

STATE OF SOUTH CAROLINA  
In the Court of Appeals

69652

APPEAL FROM OCONEE COUNTY  
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

RECEIVED  
SEP 05 2013  
SC Court of Appeals

2006-CP-37-00030

Scott F. Lawing and Tammy R. Lawing, ..... Appellants,

v.

Univar, USA, Inc., Trinity Manufacturing Inc.,  
and Matrix Outsourcing, LLC, Defendants,

Of Whom  
Trinity Manufacturing, Inc. and Matrix  
Outsourcing, LLC are ..... Respondents.

**PETITION FOR REHEARING**

Pursuant to Rules 221 and 240, SCACR, Appellants petition the Court for rehearing. In affirming the trial court's decision to charge the jury as to the "sophisticated user" defense in this case, the Court overlooked or misapprehended the following points:

1. In rejecting Appellants' argument that the sophisticated user doctrine is not the law of South Carolina, the Court stated it had "refuted [Appellants'] argument years ago in *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 462 S.E.2d 321 (Ct. App.

1995).” The Court overlooked Appellants’ argument that although the *Bragg* court held the trial court properly charged the defense as set forth in Section 388 of the Restatement (Second) of Torts (i.e., that the charge as given reflected the doctrine), the *Bragg* Court did not address whether the defense was the law of South Carolina, but that as charged, the doctrine was accurately portrayed. (App. Br. pp. 30-31).

2. In applying the sophisticated user doctrine in this case, the Court overlooked or misapprehended Appellants’ argument that, if the doctrine is part of the law of South Carolina, then Section 388 of the Restatement (Second) of Torts requires the application of a balancing test of six (6) factors, which include:
  - a) the dangerous condition of the product;
  - b) the purpose for which the product is used;
  - c) the form of any warnings given;
  - d) the reliability of the third party as a conduit of necessary information about the product;
  - e) the magnitude of the risk involved;
  - f) the burdens imposed on the supplier by requiring that he directly warn all users.

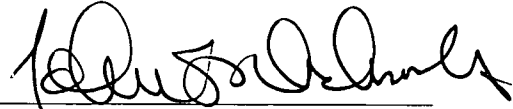
*Goodbar v. Whitehead Bros.*, 391 F.Supp. 552, 557 (W.D. Va.1984). *See, e.g., Smith v. Walter C. Best, Inc.*, 927 F.2d 736, 739-740 (3d Cir.1990); *Willis v. Raymark Indus., Inc.*, 905 F.2d 793, 796 (4th Cir.1990). A balancing of these considerations is necessary in light of the fact that no single set of rules could

possibly be advanced that would automatically cover all individual situations. *Goodbar*, 391 F.Supp. at 557. The Court overlooked Appellants' argument that upon an application of the 6-factor test to the facts of the case, the sophisticated user defense, even if recognized as the law of South Carolina, is unavailable to the Defendants and the Trial Judge was in error charging the defense to the jury. (App. Br. pp. 30-47).

3. In applying the sophisticated user doctrine in this case, the Court overlooked or misapprehended Appellants' argument that the warning given the intermediate user in this case were inadequate, so that even if the sophisticated user doctrine is the law of this State, it affords no defense at all in this case. (App. Br. pp. 48-50).
4. In applying the sophisticated user doctrine in this case, the Court overlooked or misapprehended Appellants' argument that, if the doctrine is part of the law of South Carolina, the Defendants assumed the obligation to warn the end users apart from any warning given to sophisticated intermediaries. (App. Br. pp. 24-30).
5. In rejecting Appellants' argument that the sophisticated user doctrine is impliedly preempted in this case, the Court overlooked Appellants' argument that federal preemption also applies where state common law defenses that conflict with the federal law. (App. Br. pp. 15-18)
6. In rejecting Appellants' argument that the sophisticated user doctrine is implied preempted in this case, the Court overlooked Appellants' argument that state law which incorporates federal regulations also prevent application of the sophisticated user defense. (App. Br. pp. 18-23).

Appellants respectfully request that the Court grant this Petition, rehear this matter, and issue a new opinion reversing the trial court's decision to instruct the jury on the sophisticated user defense.

Respectfully submitted,



John S. Nichols, Esquire  
SC Bar No. 004210  
BLUESTEIN, NICHOLS, THOMPSON &  
DELGADO, LLC  
Post Office Box 7965  
Columbia, SC 29202  
(803) 779-7599

Larry C. Brandt, Esquire  
LARRY C. BRANDT, PA  
Post Office Box 738  
Walhalla, SC 29691  
(864) 638-5406

Robert P. Foster , Esquire  
FOSTER & FOSTER, LLP  
Post Office Box 2123  
Greenville, SC 29602  
(864) 242-6200

William P. Walker, Jr., Esquire  
S. Kirkpatrick Morgan, Jr.  
WALKER & MORGAN, LLC  
Post Office Box 949  
Lexington, SC 29072  
(803) 359-6194

September 5, 2013

Attorneys for Appellants

STATE OF SOUTH CAROLINA  
In the Court of Appeals

---

APPEAL FROM OCONEE COUNTY  
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

---

2006-CP-37-00030

---

Scott F. Lawing and Tammy R. Lawing, ..... Appellants,

v.

Univar, USA, Inc., Trinity Manufacturing Inc.,  
and Matrix Outsourcing, LLC, Defendants,

Of Whom Trinity Manufacturing, Inc. and  
Matrix Outsourcing, LLC are ..... Respondents.

---

**PROOF OF SERVICE**

---

The undersigned hereby certifies on the date indicated below, she served counsel for the Respondents with a copy of the *Petition for Rehearing* by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:

Christian Stegmaier, Esquire  
COLLINS & LACY, P.C.  
Post Office Box 12487  
Columbia, South Carolina 29211

Amy L. Neuschafer, Esquire  
COLLINS & LACY, P.C.  
11945 Grandhaven Dr., Suite D  
Murrells Inlet, South Carolina 29576

**RECEIVED**  
SEP 05 2013  
**SC Court of Appeals**

Gray T. Culbreath, Esquire  
GALLIVAN, WHITE & BOYD, PA  
Post Office Box 7368  
Columbia, South Carolina 29202

Ellis M. Johnston, II, Esquire  
Joshua Howard, Esquire  
HAYNSWORTH SINKLER BOYD, PA  
Post Office Box 2048  
Greenville, South Carolina 29602-2048

*Erin Bridges*

Erin Bridges  
Paralegal  
BLUESTEIN, NICHOLS, THOMPSON  
& DELGADO, LLC

Septemeber 5, 2013  
Columbia, South Carolina

**RECEIVED**

SEP 05 2013

**SC Court of Appeals**