (as opposed to the Standard seat)[3] would have prevented the accident. J.A. 687-88.[4]

Kasbekar made clear that his opinions on design and warnings were meant to work together; his proposals were not intended to function as stand-alone remedies. J.A. 597-98 (Kasbekar was "looking at the **entire design**. I'm looking at the warnings. I'm looking at the design of the seat and the strap, and they go together.") (emphasis added).

Kasbekar's opinion on the warnings inadequacy focused on the location of the warnings regarding orifice injury, not the wording. Hickerson's counsel told the court, the industry-wide, Uniform Warning Label (on the glove box of the subject PWC), was "not necessarily being criticized in this case." J.A. 1241. The warning was inadequate, because "[i]ts location doesn't adequately inform the

[3] Hickerson's brief refers to Yamaha's Cruiser seat, which was available at the time the subject craft was purchased had it been desired, as a "Safety Contour Seat." Brief of Appellant ("App. Br.") at 2. Yamaha does not refer to its Cruiser seat as a "Safety Contour Seat," and the trial court entered an order excluding the use of the term "Safety Contour Seat" from trial, because it was misleading and unduly prejudicial. Dkt. No. 101 at 4-5.

[4] Kasbekar formulated his opinions and completed his report after two days of "work." J.A. 429-430 (he was retained on November 12th and his report was dated November 14th). At the time of his report, Kasbekar had not seen the subject PWC nor done any testing on the WaveRunner VXS unit. J.A. 448. Instead, he had relied on three reports from experts in a SeaDoo Texas case; which were provided to him by Hickerson's counsel. J.A. 432.

passenger." J.A. 1218 (emphasis added). *See also id*. at 1215 (the warning is "placed in the wrong area and, therefore, is not an effective warning"). Accordingly, Kasbekar (with the help of a human factors expert) proposed an "improved" warning, which was essentially the same as Yamaha's warning, but located on the PWC's seat. J.A. 1242 (Kasbekar "effectively moved their warning to a location more fit for a passenger"); J.A. 1004 (Kasbekar "effectively locate[d] a shorter version of Yamaha's warning near the at-risk passenger on the PWC"); J.A. 1284 (Kasbekar's proposed warning did not require testing, because it was "merely [Yamaha's] own warning, using less words;" J.A. 1284-85 (Kasbekar's "proposed warning language is so similar" to Yamaha's that it does not need to be tested); J.A. 1279 ("the proposed label does not substantively change the Defendant's language"). *See also* J.A. 571 (the location would provide greater impact).

Essentially, the subject Yamaha PWC had two orifice injury warnings, one on the glove box and one at the rear of the craft near the boarding deck – Kasbekar wanted to add a third warning, located between the two, on the seat of the PWC.

The District Court below also had a photograph of the watercraft showing the relationship of the existing two warnings. J.A. 1382. *See* Ex. A at 6.

Kasbekar only satisfied the minimal criteria as a warnings expert: Kasbekar offered these opinions, while admitting: "I wouldn't go out and say that

I'm a warnings expert." J.A. 406.[5] Rather, he explained that his background lies in product design, failure analysis and prevention. J.A. 399. Because his "expertise" in "human factors is limited," Kasbekar relied on the work of two human factors experts, Mr. Karnes and Mr. Maddox. J.A. 406; 431-34; 566-67. Prior to the formulation of his opinions, he was given the affidavit of Karnes from a Texas SeaDoo case. J.A. 430-31. He relied on the Karnes affidavit as part of the basis for forming his opinions.[6] Kasbekar later hired a second warnings expert, Maddox. He needed Maddox because, "there's a human factors component to the wording and language" and "that's really not my forte." J.A. 569. In the end, the Kasbekar/Maddox warning basically just mimicked the Yamaha warning, with slightly fewer words. J.A. 1284.

Kasbekar had no testing or other empirical work to support his view: Kasbekar cited no support for his opinion that the warning must be placed on the PWC's seat. *See* J.A. 571 ("Q. … [H]ave you cited me to any authoritative piece

[5] Kasbekar similarly testified: "I would not go to a company and say, hey, let me rework your warning and let's stick it on a product." J.A. 406-407. *See also* J.A. 400. Kasbekar has no degrees or certifications in human factors (J.A. 719), has "never authored any articles on warnings" (J.A. 399) and is not a member of the Human Factors Society. J.A. 567.

[6] Kasbekar relied on the Karnes affidavit for "initial information with regard to PWC warnings," the "cost of compliance," and Karnes' "criticisms of the warnings." J.A. 432, 435.

of research that is going to indicate that warnings on seats are more read than warnings on the craft itself? A. No.") He acknowledged that as of 2011, the manufacturing date, no PWC manufacturer had placed a warning on the seat. J.A. 667. He had never heard Karnes say that warnings on the seat are more likely to be read as opposed to warnings on the rear boarding deck. J.A. 442.

Kasbekar admitted that his proposed "improved" warning had not been tested. J.A. 573. It was not "ready to be put on a production product." J.A. 578.[7] Kasbekar: it is possible that "if you tested it," it could "test[] out worse than the uniform label." J.A. 578. While Kasbekar intended to testify that "moving a warning to the seat" would make it more likely to "be seen," he would not "jump to the next level to say it's more likely to be read where read means to me read and comprehend it." J.A. 572-73.[8] Further, Kasbekar would not say that his proposed warning would make the risk of injury known to those who read it. J.A. 685.

Hickerson alleges here, that Kasbekar supported his warnings opinion with, *inter alia*, "industry practice" and "industry standards." App. Br. at 3 (citing J.A. 411-14). However, the testimony referring to "industry practice" related to the

[7] Instead, Kasbekar testified that he "would recommend" that it "be **considered for testing.**" J.A. 622 (emphasis added). *See also id*. at 623 (the warning required " . . . further testing and analysis").

[8] Kasbekar agrees that "if a consumer doesn't read it, they're not likely to comply with it." J.A. 585.

color of the wetsuit bottom on the Uniform Label (whether the wetsuit bottom should be black or white). J.A. 411-12. He briefly mentioned ANSI Z535 regarding spacing and multiple messages in a warning, but never identified any section that was violated and, later, disclaimed opinions on those topics. J.A. 414, 417-418 (Kasbekar has not done a "comprehensive study" on the Uniform Warning Label, and will not say that "Yamaha needs to completely rewrite this" because "I haven't done that work"). Instead, his opinions turned on locating an additional warning on the seat: "My opinion is, it's fairly simple in this case, I think a specific warning located where the rear passenger can clearly see it would have had a greater impact … ." J.A. 417.

Hickerson alleged that Kasbekar relied on "his on-water testing" (App. Br. at 3 (citing J.A. 690-91)), but the cited testimony discusses his on-water testing regarding his Cruiser seat concept. J.A. 690-91. *See also* J.A. 692 (Kasbekar noting that the warning is a "third thing," not related to the on-water seat testing). Kasbekar nowhere testified that his on-water testing regarding Cruiser seats supported his warnings opinions.[9]

[9] Moreover, below, Hickerson's briefs did not argue that the water testing had anything to do with the warnings opinions. This is newly raised here. J.A. 1003-04, 1278.

Hickerson alleges that Kasbekar relied on his "knowledge, skill, experience, training, and education" for his warnings opinion, (App. Br. at 3 (citing J.A. 719-23)) but Hickerson's citation in support is merely to his C.V., not to any Kasbekar testimony where he identifies how his knowledge, skills, experience, or education formed his warnings opinions in this case.

II. PROCEDURAL HISTORY

A. Yamaha's *Daubert* Motion and Hickerson's Response

Basically, all that Kasbekar did on the warnings front was take the Yamaha warning, cut out a few words, and add it at a spot 14 inches from (and in between) the other two warnings. His entire criticism was the location and neither the existing location (nor his new proposed location) was tested by him. There was no cited scientific literature to support either concept. In addition, in light of Hickerson's testimony that even if she had read the warning she might not have done anything different, Yamaha moved to exclude Kasbekar's defect opinions under *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993). J.A. 259-95.[10]

[10] While Hickerson ignores this argument in her brief, Kasbekar's failure to take into account Hickerson's testimony regarding warnings made his warnings opinions lack the requisite fit. Yamaha's motion also sought exclusion of Kasbekar's seat strap and Cruiser seat opinions, because, *inter alia*, they lacked the reliability and fit required by *Daubert*.

In opposition, Hickerson asserted (contrary to her current position) that warnings and design were interrelated and, thus, Kasbekar's product design expertise as a mechanical engineer qualified him to testify regarding warnings. J.A. 1210.[11]

B. The District Court's Ruling on the *Daubert* Motion

The District Court granted Yamaha's *Daubert* motion, in part. J.A. 1245-61. Noting that Kasbekar had performed no warnings testing at all and cited no "specific relevant research or studies," (J.A. 1253) the Court granted the motion on warnings. Regarding Kasbekar's proposed warning on the seat, the District Court noted the reliance on Karnes and Maddox, the lack of testing, and the same lack of "specific relevant research or studies." J.A. 1252-53. Because Kasbekar's warnings "expertise," such as it was, could not overcome "what this court deems as deficiencies under *Daubert's* standard for reliability," the District Court excluded Kasbekar's "proposed warnings system opinion." J.A. 1253-54.

[11] *See also* J.A. 1215 (Hickerson: "product design … includes whether a product that is already dangerous can be made safe by a warning."); 1223 (consideration of warnings "is hand in hand with what engineers do and products are examined in total, not in isolation one piece at a time. So, that is what gives him the expertise.") (emphasis added). Likewise, Hickerson argued that his "experience in safe product design" made his warnings opinions reliable. J.A. 1003.

C. Yamaha's Motion for Summary Judgment and Hickerson's Response

At the same time that it filed its *Daubert* motion, Yamaha moved for summary judgment on *Daubert*/no expert and causation grounds. J.A. 49-70. The correctness of the *Daubert*/no expert legal position was seemingly conceded at the hearing.[12] In fact, at the hearing, a significant amount of time was devoted to the warnings issues because they were critical to the outcome of the case.[13] The parties argued extensively about the import of comment j, which states: "Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous." Ex. B; J.A. 1168.

[12] At the hearing on the motions, Hickerson recognized that Kasbekar's testimony was vital to her case. Hickerson's counsel told the Court: "[I]f the Court is inclined to exclude Kasbekar, that gives us **significant issue** on the summary judgment and one piggybacks the other." J.A. 1223 (emphasis added). Hickerson now claims that she was confused and implies that Yamaha was confused as well, alleging that "both parties continued discovery." App. Br. at 4. This is wrong. There was no discovery. The summary judgment motion was still pending and a trial setting loomed on the horizon. Accordingly, on August 18, 2016, Hickerson took a trial preservation deposition of her own medical expert, Dr. Vanderpool. There was no other activity.

[13] *See* J.A. 1189-1230.

Hickerson was well aware that without a warnings claim, her case would fail and, in effect, conceded this point in her briefs as well.[14]

D. The Court Grants Summary Judgment to Yamaha

The Court granted Yamaha summary judgment on Hickerson's warnings claims on two separate grounds. J.A. 1265-71. First, the District Court held that Yamaha was entitled to summary judgment on Hickerson's warnings claims, given the inadmissibility of Kasbekar's warnings opinions and the evidence that the Yamaha warnings were adequate.[15] Hickerson's assertion that the District Court did not address the "adequacy" opinions is incorrect. App. Br. at 4-5. First, when your only criticism of the warning is the location, and you have not tested **any location** or cited any literature regarding **any location**, excluding the proposed

[14] *See* discussion about *Allen* and *Curcio*, *supra*, *pages* 41-42. *See also* J.A. 1092 (Hickerson asserting that "[i]n a case where the manufacturer concedes it [sic] product is dangerous, the product can be made safe by an adequate warning," but arguing "[t]he present is not a case where the Defendants have conceded their product is defective … .").

[15] The District Court described the evidence of the adequacy of the warnings, including (1) the Uniform Warning Label; (2) the fact that it had been evaluated and accepted by the U. S. Coast Guard and BSAC; and (3) the "plain language" of the warning "reasonably advise[d] anyone who rides the PWC, including a passenger, of the very types of dangers Plaintiff endured and moreover provides specific recommendations to prevent such injuries." J.A. 1268-69.

new location necessarily excludes the criticism of the old location and, hence, the entire warnings opinion.[16]

Hypothetically, if an expert's only criticism of a warning was that it used the words "serious injury" instead of "severe injury" (and the alternative warning was the exact same warning except that it used "severe injury") and the expert cited no standard, test or literature to support the notion that such a change was needed or that it would make any difference, *Daubert* serves to exclude such unsubstantiated second-guessing (as to both adequacy and alternative design). Clearly, it would be nonsensical to exclude the alternative warning (using "severe") but allow an opinion that the existing warning was inadequate because it did not use the word "severe."

Hickerson's arguments here ignore that Kasbekar's opinions basically accepted the wording of the warning "as is." As repeated multiple times by Hickerson's counsel prior to the District Court's orders, Kasbekar's objections to the **adequacy** of the warnings was their **location** – specifically, that the warning should have been on the PWC's seat. Second, Hickerson ignores that in the

[16] The District Court made this clear in the order denying the motion to alter or amend. While conceding that the Court had not expressly excluded the adequacy opinion, the District Court made it clear that one necessarily follows from the other. The District Court made this clear in the summary judgment ruling. J.A. 1268.

District Court's *Daubert* order, the District Court separately analyzed the reliability of both the opinion regarding inadequacy and the proposed alternative warning. J.A. 1252-53.

The District Court also granted summary judgment to Yamaha on Hickerson's warnings claims on a causation basis, because Hickerson could not show that the warning would have made a difference. J.A. 1270-71 (citing Hickerson's testimony). In the current appeal, Hickerson does not appear to be challenging that ruling.

Finally, the District Court granted summary judgment to Yamaha on Hickerson's design claims regarding the PWC's seat, as well as her claims in negligence and warranty, under South Carolina law, which has long adhered to comment j of the Restatement (Second) of Torts § 402A, because it had determined "based on the evidence before it that the warnings [Yamaha] provided were adequate as a matter of law." J.A. 1276.

E. The District Court Denies Hickerson's Motion to Reconsider

Hickerson filed a motion to alter or amend the judgment. *See* J.A. 1277-92. Almost all of this motion was re-argument.

Hickerson did not take the position (now being advanced) that the Supreme Court of South Carolina would reverse *Allen v. Long Mfg. NC, Inc.*, 505 S.E.2d 354 (S.C. Ct. App. 1998) and *Curcio v. Caterpillar, Inc.*, 543 S.E.2d 264 (S.C. Ct.

App. 2001), *rev'd on other grounds*, 355 S.E.2d 272 (S.C. 2003); or that *Allen* and *Curcio* were wrongly decided ("wrong-headed"); or that the South Carolina Supreme Court either would (or already has) adopted the Restatement Third of Torts or any other like arguments. Rather, Hickerson attempted to distinguish Kasbekar's alternative warning theory from his inadequacy theories (J.A. 1282) and argued that Kasbekar did not need any testing because his warning was just the "Yamaha warning" at a new location.[17] Hickerson repeated the *Dorris-admitted-there-is-a-defect* theory that she had advanced earlier and that she re-advances here. J.A. 1285-86. Hickerson also repeated her *we-do-not-need-an-expert* position that is also re-asserted here. J.A. 1289-90. However, Hickerson's only position before the District Court on comment j was that it, in fact, defeats ("trumps") a design defect claim, but only when the defendant makes certain concessions. J.A. 1286-87. *See also* J.A. 1288 ("Since the Defendants fail to concede a duty to warn, the Court should have failed to grant summary judgment … .").

The District Court rejected Hickerson's novel interpretation of comment j (and *Allen* and *Curcio* and other South Carolina authorities) on the issue of

[17] Characterizing Kasbekar's proposed seat warning as "the Defendant's own warning, using less words," Hickerson argued that testing regarding the Uniform, Warning Label, made Kasbekar's proposed label reliable. J.A. 1284.

required-concessions and denied the motion. The District Court reiterated that "under South Carolina law, a product cannot be unreasonably dangerous if it is accompanied by adequate warnings that, if followed, make the product safe for use," and, thus, denied Hickerson's motion on that point, as well. J.A. 1477.

The District Court noted that she had considered both the alternative warning and the adequacy opinions and that one necessarily implicated the other. J.A. 1466.

The District Court disagreed with Hickerson's argument as to whether expert testimony was required. J.A. 1471. The District Court also rejected the argument that Yamaha's warnings expert admitted that there was a defect. J.A. 1472-75.

SUMMARY OF THE ARGUMENT

The District Court properly excluded Kasbekar's warnings opinion(s) that there needed to be a third warning 14 inches away from (and in between) the two other (admittedly-adequately-worded) warnings, because there was no scientific basis for any of his opinion as to the warnings location (the existing ones or the newly proposed one). Once the warnings were adequate as a matter of law, comment j, particularly on the facts of this case, requires dismissal of the entire case. Also, the legal positions being advanced here (on comment j) are new and were not raised below and should not be permitted now. There is absolutely no indication that the South Carolina Supreme Court would reverse a host of Appellate Court rulings and, contrary to the express language in the legislative history, announce a new rule in opposition to comment j on the facts of this case.

ARGUMENT

I. The District Court Properly Excluded Kasbekar's Warnings Opinions, Because the Opinions Lacked Any Scientific Basis

A. Standard of Review

"[T]he question of admissibility of expert testimony … is reviewable under the abuse-of-discretion standard." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 143 (1997). The "trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 200 (4th Cir. 2001) (quoting *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999)). "[T]he abuse of discretion standard requires a reviewing court to show enough deference to a primary decision-maker's judgment that the court does not reverse merely because it would have come to a different result in the first instance." *Evans v. Eaton Corp. Long Term Disability Plan*, 514 F.3d 315, 322 (4th Cir. 2008) (internal citation omitted). To demonstrate an abuse of discretion, Hickerson must show that the District Court "made an error of law" or that its "conclusion rests upon a **clearly erroneous** factual finding." *Nease v. Ford Motor Co.*, 848 F.3d 219, 228 (4th Cir. 2017), *cert. denied*, No. 16-1333, 2017 WL 1807087 (U.S. June 12, 2017) (emphasis added). Neither is present here.

B. Kasbekar's Warnings Opinion(s) Lacked Reliability

Boiled down to their essence, Kasbekar's warnings opinion(s) were that the current locations were not good enough and that a third warning was needed in between the other two (admittedly good) warnings. Kasbekar did not test the existing locations, cited no standards or literature on the existing locations and conducted no surveys of the existing locations. He performed the same level of non-work as to his proposed new location.

The district court bears a "gatekeeping responsibility" to "ensur[e] that an expert's testimony both rests on a *reliable* foundation and is *relevant* to the task at hand." *Nease*, 848 F.2d at 229 (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993)) (emphasis in *Nease*). To pass the reliability inquiry, the court must "ensure that the proffered expert opinion is 'based on scientific, technical, or other specialized *knowledge* and not on belief or speculation, and inferences must be derived using scientific or other valid methods.'" *Nease*, 848 F.3d at 229 (quoting *Oglesby v. Gen. Motors Corp.*, 190 F.3d 244, 250 (4th Cir. 1999)) (emphasis in original). The proponent of the testimony must "establish its admissibility by a preponderance of proof." *Cooper*, 259 F.3d at 199 (internal citation omitted).

"*Daubert* requires trial courts to look seriously at the quality of the science or technology used by a witness proffered as an expert. Courts no longer can

simply pass along to juries the principal task of determining the validity of expert testimony on difficult questions of science and engineering." David G. Owen, PRODUCTS LIABILITY LAW (West 3d ed. 2015) at 381. *See also id*. at 361 ("[O]n both defect and causation – experts are usually crucial to the prosecution and defense of a products liability case.")[18] "The main purpose of *Daubert* exclusion is to protect juries from being swayed by dubious scientific testimony." *Nease*, 848 F.3d at 231 (internal quotation marks and citation omitted). *See also Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 261 (4th Cir. 1999) (courts must recognize that "expert witnesses have the potential to be both powerful and misleading") (internal quotation marks and citation omitted).[19]

[18] Without a doubt, the *Daubert* principles apply to expert engineering testimony. *Nease*, 848 F.3d at 229-30. In the context of products claims, the Fourth Circuit has "admonished" that "a plaintiff may not prevail in a products liability case by relying on the opinion of an expert unsupported by any evidence such as test data or relevant literature in the field." *Oglesby*, 190 F.3d at 249 (internal citations and quotation marks omitted).

[19] Where professional experts are involved, like Kasbekar, who has testified a few hundred times (J.A. 401), Hickerson's counsel recognizes the particular need for close scrutiny regarding reliability of their potentially "twisted testimony." Owen, PRODUCTS LIABILITY LAW at 362-63 ("The very idea of a *professional* expert witness is problematic. . . . [M]any 'professional' experts are economically dependent on being retained by lawyers to testify … they have a natural bias to arrive at conclusions that favor their employers. Without a steady moral compass, grounded in a personal reservoir of knowledge, judgment, professional conviction, and an alternative source of income, a professional witness will be tempted to tell the employing lawyer what the expert thinks the lawyer *wants* to hear … .") (emphasis in original).

Hickerson brashly argues that the District Court abused her discretion, because she "conducted **no** reliability analysis under any factors" regarding Kasbekar's opinions on the adequacy of Yamaha's warnings, and the District Court "**arbitrarily** assumed that Dr. Kasbekar's opinion was 'ostensibly' based on his proposed alternative warning." App. Br. at 24 (emphasis added).[20] She asserts that in three separate orders, totaling fifty-four pages (J.A. 1245-61; 1262-76; 1453-77), the District Court nowhere applied *Daubert* and its progeny regarding the reliability of his opinion on warnings. This is not only completely unbelievable; it is plainly incorrect.

Hickerson agrees that as to Kasbekar's (*the existing locations are not good enough, you need a third one — in between — the other two)* opinion(s), the District Court "analyze[d] the reliability of his opinions based on the *Daubert* testing and research factors." App. Br. at 25. It is not arbitrary, odd or confusing (Hickerson's terms) that once the District Court concluded that (under *Daubert*) the "third one in between the other two" opinion was not scientifically grounded, that the "existing locations are not good enough" opinion must also fail. After all, there was no science offered by Kasbekar regarding any location whatsoever.

[20] *See also id*. at 25 (alleging that the District Court's *in limine* order "failed to undertake **any reliability** analysis on Dr. Kasbekar's opinions on the inadequacy of the jet ski warning labels" and "oddly, and confusingly," ruled that "Plaintiff had no expert testimony on the warnings issues in the case.") (emphasis added).

The District Court made no "assumptions" about Kasbekar's opinions. Kasbekar testified that Yamaha's warnings were inadequate, due to their **location** and that a third warning in between was needed. J.A. 416; 417 ("My opinion is, it's fairly simple in this case, I think a specific warning located where the rear passenger can clearly see it would have had a greater impact.") Hickerson's counsel argued to the District Court repeatedly that the crux of Kasbekar's opinion that Yamaha's warnings were inadequate was because they were in the wrong location.[21]

Where an opinion on adequacy turns on whether the warning is in the wrong location, and the court excludes the opinion regarding the new location for lack of scientific basis (because there was no testing, literature or studies in support of—or against—any location), it necessarily follows that the entire opinion on location fails. The District Court made the connection clear in her orders. J.A. 1457 (the same analysis was applied to both Kasbekar's testimony that the warnings were inadequate and his proposed warning on the PWC's seat); 1458 (the District Court

[21] J.A. 1241 (the Uniform Warning Label was "not necessarily being criticized in this case"); J.A. 1218 (it is the Uniform Warning label's "location" that "doesn't adequately inform the passenger"); 1215 (the warning is "placed in the wrong area and, therefore, is not an effective warning"); 1242 (Kasbekar "effectively moved their warning to a location more fit for a passenger"); 1004 (Kasbekar "effectively locate[d] a shorter version of Yamaha's warning near the at-risk passenger on the PWC").

explaining that exclusion of Kasbekar's proposed warning "would also result in exclusion of his testimony as to the adequacy of the PWC's warnings").

The District Court expressly conducted a *Daubert* reliability analysis regarding the warnings opinion(s). The *Daubert* order reviewed the bases for **both** Kasbekar's inadequacy opinion and his proposed location opinion. J.A. 1252. The District Court found that he "provided no specific relevant research or studies – neither in his deposition testimony nor his report," for his opinions that the warnings are "inadequate and insufficient." J.A. 1252-53. The District Court expressly outlined why the *Daubert* factors, when applied to the inadequacy opinion, led to the exclusion of Kasbekar's inadequacy opinions. J.A. 1466-67 (citing case law and explaining that "[t]he failure of an expert testifying to a warning's adequacy to validly create and test an alternative design weighs against the reliability of his testimony"); *id.* (citing cases to explain "[t]he failure of such an expert to support his opinion with relevant studies or literature in the field likewise weighs against reliability"). In summary, the District Court made its *Daubert* analysis regarding the inadequacy opinion crystal clear for Hickerson:

> [T]he court accounted for the facts that Dr. Kasbekar had some training and experience in the relevant field, had failed to subject his proposed warning to testing and thus had failed to create an alternative test on which to form an opinion regarding the warnings' adequacy, and had not tied his opinion to the warnings' adequacy to any specific research or studies within the field.

J.A. 1467-68. Hence, Hickerson's brash assertion that the District Court did not conduct a "reliability" analysis (App. Br. at 24) distorts the record.

Second, Hickerson argues that "[t]he record," *i.e.*, "Kasbekar's testimony" showed that he relied on (1) "other warning labels in use on competitors' products in the industry"; (2) "ANSI industry standards"; and (3) "his own testing of the Yamaha jet ski," which purportedly make his inadequacy opinion reliable. App. Br. at 26. The record shows no such thing.

As to the "other warnings" issue, which relates to whether the pictogram should be black on white or white on black (App. Br. at 26-27 (citing J.A. 411-12)), Kasbekar testifies "I think it should be black." J.A. 412. He identifies no scientific basis for the criticism, but relies on his subjective beliefs ("I don't know that I've ever seen a white wetsuit bottom") (J.A. 412),[22] and nowhere testifies that had the wetsuit bottom in the warning been black, the accident would have been prevented. J.A. 412. Thus, there was no showing of either reliability or fit, as required by Rule 702. Below, Hickerson did not argue otherwise.[23]

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[22] It can be either black on white or white on black. *See* J.A. 862 (Dr. Dorris finding that the Uniform Warning Label's written safety messages as well as symbols (pictorials) to communicate important safety messages are "formatted appropriately and conform to the conventions outline in the American National Standard Z535.4.").

[23] *See* J.A. 1003-05 (arguing for reliability of Kasbekar's warnings opinions, nowhere referring to criticism regarding the color of wetsuit bottoms). *See also*

As to Kasbekar's purported reliance on ANSI Z535 for the "opini[on] that the product label is congested with too many warnings," (App. Br. at 3 (citing J.A. 413-14)) Kasbekar did not testify that Yamaha violated any section of ANSI Z535[24] and, in fact, testified that he was **not** opining regarding whether the Uniform Warning contained too many warnings:

> Q. But – so I'm characterizing your view about this. There's too many warnings there. You want – you think it should be less?
> A. Well, I don't – **I don't know whether I'm going to say that it should be less** in that particular location. … And I think that particular warning should be relocated to a different location with simpler language and isolated from the other warnings.
> Q. . . . Are you agreeing that what you're saying is that there are too many warnings on the uniform label. Is that a yes or a no to that?
> A. **I'm not going to say there are too many warnings on the label**. …

J.A. 415-16 (emphasis added). Thus, "the record" shows that Hickerson is complaining that the District Court failed to consider Kasbekar's reliance on ANSI for an opinion that he was not offering in the case.

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discussion, *supra*, that at the hearing and during the motion to amend, Hickerson adopted the Yamaha warnings as her own and only criticized the location.

[24] Kasbekar's report did not refer to or cite ANSI in support of his warnings opinions. *See* J.A. 724-25.

Hickerson argues (citing *Marshall v. Lowe's Home Center, LLC*, 2016 WL 4208090 (D.S.C. Aug. 10, 2016)) that reliance on ANSI standards can be an indication of reliability. App. Br. at 28. That may be, but first it has to be relied upon for an opinion that is actually being offered, and that is not the case here. As Hickerson explained to the District Court, she was not criticizing the Uniform Warning Label content or format; just the location. Accordingly, *Marshall*'s references to ANSI are of no import here.[25]

Hickerson also argues that the District Court's *Daubert* analysis was an abuse of discretion, because Kasbekar supported his inadequacy opinion with on-water testing. App. Br. at 27. Hickerson makes this argument for the first time. She said nothing of this kind to the District Court. J.A. 1003-05. The on-water testing had nothing to do with the warnings opinion, and she told the District Court that those tests "duplicated the exact tests that Yamaha ran" on their Cruiser seat—

[25] Moreover, in *Marshall* the court found the testimony of one of the plaintiff's experts reliable, because the expert had a prototype alternative design which was tested for compliance with ANSI standards. *Marshall*, *supra*, at *8. Further, that expert had discussed his review of the ANSI standard in his report and testified regarding the specific standard in his deposition. *Id*. at *9. Additionally, that expert discussed the incident with the plaintiff, went to the site, photographed the product, reviewed discovery, and created and tested the alternate design. *Id*. at *9. In comparison, Kasbekar's report does not cite ANSI, his deposition testimony regarding ANSI is related to warnings congestion, an opinion that he ultimately abandoned, and he did not testify that his alternative design warning was tested under ANSI standards.

supporting Hickerson's design argument regarding seat shape. J.A. 1001. Moreover, Kasbekar's references to the on-water testing nowhere records any findings regarding warnings. *See* J.A. 768-86. It was to show that a different seat shape might make it easier to stay on the craft.[26]

C. Warnings Opinions Are Not Exempt from *Daubert* Analysis

Hickerson argues that even though Kasbekar's warnings inadequacy opinions meet the *Daubert* reliability factors, these "factors are often inapt for assessing the reliability of expert testimony" concerning "product warnings." App. Br. at 28. Thus, while castigating the District Court for allegedly failing to apply the *Daubert* factors, Hickerson asks this Court to find that a *Daubert* analysis is not required and should not be used to exclude Kasbekar's testimony. Hickerson's argument fails for multiple reasons including: (1) the District Court made clear that she recognized the flexibility of the *Daubert* factors and did not apply a bright-line rule regarding testing; and (2) regardless of the subject matter of the expert testimony, case law holds that a *Daubert* analysis must be applied before expert

[26] The illogic of Hickerson's argument that Kasbekar's on-water testing supported an opinion that the direction to use a wetsuit "did not effectively convey how to avoid injuries," is aptly demonstrated by the fact that his own proposed warning told riders to "**ALWAYS**" wear a wetsuit bottom. *See* J.A. 754, 756 (emphasis in original).

testimony may go to the jury. There is no exception to this rule for warnings opinions.

Hickerson points to testimony from Yamaha's warning expert, Dr. Dorris, that developing a warning may not require testing. App. Br. at 28. First, Dorris' testimony does not say that testing is never an appropriate way to evaluate warnings efficacy. He testified that to measure effectiveness, you "can look and evaluate if the warnings achieve those goals." J.A. 829. He also makes clear that the Uniform Warning Label (used by Yamaha) was, in fact, tested.[27] Testing of warnings is valuable information, but it may not be necessary in every case.

Additionally, the District Court expressly held that she would not adopt a bright line rule requiring testing for the admissibility of warnings opinions. J.A. 1456 (explaining rejection of "a brightline approach" and that "the absence of testing" is just one factor"). Lack of testing is just one fact, but here Kasbekar had nothing else (no standards, no literature, or other "science").

Hickerson cites no authority that supports her proposition that warnings opinions are beyond *Daubert's* reach.[28] Moreover, other courts have applied

[27] "We do have that kind of information. These messages have been evaluated for comprehension. So there is some data that you can look at with respect to comprehension of the messages." J.A. 830.

[28] The Advisory Committee on Fed. R. Evid. 702's notes to the 2000 Amendments, cited by Hickerson (App. Br. at 29) support the application of *Daubert* to warnings

Daubert factors to warnings testimony. *See, e.g.*, *Bourelle v. Crown Equip. Corp.*, 220 F.3d 532 (7th Cir. 2000); *In re C.R. Bard, Inc.*, 948 F.Supp.2d 589 (S.D. W.Va. 2013); *Milanowicz v. The Raymond Corp.*, 148 F.Supp.2d 525 (D.N.J. 2001); *Jaurequi v. John Deere Co.*, 971 F.Supp. 416 (E.D. Mo. 1997).

Hickerson raises the often asserted notion that cross-examination is always available. App. Br. at 29. This argument is frequently raised in *Daubert* hearings, but rarely persuasive. This Court has specifically admonished district courts against abdicating their *Daubert* gatekeeping duties and leaving reliability determinations to the jury on cross-examination. In *Nease*, the District Court denied the *Daubert* motion; relying, instead, upon thorough cross-examination. This Court reversed: "[T]he district court did not perform its gatekeeping duties" and "abused its discretion." *Nease*, 848 F.3d at 231. "The fact that an expert witness was subject to a thorough and extensive examination, does not ensure the reliability of the expert's testimony; such testimony must still be assessed **before it**

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opinions. *See* Fed. R. Evid. 702, Advisory Cmte. Notes 2000 Amendments ("The trial court's gatekeeping function applies to testimony by **any** expert. … While the relevant factors for determining reliability will vary from expertise to expertise, the amendment rejects the premise that an expert's testimony should be treated more permissively simply because it is outside the realm of science.") (emphasis added).

is presented to the jury for cross-examination." *Id.* (internal quotation marks and citation omitted) (emphasis added).[29]

Hickerson cites *Pineda v. Ford Motor Co.*, 520 F.3d 237 (3d Cir. 2008) and *Bradley v. Ameristep, Inc.*, 800 F.3d 205 (6th Cir. 2015) to support her "cross-examination is the best test" argument. App. Br. at 29. Neither support the argument. In *Pineda*, the court expressly recognizes the applicability of the *Daubert* factors to warnings opinions. *Pineda*, 520 F.3d at 247-48.[30] In *Bradley*, the Sixth Circuit explained that "[t]he district court did not reach the issue of whether to exclude [the experts'] opinions as to the failure-to-warn claims because the district court dismissed those claims on other grounds." 800 F.3d at 207, n.1.

[29] *See also* "Abnormal Interviews: Law Professor David G. Owen," (Oct. 26, 2010) *available at* http://abnormaluse.com/2010/10/abnormal-interviews-law-professor-david.html ("The purpose of Daubert was to rid courtrooms of 'junk science,'" which was "allowed into evidence" by judges "uttering the mantra that any weakness in such testimony went merely to its weight.").

[30] Although the court in *Pineda* found that the district court focused "too narrowly" on the expert's failure to test or offer proposed warnings language, (520 F.3d at 248) the District Court, here, did not require testing and considered other *Daubert* factors, including lack of any scientific evidence.

D. The District Court Correctly Held that Yamaha's Warnings Were Adequate as a Matter of Law

1. The District Court Did Not Err

Hickerson argues that the District Court erred in "ruling that expert testimony was needed." App. Br. at 23, 31. This is also wrong.

As an initial matter, the District Court's order did not adopt an inflexible rule requiring expert testimony regarding all warnings claims. Instead, the District Court explained:

> Because adequacy of warnings in products liability cases tend to implicate the study of human factors and other industry standards, this court agrees that expert testimony is perhaps the most appropriate form of evidence to support Plaintiff's claims since those areas are generally beyond the common knowledge of the jury.

J.A. 1267. *See also* J.A. 1471 ("[t]he order never stated that expert testimony is always necessary for a jury to reach a determination that a warning is inadequate" and that "[a]t most, the court determined that, in **this particular case**, expert testimony as to the warnings' inadequacy would be important") (emphasis added).

Case law (cited by Hickerson) supports the District Court's findings regarding the importance of expert testimony in this case. In *Pineda*, the court held that where a plaintiff claimed "an existing warning or instruction was ineffective, misleading, or otherwise defective, a true 'warnings expert' might be required." 520 F.3d at 245 n.12. According to the court, "[s]uch an expert could be

expected to testify as to the syntax, color, size, placement, clarity, or other numerous factors, related to an existing warning or instruction." *Id.* (internal citation omitted).

Hickerson's argument that expert testimony regarding warnings is unimportant is also contrary to the actions of Hickerson's counsel and of Kasbekar himself. Kasbekar relied on **two** human factors experts to formulate his warnings opinions. *See* J.A. 435 (Kasbekar relied on Karnes' affidavit from Hickerson's counsel); 569 (Kasbekar, by himself, hired another warnings expert to assist him).

Academics likewise acknowledge the importance of expert testimony in products liability warnings defect cases. In "A Decade of Daubert," one such author wrote that "[u]nderstanding the various aspects of the design, manufacture and **labeling** of products normally involves a host of complex, technical considerations requiring specialized expertise." David G. Owen, *A Decade of Daubert*, 80 DENV. U. L. REV. 345 (2002-2003) (emphasis added). The same author wrote: "Expert testimony is often necessary to establish a defect in manufacture, design and warnings and instructions," and, thus, "a products liability case **usually will fail** without an expert's proof of defect by expert testimony." Owen, PRODUCTS LIABILITY LAW at 357 (emphasis added).

Hickerson suggests that warnings are just a question of fact (App. Br. at 30), which ignores the notion that jurors only decide "facts,"[31] (they do not decide "law"), and many "facts" require expert testimony (*e.g.*, medical malpractice cases) to resolve those "facts." The Federal Rules of Civil Procedure require that issues of fact for the jury be triable ones.[32] *See* Fed. R. Civ. P. 50(a)(1) (a court may grant judgment as a matter of law if the "court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue"); Fed. R. Civ. P. 56. ("The court shall grant summary judgment if the movant shows there is no genuine dispute as to any material fact … .").[33]

Plaintiff cites *McCullock v. H.B. Fuller Co.*, 981 F.2d 656, 657 (2d Cir. 1992) and *Ruggiero v. Yamaha Motor Corp., USA*, 2017 WL 1197755 (D.N.J. March 31, 2017), for the same proposition. App. Br. at 30. *McCullock*, has no application here. In that case, the plaintiff was never provided a warning because she was an employee and did not receive the MSDS materials or the shipping box. *McCullock*, 918 F.2d at 657. *Allen v. Long Mfg, N.C., Inc.*, 505 S.E. 2d 354 (S.C.

[31] *See United States v. Cone*, 714 F.3d 197, 227 (4th Cir. 2013) ("It is axiomatic that … issues of fact are reserved for the jury.") (internal citation omitted).

[32] While she cites *Curcio v. Caterpillar, Inc.*, 585 S.E.2d 272, 274 (S.C. 2003) for this proposition (App. Br. at 31), "triable issues" is a procedural question and federal courts and state court procedural rules differ.

[33] Moreover, *Curcio* nowhere states that it is relaxing the standard for judgment as a matter of law.

Ct. App. 1998), the only South Carolina decision to cite *McCullock*, cited it for the proposition that "other jurisdiction[s]" have "held that the adequacy of a warning is a question for the jury **once the plaintiff has presented evidence that the warning is inadequate**." *Id*. at 357 (emphasis added).[34]

Ruggiero was a diversity case under New Jersey law (where New Jersey adopted the "heeding presumption"), which arguably shifts the burden to the defendant in warnings cases. 2016 WL 1197755 at *11. Moreover, unlike here, the *Ruggiero* Court did not reach the causation issue, because the facts were different. *Id*. *Ruggiero* has no application here for those reasons.

Gasque v. Heublin, Inc., 315 S.E.2d 556 (S.C. Ct. App. 1984) (App. Br. at 31) likewise does not support Hickerson's argument that expert testimony was not needed for her warnings claims. First, there was expert testimony on the warnings.[35] Second, unlike here, there was a complete absence of a warning on premature cork ejection. *Id*. Here, there were express warnings on the very topic at issue. J.A. 1268-69. *See also id*. at 1270 ("[I]t would be difficult for this court

[34] Thus, *McCullock* is similar to *Pineda*, which held that a true warnings expert may be required to testify regarding existing warnings, but not about whether a warning should have been provided to the plaintiff at all.

[35] An expert testified regarding the label's print size, one of the three facts noted by the appellate court as making the issue one for the jury. *Gasque*, 315 S.E.2d at 560.

to accept that a jury could find that the warnings' direct and specific verbiage and its multiple locations on both the front and rear parts of the PWC rendered them inadequate") (citing *Phelan v. Synthes*, 35 Fed. Appx. 102, 109 (4th Cir. 2002)).

Hickerson's brief spends two and a half pages arguing that the "location, content, and form of the warning" created a question of fact for the jury. App. Br. at 31-33. While Hickerson makes numerous factual representations regarding the warnings' adequacy, there are no citations to the record or to case law. This is plain and simply unsupported lawyer argument. These issues are waived. *See* Fed. R. App. P. 28(a)(8)(A) and *Projects Mgmt Co. v. Dyncorp Intern, LLC*, 734 F.3d 366, 376 (4th Cir. 2013) (failure to cite the record amounts to waiver).

2. Hickerson's Lack of Evidence

Hickerson argues that the District Court erred by "improperly weighing" evidence. App. Br. at 34. This is legally incorrect. A nonmoving party "cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another." *Othentec Ltd. v. Phelan*, 526 F.3d 135, 140 (4th Cir. 2008) (internal quotation marks and citation omitted). To defeat summary judgment, the nonmoving party must produce evidence "upon which a jury could properly proceed to find a verdict." *Id.* (internal quotation marks and citations omitted). "[T]he mere existence of **some** alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary

judgment." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247-48 (1986) (emphasis in original). If "the evidence is **merely colorable**" or "**is not significantly probative**, summary judgment may be granted." *Id*. (internal citations omitted) (emphasis added).

Hickerson then asserts that there was "considerable body of record evidence" supporting Hickerson's position. App. Br. at 36. However, the evidence cited is Yamaha's own expert, Dr. Dorris, most of which she **did not cite** below when she opposed summary judgment, below. App. Br. at 34-36.[36] The main pages cited below were pages 95 and 96, wherein Dorris testified that the passenger either might (or might not) have a direct line of sight to the glove box warnings; after already being seated, depending on multiple variables. These pages did not create an issue that would enable the jury to reach a verdict. J.A. 1474-75. It was also not an "admission" of defect.

Hickerson also argues that the District Court "effectively held that conforming to industry custom is a conclusive defense." App. Br. at 36. Again, this is wrong. The District Court did not make that holding, but certainly the fact

[36] Below, opposing summary judgment, Hickerson cited just 4 pages from Dorris' deposition in support of her warnings inadequacy argument (49, 95, 149 and 154), (J.A. 1090) whereas here Hickerson cites 12 pages (95-96, 99-100, 113-115, 126-127, 130, 132, and 149). App. Br. at 34-35 (citing, respectively, J.A. 833-834, 837-838, 839-841, 844-845, 848, 850, and 1101).

that the Uniform Warning Label has been tested and reviewed by a host of safety organizations is a relevant consideration. J.A. 1262-76, 1453-78.

The District Court ruling was correct.

II. The District Court Correctly Held that South Carolina Follows Comment j to the Restatement (Second) Torts § 402A

Summary: Boiled down to its essence, Hickerson's current arguments are: a) the South Carolina Appellate Courts are wrong ("wrong-headed"); b) the District Court was wrong ("clear error"); c) comment j (read literally) is wrong;[37] and; d) the new Hickerson-Appellate view is correct and the South Carolina Supreme Court would (should?) adopt the Hickerson-Appellate view because South Carolina is "plaintiff-friendly." Accordingly, Hickerson says this Court should also adopt this view and reject comment j (as well as all of the existing South Carolina precedent).

There is no indication that any of this is correct. In the face of the 402A Act,[38] consistent South Carolina court interpretation and legislative acceptance of

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[37] Presumably, Prosser was also "wrong" for proposing it. [Some academics have, in fact, made just that argument. *See, infra*, n. 54 (citing David G. Owen, *The Puzzle of Comment j*, 55 HASTINGS L.J. 1377 (2003-2004) at 1384, n.39).]

[38] South Carolina adopted the Restatement (Second) of Torts § 402A by statute. S.C. Code Ann. § 15-73-10 (the "402A Act"). The Act also adopted the comments to § 402A. S.C. Code Ann. § 15-73-30 (both statutory sections included in Exhibit B hereto).

the pre-existing interpretations of comment j, Hickerson nonetheless prevails upon this Court to reject it all. No doubt, some in the academic world would now like to go back and delete comment j from the South Carolina statutory history. In 1974, when the statute was enacted, almost everyone understood 402A's comment j to mean just what it appeared to say: a warning can be sufficient to make the product "safe."[39] Accordingly, the District Court was correct to rely upon the uniform state court interpretation of the statute and comment j.

The new Hickerson-Appellate view should be disregarded: In addition to the above reasons why Hickerson's comment j arguments should be disregarded, they are also newly raised on appeal. [40] Below, Hickerson did not make the South

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[39] At the time South Carolina adopted the 402A Act and even later, it was understood that an adequate warning could prevent a defect claim. *See, e.g.*, *Procter & Gamble Mfg. Co. v. Langley*, 422 S.W.2d 773, 778 (Tex. App. 1967); *Schmeiser v. Trus Joist Corp*., 540 P.2d 998, 1007 (Or. banc 1975); *Phipps v. General Motors Corp*., 363 A.2d 955, 960 (Md. 1976); *Baughn v. Honda Motor Co., Ltd*., 727 P.2d 655, 661 (Wash. banc 1986). *See also* James A. Henderson, Jr., *Restatement Third, Torts: Products Liability: What Hath the ALI Wrought?* 64 DEF. COUNS. J. 501, 511 (Oct. 1997) ("Under existing case law, a design that would be defective without a warning can be made non-defective by an adequate warning") (citing cases).

[40] Below, opposing summary judgment, Hickerson argued that under *Allen*, "[i]n a case where the manufacturer concedes it [sic] product is dangerous, the product can be made safe by an adequate warning." J.A. 1092. *See also id*. at 1275-76 (District Court rejecting the need for the concession). In her Motion to Alter or Amend the District Court's order, Hickerson argued that South Carolina law was "clear" and applied comment j to make products not defective, if there was a concession that the product required a warning. J.A. 1286 ("South Carolina law

Carolina Courts are "wrong-headed" argument, but rather argued that comment j would "trump" a design defect theory; but only if the defendant made certain "concessions." The "required-concessions" position has not been re-asserted here.

Because Hickerson did not argue below that the South Carolina Supreme Court would not follow *Allen* and *Curcio* (applying 402A's comment j) and did not argue that those cases "misinterpreted" comment j or were "wrong-headed," her failure waives the argument on appeal. *See, e.g., First Virginia Banks, Inc. v. BP Exploration and Oil, Inc.*, 206 F.3d 404, 407 n.1 (4th Cir. 2000); *Muth v. United States*, 1 F.3d 246, 250 (4th Cir. 1993) (holding "issues raised for the first time on appeal generally will not be considered") (internal citations omitted). Nor may Hickerson revert to her prior argument, that Yamaha must concede a duty to warn, in her reply brief. *Lewis v. U.S. Immigration and Naturalization Serv.*, 194 F.3d 539, 547 n.9 (4th Cir. 1999) (refusing to consider an issue raised for the first time in a reply brief).

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makes it clear that products that **must display a warning** are not unreasonably dangerous if accompanied by an adequate warning.") (emphasis in original); 1287 ("As *Allen* mandates, and *Curcio* confirms, before reaching the question of adequacy of warnings, a court must look first to whether there is a duty to warn."); 1288 (Defendants "fail to concede that their product is unreasonably dangerous without the warning," and "[w]ithout the concession, the Defendants have not admitted a duty to warn and cannot therefore rely on a mere warning to make their product reasonably safe."); 1289 ("Since the Defendants fail to conceded a duty to warn, the Court should have failed to grant summary judgment … .").

A. Product Design Includes Warnings

Hickerson argues that product defect claims are "independent of one another in South Carolina as elsewhere." App. Br. at 9. Hickerson cites the author of her brief as authority, stating that this is "hornbook (and nutshell) law." *Id*. at 11. Case law, legal practitioners (including Hickerson's counsel below), and product engineers, agree the claims are necessarily interrelated. Common sense says the same.[41]

South Carolina adopted the Restatement (Second) § 402A, including its comments, by statute. *Branham*, 701 S.E.2d at 14 (citing S.C. Code Ann. §§ 15-73-10 et seq.). At the time 402A was drafted, defect was considered a "unitary

[41] Consider, for example, the issue of manufacturing defect. By definition, a manufacturing defect can only be understood in reference to the design itself. Even under the risk/utility test of the Restatement Third, one of the factors in a design defect case is consideration of the warnings. *Branham v. Ford Motor Co*., 701 S.E.2d 5, 14 (S.C. 2010). Commentators have noted the artificiality of entirely distinct "boxes." Frank J. Vandall, *Constructing a Roof before the Foundation is Prepared: The Restatement (Third) of Torts: Products Liability 2(b) Design Defect*, 30 U.MICH. J.L. 261, 267-68 (Spring 1997) (discussing the Third Restatement's "three magic boxes": the manufacturing defect box, the design defect box, or the warning defect box," asserting that "applying magic boxes to actual cases will be challenging at best"); Douglas E. Schmidt., et al., *A Critical Analysis of the Proposed Restatement (Third) of Torts: Products Liability*, 21 WM. MITCHELL L. REV. 411, 414 (Winter 1995) (distinctions between manufacturing and design defects have been called an illusion, slippery, and are no longer tenable) (internal quotation marks and citations omitted).

concept." Owen, PRODUCTS LIABILITY LAW at 331.[42] South Carolina requires a plaintiff to establish the following same three elements in "**any** products liability action": "(1) he was injured by the product; (2) the product was in essentially the same condition at the time of the accident as it was when it left the hands of the defendant; and (3) the injury occurred because the product was in a defective condition unreasonably dangerous to the user." *Graves v. CAS Med. Sys., Inc.*, 735 S.E.2d 650, 659 (S.C. 2012) (internal citation and quotation marks omitted) (emphasis added). South Carolina law holds that "[i]f a warning is given which, if followed, makes the product safe for use, the product cannot be deemed defective or unreasonably dangerous." *Allen*, 505 S.E.2d at 357 (citing Rest. 2d Torts § 402A, cmt. j (1965)).

Below, Hickerson argued that design and warnings were so intimately related that any design expert would necessarily be qualified to testify about

[42] *See also* David G. Owen, *Design Defect Ghosts*, 74 BROOK. L. REV. 927, 928 (2008-2009) ("First among design defect issues highlighted by the Third Restatement was whether the idea of a defective product should continue to be conceived of as a **unitary concept**, as in section 402A … or whether the product defect idea should be splintered into three separate pieces … ."") (emphasis added). In this scholarly article, the author calls the Restatement (Third) of Torts: Products Liability "politically charged," and states that it was perceived as "an ideologically driven reform effort." *Id*. at 927, 929.

warnings.[43] If these fields are wholly distinct, separate and unrelated, then the arguments made below were wrong.

Hickerson cites *Watson v. Ford Motor Co*., 699 S.E.2d 169 (S.C. 2010), *Marshall v. Lowe's Home Centers,* LLC, 2016 WL 4208090 (D.S.C. Aug. 10, 2016), and *Williams v. Pioneer Machinery, Inc*., 2004 WL 6249103 (S.C. Ct. App. Feb. 25, 2004) to argue that South Carolina law recognizes three types of product defect claims. App, Br. at 10. Recognizing that there are theories (warnings, manufacturing and design) does not establish that they are unrelated to each other. For example, *Marshall* held that comment j and South Carolina case law "recognize an adequate warning *may* preclude liability for a defective design claim," (*Marshall* at *20, n.29) just as the District Court held, here.[44]

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[43] Kasbekar is qualified to testify about "the design of a product, **which is inclusive of warnings**, and determine[] whether the product is reasonably safe … ." J.A. 1210 (emphasis added). Noting experience in "failure analysis and prevention," "where issues of warnings is a key ingredient." J.A. 399.

[44] *Marshall's* recognition of the fact that comment j and South Carolina law hold that an adequate warning may preclude a design defect claim is consistent with the decision of the District Court, as well as other federal district court opinions. *See, e.g., Aldana v. RJ Reynolds Tobacco*., 2007 WL 3020497, *4 (D.S.C. Oct. 12, 2007); *Alford v. Lowe's Home Centers*, Inc., 2014 WL 5305825, *2 (D.S.C. Oct. 15, 2014); *Grooms v. United Industries Corp*., No: 3:07-392-JFA, Order Granting Summary Judgment, (8/15/08) at 10 (*Grooms* included in attached Exhibit B).

B. The District Court Appropriately Followed South Carolina Appellate Case Law

Hickerson argues that the "District Court erroneously relied on South Carolina intermediate appellate opinions … ." App. Br. at 11, 13. Hickerson's legal position is wrong and District Courts should defer to Court of Appeals' decisions, as they represent South Carolina law. Only in the face of "persuasive data" that the existing Appellate Court decisions are wrong, may a District Court ignore them. Hickerson presents no such "persuasive data."

There was nothing erroneous about the District Court's reliance on South Carolina Court of Appeals' precedent. An intermediate court of appeals judgment "is not to be disregarded by a federal court," unless the court is "convinced by persuasive data that the highest court of the state would decide otherwise." *Assicurazioni Generali, S.P.A. v. Neil*, 160 F.3d 997, 1002 (4th Cir. 1998) (internal citation omitted).[45] "Generally, only if the decision of a state's intermediate court cannot be reconciled with state statutes, or decisions of the state's highest court, or both, may a federal court sitting in diversity refuse to follow it." *Id*. at 1003. "[A] federal court cannot refuse to follow an intermediate appellate court's decision

[45] *See also Lynch v. Universal Life Church*, 775 F.2d 576, 580 (4th Cir. 1985) ("Ordinarily, a federal court should follow the decisions of the intermediate state court of appeals.")

because it believes the intermediate court's decision was wrong, bad policy, or contrary to the majority rule … ." *Id.* at 1003.[46]

Hickerson's "persuasive data" for disregarding the appellate court opinions is the purported "self-evident" fact that "the South Carolina General Assembly enacted the 402A statute to assist persons injured by defective products." App. Br. at 11. Of course, there is nothing in the statue that proclaims that it was intended to be "plaintiff-friendly." No other evidence is provided. It is exactly this kind of (*I do not agree with the policy*) argument that federal courts have been encouraged to avoid when interpreting state law.

Other commentators have recognized that in South Carolina, comment j means that a warning can render a product "safe." Stephen G. Morrison, *Warning v. Design in Products Litigation: Third Time's Not Always a Charm*, 10 KAN. J. K. & PUB. POL'Y 86 (2000) at 86 n.1, 88 (explaining that comment j is "a well-established principle of law," that it "has been adopted or cited by approval in twenty-eight states," and noting its adoption by South Carolina in *Allen*).[47]

[46] "Common sense" or "what ought to be the law," are not "persuasive data permitting a federal court to ignore the holding of an intermediate state court." *Id.* at 1004.

[47] One cited hornbook dedicated a section of that book to Morrison as "an exceptional lawyer." Owen, PRODUCTS LIABILITY LAW at 351 n.101.

C. The District Court Correctly Held that South Carolina Would Not Abandon Precedent Applying Comment j

Hickerson argues the South Carolina Supreme Court would overrule or reverse South Carolina law applying comment j for "at least four reasons." App. Br. at 14. All of this is newly raised here, but none of it is correct.

Argument 1: There are three types of defect theories. App. Br. at 14. There are no citations to any South Carolina cases here; but as explained above, whether there are different theories or not, says nothing about whether they are interrelated.[48] Hickerson must have anticipated this logical response, because Hickerson goes on to support this contention relying upon "common sense, good policy, and widespread American law." None of this is "persuasive data" and the Fourth Circuit expressly warns against ignoring state law based upon "bad policy." *See Assicurazioni Generali, S.p.A.,* 160 F.3d at 1003.

Argument 2: Design defect theories are "vitally important to society." App. Br. at 14-15. Of course, this sounds like the same "bad policy" argument from above. No South Carolina cases are cited. This also does not amount to "persuasive data" sufficient to justify a departure from a variety of Court of Appeals holdings. Hickerson then goes on to suggest additional "policy

[48] As we saw in *Marshall*, cited by Hickerson for the proposition that South Carolina recognizes separate types of defect, (App. Br. at 10) that fact does not preclude the application of comment j. 2016 WL 4208090, *20 n.29.

reasons;" such as the suggestion that comment j can result in "unacceptable safety implications."[49] App. Br. at 15. Of course, the fan example has no application here. For comment j to apply, the warning must be "adequate." *Allen*, 505 S.E.2d at 357. One might view the words: "watch out for blades" as being inadequate—but that is not the case with Yamaha's warnings, because there is no dispute over the words.[50] Moreover, an inadvertent hand insertion into a spinning blade is different from a conscious decision not to wear a motorcycle helmet or other kinds of protective gear.[51] These imaginary "safety implications" are simply not applicable to this case.[52]

Argument 3: Comment j would "revive" the "patent danger rule."

App. Br. at 15. Hickerson cites two South Carolina cases to support the notion that South Carolina rejects the patent danger rule. *Id*. at 16, n.5. Obviously, if South Carolina has rejected the patent danger rule and has accepted comment j; then this

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[49]App. Br. at 15 (proposing a hypothetical unguarded fan with a warning).

[50]*See, e.g.*, J.A. 1284 (Kasbekar's proposed warning is "merely the Defendants' own warning").

[51] The Fourth Circuit has held while a warning might not bar liability if the case involved a "consumer's inevitable inattention," it would apply in cases where there was affirmative consumer misuse. *Hood v. Ryobi Am. Corp.*, 181 F.3d 608, 611-13 (4th Cir. 1999) (citing comment j and applying Maryland law).

[52]*See* J.A. 1268-69 (District Court holding the plain language of the warnings expressly warned of the injury suffered by Hickerson and provided instructions regarding its avoidance).

argument fails. Clearly, one does not result in the other. As a part of this argument, Hickerson suggests that the entire South Carolina statute was intended to be "plaintiff-friendly." App. Br. at 16-17. The text of South Carolina's 402A Act does not contain the words "plaintiff-friendly."[53]

South Carolina case law on statutory interpretation supports the appellate courts' and District Court's application of comment j. *Barnwell v. Barber-Coleman, Co.*, 393 S.E.2d 162, 163 (S.C. 1989) (holding that "this Court is compelled to interpret the laws of the General Assembly in their plain meaning, whether or not the result places South Carolina in the minority among jurisdictions," and courts "cannot read into a statute something that is not within the manifest intention of the Legislature as gathered from the statute itself"). In *Barnwell*, the court explained:

> To depart from the meaning expressed by the words is to alter the statute, to legislate and not to interpret. The responsibility for the justice or wisdom of legislation rests with the Legislature, and it is the province of the Courts to construe, not to make, the laws.

Id. (internal citation omitted).

Hickerson devotes three pages (App. Br. at 17-20) to citing articles and arguing that the South Carolina courts are "wrong-headed." Hickerson advances

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[53] As Hickerson acknowledges, "the text of a statute is considered the best evidence of legislative intent." App. Br. at 16 (citing *White Oak Manor, Inc. v. Lexington Ins. Co.*, 753 S.E.2d 537, 540 (S.C. 2014)).

the newly generated notion that comment j really should have been in comment k. Comment j is entitled "**Directions and Warnings**" and seemingly was intended to generically refer to that topic. Rest. 2d. Torts § 402A, cmt. J. Comment k is entitled "**Unavoidably Unsafe Products**" and seemingly was intended to refer to a unique subset of products. *Id*. at cmt. k. Admittedly, some authors have suggested that comment j is some form of a scrivener's error and that Dean Prosser was in a hurry[54] and really meant for it to be included in comment k. In the absence of some real evidence, this appears to be 30-years-later wishful thinking.

Argument 4: *Branham v. Ford Motor Co*., 701 S.E.2d 5, 14 (S.C. 2010). App. Br. at 20-21. *Branham* actually supports the District Court. Hickerson argues that the Restatement (Second) of Torts § 402A and its comments have been essentially abandoned by the Supreme Court of South Carolina. This also appears to be wishful thinking.

In *Branham*, the court formally adopted risk-utility as the test for design defect cases. 701 S.E.2d at 14. The court relied upon two items that are pertinent here. First, the uniform decisions of the appellate courts (which in our case

[54] David G. Owen, *The Puzzle of Comment j*, 55 HASTINGS L.J. 1377 (2003-2004) at 1384, n.39 ("In his haste to revise the draft … Prosser neglected to adapt most of the comments to their now much broader scope … . Had he had more time, no doubt, he would have added a major heading over comments i, j, and k, entitled "Unavoidably Unsafe Products" … .).

support comment j). *Id*. at 15 ("We believe the rule we announce today … adheres to the approach the trial and appellate courts in this state have been following."). Second, in the face of the earlier South Carolina decisions, the legislature had not acted *Id*. at 14. Likewise, here there have been years of court decisions applying comment j, and the legislature has not acted.

Hickerson goes on to suggest that *Branham* implicitly adopted the Third Restatement and its comments, but case law post-dating *Branham* shows the opposite; 402A and its comments are alive and well in South Carolina. *See Lawing v. Univar, USA, Inc*., 781 S.E.2d 548, 555 (S.C. 2015) (relying on 402A comments l and o to determine whether the plaintiff was a "user" of a product); *Turner v. Cincinnati Inc*., 2013 WL 12126016, *13 (D.S.C. Oct. 15, 2013) (citing comment j); *Sauls v. Wyeth Pharm., Inc*., 846 F.Supp.2d 499, 502 n.2 (D.S.C. 2012) ("South Carolina courts consistently have relied upon [402A] and its commentary in the development of products liability case law.") Even *Marshall v. Lowe's Home Centers, LLC*, 2016 WL 4208090 (D.S.C. Aug. 10, 2016), which Plaintiff cites to support this argument (App. Br. at 20, n.9), recognizes the continuing viability of comment j. *See Marshall, supra* at *20, n.29.

Moreover, the outcome in *Branham* belies any purported notion that South Carolina is "plaintiff-friendly." In fact, commentators have characterized *Branham* and the Third Restatement's risk-utility test as pro-manufacturer. "Abnormal

Interviews: Law Professor David G. Owen," (Oct. 26, 2010) *available at* http://abnormaluse.com/2010/10/abnormal-interviews-law-professor-david.html (the "idea" behind 402A "was that the law demands safe products … ," but the law has been moving "away from strict liability," the and the "most recent example" being *Branham*); Vandall, *Constructing a Roof Before the Foundation is Repaired* at 262 (the Third Restatement does not "further[] traditional products liability policies" and "does not benefit consumers").

CONCLUSION

The Defendants-Appellees, Yamaha Motor Co., Ltd. and Yamaha Motor Corporation, U.S.A., respectfully ask this Court to uphold the District Court's summary judgment ruling in its favor.

Respectfully Submitted,

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Dated: July 14, 2017

STATEMENT REGARDING ORAL ARGUMENT

Yamaha respectfully requests that this Court permit oral argument, given that Hickerson attempts to use the instant appeal to upend settled South Carolina statutory provisions and Court of Appeals case law, basing her argument on nothing more than a wished-for policy change.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(B) and Rule 32(g) of the Federal Rules of Appellate Procedure, I hereby certify that this document complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because it contains 12,503 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as determined by the word count feature of Microsoft Word Version 14.0.7182.5000. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5), because it has been prepared in a proportionally spaced typeface using the same Microsoft Word Version in Times New Roman 14-point font.

Respectfully Submitted,

/s/ Richard A. Mueller

Attorney for Defendants-Appellees

CERTIFICATE OF SERVICE

I hereby certify that, on the 14th day of July, 2017, the foregoing Response Brief of Appellees was filed electronically with the Clerk of Court for the Fourth Circuit Court of Appeals using the CM/ECF system. This CM/ECF system sent notice of such filing to all participants in the case who are registered CM/ECF users. Additionally, one bound, paper copy was filed by overnight, express mail.

/s/Richard A. Mueller
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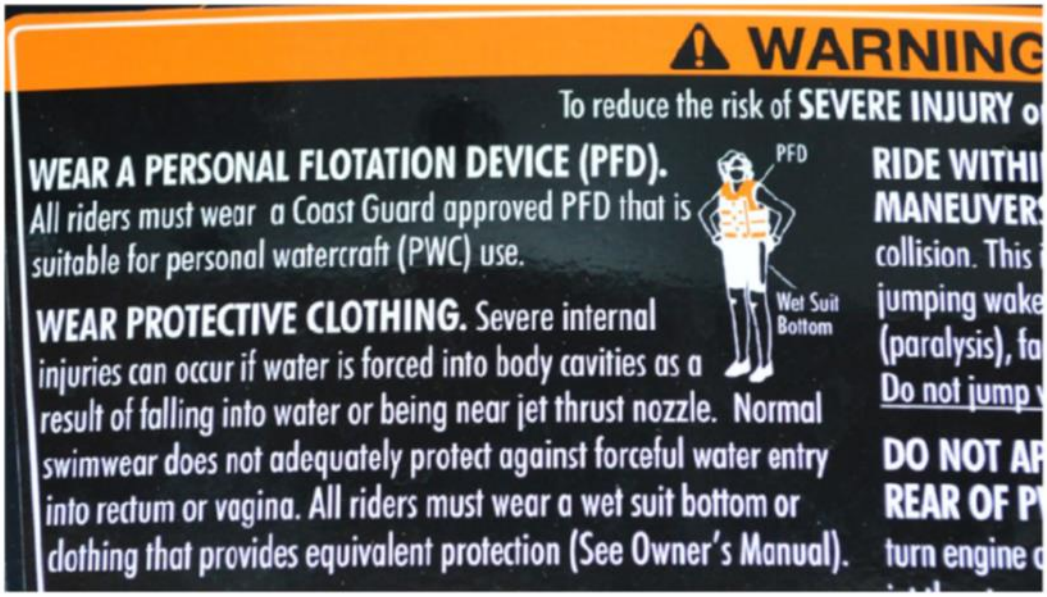
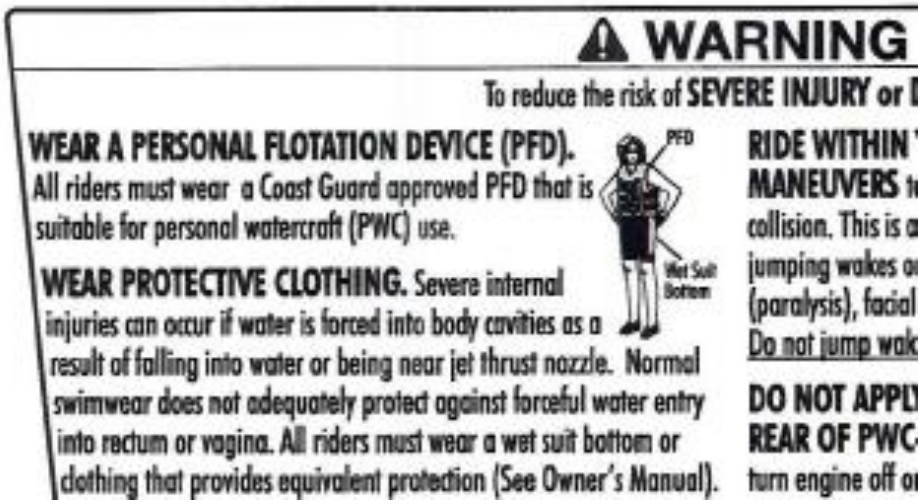
EXHIBIT A

Uniform Warning Label:



Owner's Manual Graphic:



On-Craft Rear Warning Label:

Owner's Manual Graphic:

On-Craft Occupancy Warning Label:

Owner's Manual Graphic:

Photograph – Hickerson and Abascal:

Photograph – Surrogate Riders:

Photograph – Warnings Locations:

EXHIBIT B

Code of Laws of South Carolina 1976 Annotated
Title 15. Civil Remedies and Procedures
Chapter 73. Sellers of Defective Products

Code 1976 § 15-73-10

§ 15-73-10. Liability of seller for defective product.

Currentness

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm caused to the ultimate user or consumer, or to his property, if

(a) The seller is engaged in the business of selling such a product, and

(b) It is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in subsection (1) shall apply although

(a) The seller has exercised all possible care in the preparation and sale of his product, and

(b) The user or consumer has not bought the product from or entered into any contractual relation with the seller.

Credits
HISTORY: 1962 Code § 66-371; 1974 (58) 2782.

Code 1976 § 15-73-10, SC ST § 15-73-10
Current through 2017 Act No. 86, and 88, 90 to 92, and 95, subject to technical revisions by the Code Commissioner as authorized by law before official publication.

Code of Laws of South Carolina 1976 Annotated
Title 15. Civil Remedies and Procedures
Chapter 73. Sellers of Defective Products

Code 1976 § 15-73-30

§ 15-73-30. Intent of chapter.

Currentness

Comments to § 402A of the Restatement of Torts, Second, are incorporated herein by reference thereto as the legislative intent of this chapter.

Credits
HISTORY: 1962 Code § 66-373; 1974 (58) 2782.

Code 1976 § 15-73-30, SC ST § 15-73-30
Current through 2017 Act No. 86, and 88, 90 to 92, and 95, subject to technical revisions by the Code Commissioner as authorized by law before official publication.

Restatement (Second) of Torts § 402A (1965) cmt. j:

j. Directions or warning. In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use. The seller may reasonably assume that those with common allergies, as for example to eggs or strawberries, will be aware of them, and he is not required to warn against them. Where, however, the product contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product, the seller is required to give warning against it, if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger. Likewise in the case of poisonous drugs, or those unduly dangerous for other reasons, warning as to use may be required.

But a seller is not required to warn with respect to products, or ingredients in them, which are only dangerous, or potentially so, when consumed in excessive quantity, or over a long period of time, when the danger, or potentiality of danger, is generally known and recognized. Again the dangers of alcoholic beverages are an example, as are also those of foods containing such substances as saturated fats, which may over a period of time have a deleterious effect upon the human heart.

Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Colia Grooms, Plaintiff, vs. United Industries Corporation; and Dolgencorp, Inc. d/b/a Dollar General Defendants.	)	Civil Action No.: 3:07-392-JFA **ORDER GRANTING SUMMARY JUDGMENT**

This matter comes before the court on the defendants' joint motion for summary judgment filed May 8, 2008 [dkt. # 55]. After full briefing, the court heard oral argument on July 21, 2008. This order serves to announce the court's ruling on the matters taken under advisement at the hearing. For the reasons stated herein, defendants' motion for summary judgment is granted.

I. Factual Background

On or about June 8, 2004, plaintiff Colia Grooms purchased a can of "Rid-a-Bug Fogger" ("fogger"), an indoor pesticide manufactured by defendant United Industries Corporation and sold to plaintiff by a Dollar General store in Columbia, South Carolina. While using the fogger, plaintiff claims she received first and second degree burns to her legs as a result of an explosion that occurred when the flammable propellant in the fogger was ignited by a lit pilot on her gas stove. Despite the Environmental Protection Agency

("EPA")-approved labeling,[1] which warned that the pilot light should be turned off prior to use, plaintiff, who is illiterate, alleges that the warnings were inadequate because the fogger did not contain photographs or images to depict the proper measures to take before using the fogger. Additionally, plaintiff asserts claims for defective design, manufacturing defect, and breach of warranty.

As an initial matter, defendants assert that plaintiff should not be permitted to argue, as a basis for her warnings claims, that the fogger did not contain photographs or images because she did not assert such an argument until after the close of discovery. Additionally, defendants argue they are entitled to summary judgment on plaintiff's failure to warn, defective design, manufacturing defect and breach of warranty claims.

II. Discussion

A. Standard for Summary Judgment

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). It is well-established that summary judgment should be granted "only when it is clear that there is no dispute concerning either the facts of the controversy or the inferences to be drawn from those facts." *Pulliam Inv. Co. v. Cameo Properties*, 810 F.2d 1282, 1286 (4th Cir. 1987).

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[1] The fogger is a pesticide registered by the Environmental Protection Agency pursuant to the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA").

The party moving for summary judgment has the burden of showing the absence of a genuine issue of material fact, and the court must view the evidence before it and the inferences to be drawn therefrom in the light most favorable to the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). When the defendant is the moving party and the plaintiff has the ultimate burden of proof on an issue, the defendant must identify the parts of the record that demonstrate the plaintiff lacks sufficient evidence. The non-moving party, here the plaintiff, must then go beyond the pleadings and designate "specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e); *see also Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

B. Analysis

1. Defendants' Rule 37(c)(1) Argument

Defendants argue that plaintiff's claim of inadequate warning should fail because she did not disclose the theoretical or factual bases of her warnings claim during discovery, as required by FED. R. CIV. P. 26(e)(2). Defendants argue that plaintiff's failure to comply with the Rule 26(e)(2) discovery obligations with respect to her warnings claims requires the "automatic exclusion" of both that claim and evidence supporting that claim, pursuant to Rule 37(c)(1)."

Rule 26(e)(2) states:

> For an expert witness whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions

> or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

Rule 37(c)(1) provides that if a party "fails to provide information or identify a witness as required by Rule 26(a) or 26(e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Thus, the Fourth Circuit has held that "Rule 37(c)(1) could prevent a non-moving party in a summary judgment proceeding from offering evidence to support its claims when that party has previous failed to meet its disclosures and duty to supplemental requirement." *Contech Stormwater Solutions, Inc. v. Baysaver Technologies, Inc.*, 534 F. Supp. 2d 622 (D. Md. 2008).

Taken together, Rules 26(e)(2) and 37(c)(1) stand for the proposition that when a party fails to supplement an expert report or deposition with evidence prior to the close of discovery, the party may be prohibited from using the evidence to support its claim thereafter. However, Rule 26(e)(2) and 37(c)(1) do not support plaintiff's assertion that such a failure will result in an automatic exclusion of the claim as well. Accordingly, the court finds that plaintiff's failure to warn and defective design claims survive the procedural standards imposed by Rule 26(e)(2) and 37(c)(1).

2. Plaintiff's Inadequate Warning Claim

a. Arguments of the Parties

South Carolina law provides that "the question of the adequacy of the warning is one of fact for the jury as long as evidence has been presented that the warning is inadequate."

Allen, 332 S.E.2d at 357. Under FIFRA, the EPA will register a pesticide if, among other requirements, "its label complies with the statute's prohibition on misbranding." *Bates v. Dow Agrosciences*, 544 U.S. 431, 438 (2005). A pesticide is misbranded if its label does not contain adequate instructions for use, or if its label omits necessary warnings or cautionary statements. *Id.;* 7 U.S.C. §§ 136(q)(1)(F), (G). Federal law further provides that a pesticide is misbranded if:

> (F) the labeling accompanying it does not contain directions for use which are necessary for effecting the purpose for which the product is intended and if complied with, together with any requirements imposed under section 136a(d) of this title, are adequate to protect health and the environment; and
>
> (G) the label does not contain a warning or caution statement which may be necessary and if complied with, together with any requirements under section 136a(d) of this title, is adequate to protect health and the environment.

7 U.S.C. §§ 136(q)(1)(F), (G).

The issue before the court is whether plaintiff's failure to warn claim is pre-empted by 7 U.S.C. § 136v(b), which provides that states "shall not impose or continue in effect any requirement for labeling or packaging in addition to or different from those required under this subchapter." The United States Supreme Court has explained that "a state-law labeling requirement is not pre-empted by § 136v(b) if it is equivalent to, and fully consistent with, FIFRA's misbranding provisions." *Bates,* 544 U.S. at 447. Accordingly, plaintiff argues that her failure to warn claim is not pre-empted because it is equivalent to FIFRA's requirements that a pesticide label not contain "inadequate instructions or warnings."

However defendants argue that plaintiff's warning claim is pre-empted because it is

not equivalent to FIFRA's labeling requirements, but attempts to require "warnings in the form of photographs or images that depicted the proper measures to take before using the product." Defendants argue that such labeling requirements would be "in addition to" or "different from" those required under FIFRA.

b. Relevant Case Law

In *Bates*, the United States Supreme Court emphasized that 7 U.S.C. § 136v(b) "pre-empts any statutory or common-law rule that would impose a labeling requirement that diverges from those set out in FIFRA and its implementing regulations. It does not, however, pre-empt any state rules that are fully consistent with federal requirements." *Bates,* 544 U.S. at 452.

Plaintiff's failure to warn claim appears to be based solely upon the fact that the fogger did not contain photographs or images, as plaintiff suggests "a question of material fact exists as to whether the fogger should have contained warnings in the form of photographs or images that depicted the proper measures to take before using the product." Additionally, plaintiff argued that "the defendants should have placed warnings on the fogger that would catch the attention of the illiterate consumers and provide an indication of the risks involved with using the product."

Currently, FIFRA does not require a registered pesticide to contain photographs or images explaining how to use the product. Thus, it follows a failure to warn claim based solely on the failure to provide symbols or images would be pre-empted by FIFRA because

it is "additional to" or "different from" the labeling requirements under FIFRA. Failure to warn claims survive pre-emption to the extent that they are consistent with FIFRA; but, because plaintiff's failure to warn claim is based solely on a failure to provide symbols argument that is additional to or different from the labeling requirements under FIFRA, the entire claim is subject to dismissal.

Prior to the Supreme Court's decision in *Bates*, the Fourth Circuit ruled on the issue of pre-emption on several occasions. In *Lescs v. William R. Hughes, Inc.*, the Fourth Circuit found that "federal law clearly sends the message that it solely governs the labeling and packing of pesticides and that any state law affecting those requirements is preempted." 1999 WL 12913 *3 (4th Cir. Jan. 14, 1999). In *Worm v. American Cyanamid Company*, the Fourth Circuit Court of Appeals stated that, "common law causes of action alleging that the language of an EPA-approved label failed to adequately warn of risks associated with a pesticide are preempted." 5 F.3d 744, 748 (4th Cir. 1993). This includes "any state law claim that would require the defendant to alter its EPA-approved warning label, labeling, or packing to avoid liability," as well as "a failure to warn claim that contends that the same language that constitutes an EPA-approved label, labeling, or packaging is inadequate." *Lowe v. Sporicidin Int'l*, 47 F.3d 124, 129-39 (4th Cir. 1995). The Fourth Circuit concluded that "because the language on the label was determined by the EPA to comply with the federal standards, to argue that the warnings on the label are inadequate is to seek to hold the label to a standard different from the federal one." *Worm*, 5 F.3d at 748. Thus, "to the extent

that the Worms' claims challenge, by whatever state cause of action, the adequacy of information provided by American Cyanamid on its labeling, the claims are preempted by FIFRA." *Id.*

Applying the case law from the Supreme Court and Fourth Circuit holdings, the court finds that plaintiff's inadequate warnings claim is pre-empted. Finally, the court notes that "the plaintiff has the burden of showing that a warning would have made a difference in the conduct of the person warned." *Allen v. Long Mfg. NC, Inc.*, 505 S.E. 2d 354, 359 (S.C. App. 1988). While the plaintiff has posited that the warning was inadequate, she has not submitted any evidence that her behavior would have been any different if the fogger had contained pictorial warnings.

For the foregoing reasons, the court grants defendants' motion for summary judgment with respect to plaintiff's failure to warn claim.

3. Plaintiff's Defective Design Claim[2]

Plaintiff claims "the fogger was defectively designed because it contained a flammable propellant which presented an unreasonably dangerous condition to plaintiff." Pl. Opp. at 9. In support of this claim, plaintiff's expert concluded that "the proximate cause of

[2] Defective Design claims are not pre-empted. "For a particular state rule to be pre-empted, it must satisfy two conditions. First, it must be a requirement '*for labeling or packaging*'; rules governing the design of a product, for example, are not pre-empted." *Bates*, 544 U.S. at 444

the fire and injuries suffered by Colia Grooms was the manufacturer's use of a foreseeable hazardous flammable propellant combination for the fogger." Rosen Report at 7. Accordingly, the expert concluded that the fogger was "defectively designed from the safety standpoint and unreasonably dangerous." *Id.*

South Carolina law provides:

> (1) One who sells any product in a defectively condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm caused to the ultimate user or consumer, or to his property, if
>
> a. The seller is engaged in the business of selling such a product, and
>
> b. It is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

S.C. Code Ann. § 15-73-10 (1976).

However, "it is well settled under South Carolina law that a seller may prevent a product from being unreasonably dangerous if the seller places an adequate warning on the product regarding its use." *Aldana v. R.J. Reynolds Tobacco Co.*, 2007 WL 3020497, *4 (D.S.C. 2007) (quoting *Phelan v. Synthes*, 35 Fed. Appx. 102, 109 (4th Cir. 2002)). Thus, like plaintiff's inadequate warnings claim, her defective design claim depends upon whether the fogger contained adequate warnings. The only evidence plaintiff has submitted pertaining to the adequacy of the fogger's warning is a vague assertion by her expert that studies have been conducted evidencing the "difficult issues associated with instructions warning consumers to turn pilot lights off and turn them back on after use of such indoor

foggers." Rosen Depo. at 87:4-24.

Instead, plaintiff focuses her attention upon an argument that the defendants could have employed safer alternatives to prevent the fogger from being unreasonably dangerous to consumers by using non-flammable indoor foggers known as "dry foggers." In his report, plaintiff's expert stated:

> The manufacturer chose to deal with the extreme flammability hazard by warnings and instructions, rather than by safe design. Had one of the available safer alternatives been used for the propellant, there would not have been a fire and Ms. Grooms would not have been burned.

Rosen Report at 7.

The Fourth Circuit has held that "providing evidence of the existence of an alternative safer, feasible design is part of the plaintiff's products liability case under South Carolina law." *Cohen v. Winnebago Indus., Inc.*, 2000 U.S. App. LEXIS 4850 (citing *Bragg v. Hi-Ranger.*, 462 S.E.2d 321 (S.C. App. 1995)). However, plaintiff's alternative design argument cannot circumvent the fact that in South Carolina, "a seller may prevent a product from being unreasonably dangerous if the seller places an adequate warning on the product regarding its use." *Aldana v. R.J. Reynolds Tobacco Co.*, 2007 WL 3020497, *4. Thus, the court having found the fogger's warnings to be adequate in plaintiff's inadequate warning claim, it is constrained to grant summary judgment in favor of the defendants because plaintiff has failed to show a genuine issue of material fact with respect to her defective design claim.

4. Plaintiff's Manufacturing Defect and Breach of Warranty Claims

Plaintiff alleges manufacturing defect and breach of warranty claims in her Amended Complaint, but has failed to provide any evidence supporting these claims. Additionally, plaintiff fails to provide any discussion on either claim in opposition to defendants' motion for summary judgment. Thus, plaintiff has failed to designate specific facts showing that there is a genuine issue for trial. *See Celotex,* 477 U.S. at 324. Because her breach of warranty and manufacturing defect claims have not been substantiated by any evidence, and because it appears that plaintiff has abandoned these claims, the court grants defendants' motion for summary judgment with respect to both claims.

III. Conclusion

For the foregoing reasons, defendants' motion for summary judgment [dkt. # 55] is granted. The clerk is instructed to close this case.

IT IS SO ORDERED.

Joseph F. Anderson, Jr.

August 15, 2008
Columbia, South Carolina

Joseph F. Anderson, Jr.
United States District Judge