STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

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

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406 S.C. 13, 749 S.E.2d 126 (Ct. App. 2013)
Appellate Case No. 2013-002464

Scott F. Lawing and Tammy R. Lawing, ... Petitioners/Respondents,

v.

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

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

THE LAWINGS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENTS 1

I. THE CASES CITED BY RESPONDENT DO NOT CONTROL THE ISSUES PETITIONERS ARGUED IN THEIR PETITION 1

II. NO COURT HAS BEEN ASKED TO APPLY THE *GOODBAR V. WHITEHEAD* TEST 11

CONCLUSION 12

TABLE OF AUTHORITIES

Cases

Barnes v. Litton Indus. Products, Inc., 555 F.2d 1184 (4th Cir.1979) 3

Beale v. Hardy, 769 F.2d 213 (4th Cir. 1985) 2, 3, 4, 5, 11

Boyle v. United Technologies Corp., 487 U.S. 500 (1988) 7, 9

Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995) 11

Brooks v. Medtronic, Inc., 750 F.2d 1227 (4th Cir. 1984) 1, 2, 4, 5

Eagle-Picher Indus., Inc. v. Balbos, 326 Md. 179, 604 A.2d 445 (1992) 6, 8

Emory v. McDonnell Douglas Corp., 148 F.3d 347 (4th Cir. 1998) 7, 8, 9, 10

Featherall v. Firestone Tire & Rubber Co., 219 Va. 949, 252 S.E.2d 358 (1979) 3

Goodbar v. Whitehead Brothers, 591 F. Supp. 552 (W.D. Va.1984) 3, 4, 5, 7, 11

Herron v. Century BMW, 395 S.C. 461, 719 S.E.2d 640 (2011) 11

Kennedy v. Mobay Corp., 325 Md. 385, 601 A.2d 123 (1992) 5

Mazda Motor of Amer., Inc. v. Rogowski, 105 Md. App. 318, 659 A.2d 391 (1995) . . 7, 8

Nicholson v. Yamaha Motor Co., Ltd., 80 Md. App. 695, 566 A.2d 135 (1989) 7

Odom v. G.D. Searle & Co., 979 F.2d 1001 (4th Cir. 1992) 4, 5

O'Neal v. Celanese Corp., 10 F.3d 249 (4th Cir. 1993) 5, 6, 7

Miscellaneous

1 American Law Product Liability 3d § 32:61 (1987) 8

Restatement (Second) of Torts § 388 (1965) 3, 4, 5, 6

Restatement (Second) of Torts § 402A (1965) 1, 2

W. Page Keeton *et al.*, *Prosser and Keeton on the Law of Torts* § 96 (5th ed. 1984) 8

ARGUMENT

I. THE CASES CITED BY TRINITY AND MATRIX DO NOT CONTROL THE ISSUES THE LAWINGS ARGUED IN THEIR BRIEF

The cases Trinity and Matrix cite out of the federal Fourth Circuit Court of Appeals are distinguishable from this case in meaningful ways and do not inform the Court in helpful ways on the issues the Lawings raise in their Brief.

To begin with, these cases are decisions by the federal Fourth Circuit Court of Appeals and are, therefore, persuasive at best. Even so, an examination of each case reveals that Trinity and Matrix have overstated their importance. The Lawings will address each in chronological order.

A. *Brooks v. Medtronic, Inc.*, 750 F.2d 1227 (4th Cir. 1984)

Brooks (Resp. Br. pp. 22-23) arose out of South Carolina, and involved application of the "learned intermediary" doctrine in a medical device products liability case brought against the medical products manufacturer. The appeal followed a jury verdict for the defendant. As the Fourth Circuit noted:

> Under the theory of strict products liability, as embodied in section 402A of the Restatement (Second) of Torts (1965), the manufacturer of a product sold "in a defective condition unreasonably dangerous" is liable to the ultimate user who is injured by the product. Certain products, *particularly ethical drugs and medical devices*, often cause unwanted side effects despite the fact that they have been carefully designed and properly manufactured. In section 402A terminology, such products are deemed "unavoidably unsafe," but are not defective or unreasonably dangerous if they are marketed with proper directions for use or include adequate warnings of potential side effects. *Id.* at comment *k*. Failure to give such a warning constitutes a "defect" in the product and renders the manufacturer liable for selling a product in an unreasonably dangerous manner. *Id.*

> Although ordinarily warnings must be given to the ultimate user of a product, *a different approach has been developed for prescription drugs.* It is settled in a substantial majority of jurisdictions that the duty a manufacturer of ethical drugs "owes to the consumer is to warn only physicians (or other medical personnel permitted by state law to prescribe drugs) of any risks or contraindications associated with that drug." [citations omitted] *If the prescribing physician has received adequate notice of possible complications, the manufacturer has no duty to warn the consumer.* In that instance, the physician is called on to act as a "learned intermediary" between the manufacturer and the consumer because he is in the best position to understand the patient's needs and assess the risks and benefits of a particular course of treatment.

750 F.2d at 1230-1231 (emphasis added). Thus, *Brooks* involved the application of the "learned intermediary" doctrine in a case involving medical products (prescription drugs) and the concept of the "unavoidably unsafe" product under Section 402A. These facts distinguish *Brooks* in a meaningful way. Importantly, the Fourth Circuit was *not* applying the "sophisticated user" doctrine to a case involving a product for which an inadequate warning was given to anyone.

B. *Beale v. Hardy*, 769 F.2d 213 (4th Cir. 1985)

In *Beale* (Resp. Br. pp. 21-22), a case arising out of Virginia, past and present employees of the Lynchburg Foundry sued twelve corporate defendants that allegedly supplied to the Lynchburg Foundry silica sand or related products used in the casting process at the foundry. Plaintiffs claimed that the defendants had a duty to warn directly the employees of the foundry of the risks and dangers of contracting silicosis by working with products containing silica. The defendants moved for summary judgment on the ground that they had no duty to warn the plaintiffs of these risks and dangers because the

Lynchburg Foundry had been knowledgeable of the risks and dangers since at least the 1930s. The district court granted defendants' motions, *Goodbar v. Whitehead Brothers*, 591 F. Supp. 552 (W.D. Va.1984), and plaintiffs appealed.

In affirming the dismissal of the case, the Fourth Circuit stated:

> Based on these factual findings and its interpretation of the duty to warn under § 388 of the Restatement (Second) of Torts (1965), the district court granted defendants' motions for summary judgment. Plaintiff then appealed.
>
> * * *
>
> The main issue in this action concerns the existence on the part of these defendants of a duty to warn the plaintiffs directly of the dangers associated with the use of silica containing products. The district court correctly analyzed this issue under the Restatement (Second) of Torts § 388 (1965) which has been adopted as the law of Virginia by the Supreme Court of Virginia, *Featherall v. Firestone Tire & Rubber Co.*, 219 Va. 949, 962, 252 S.E.2d 358, 367 (1979), and § 388 Comment *n*, which has been determined to be included in the law of Virginia, *see Barnes v. Litton Indus. Products, Inc.*, 555 F.2d 1184, 1188 (4th Cir.1979). After analyzing the case authority relied upon by the plaintiffs and the defendants, the evidence that the foundry had extensive knowledge of the hazards associated with inhaling silica dust, the disease of silicosis, proper dust control methods, and the duty to warn under § 388(c) and comment *n*, the district court correctly held that no duty to warn existed. 591 F. Supp. at 566-67. We affirm this holding and adopt the district court's opinion as our own.

769 F.2d at 214-215. Thus, the Court held there was no *duty* in the first instance to warn end users directly of the hazards of the products.

Beale does not inform this Court on the propriety of giving the charge in this case, nor does it address the preemption arguments the Lawings made in this case.

Beale is also distinct in a meaningful way. Unlike *Beale*, there is no question that the defendants in this case owed a duty of care to these plaintiffs. The issues in this case

are whether the defendants could discharge that duty by warning Englehardt as a "sophisticated user" of the product, and whether they, in fact, discharged the duty by way of an adequate warning.

Furthermore, there was no analysis under the six factors outlined in *Goodbar v. Whitehead*, the underlying district court case in *Beale*. *See Goodbar*, 591 F.Supp. at 556-557 (analyzing the appropriate factors under § 388).

C. *Odom v. G.D. Searle & Co.*, 979 F.2d 1001 (4th Cir. 1992)

Like *Brooks*, this case arose from South Carolina and involved a claim against a drug manufacturer for failing to warn the user of the product of a potential serious injury caused by the product. The district court held "plaintiff presented nothing to establish a causative link between the alleged failure to warn and the decision of the plaintiff's physician to prescribe the product." The Fourth Circuit agreed, holding the plaintiff "failed to show that her doctor would not have prescribed the IUD if Searle had phrased its warning differently." 979 F.2d at 1002.

Importantly, the Court held plaintiff's claim was "governed by the 'learned intermediary' doctrine," citing to *Brooks*. The Court added:

> Under this doctrine, the manufacturer's duty to warn extends only to the prescribing physician, who then assumes responsibility for advising the individual patient of risks associated with the drug or device. The sole issue in this case, therefore, is whether an adequate warning to Odom's doctor about the risk of sterility would have deterred him from prescribing the IUD. Mrs. Odom does not dispute that under the "learned intermediary" doctrine, the manufacturer cannot be said to have caused the injury if the doctor already knew of the medical risk.

979 F.2d at 1003. Thus, like *Brooks*, *Odom* involved application of the "learned intermediary" doctrine in a medical products case, and while a warning was given in *Odom*, there was no evidence that the warning was not adequate. These facts distinguish *Odom* from this case in a meaningful way.

D. *O'Neal v. Celanese Corp.*, 10 F.3d 249 (4th Cir. 1993)

O'Neal arose out of Maryland. The Fourth Circuit noted that the Maryland courts expressly adopted the "sophisticated user defense" in 1992 based upon the Restatement (Second) of Torts § 388. The Court described the doctrine as follows:

> The sophisticated user defense is implicated in the situation in which A supplies a chattel to B, B in turn allows C to be exposed to the chattel, C is injured by exposure to the chattel, and C claims that A should be liable to C for A's failure to warn C of the danger.

O'Neal, at 251. The Fourth Circuit noted the Maryland Court adopted the doctrine in *Kennedy v. Mobay Corp.*, 325 Md. 385, 601 A.2d 123 (1992), *aff'g for the reasons stated in* 84 Md. App. 397, 579 A.2d 1191 (1990) and, as adopted in Maryland, upon the articulation of the defense and the principles underlying it appearing in *Goodbar v. Whitehead Bros.*, 591 F. Supp. 552 (W.D. Va.1984), *aff'd sub nom. on the opinion of the district court, Beale v. Hardy*, 769 F.2d 213 (4th Cir.1985).

The Fourth Circuit also noted the *Kennedy* court summarized the sophisticated user doctrine as follows:

> Part of the problem that may lead some to look askance at this defense is in the language that some courts have used to describe it, in particular the notion that where the elements or prerequisites of it exist, the supplier is "absolved" of any duty to warn ultimate users. That notion is

not only unnecessary to the defense but in fact is inconsistent with the rationale of comment *n* to Restatement § 388. There is a duty to warn of defects or propensities that make a product hazardous, and that duty does extend ordinarily to those who may reasonably be expected to use or come into harmful contact with the product. It is *not* a duty, we think, from which the supplier can be entirely *absolved.* The question, rather, is, what conduct will suffice to discharge that duty?

Viewed in that context, the defense is not only logical but necessary. Where it is impracticable for the supplier to give adequate warnings directly to all who may use or come into contact with the product, some substitute for such direct warnings is required, even in strict liability cases. Otherwise, * * * strict liability would become in effect, absolute liability. As comment *n* to Restatement § 388 makes clear, the focus remains on the conduct of the supplier, but that conduct is judged in light of the circumstances. Among those circumstances are the feasibility of giving direct warnings to all who are entitled to them and, where that is not feasible, whether the supplier acted in a manner reasonably calculated to assure either that the necessary information would be passed on to the ultimate handlers of the product or that their safety would otherwise be attended to. In such a situation, that is all that reasonably can be asked and it is all we think, that the law requires.

O'Neal, at 251-252 (emphasis in original). Importantly, the Fourth Circuit added:

* * * The defense is available not only when the supplier actually warned the intermediary, but also when the supplier shows that it was reasonable to believe that a warning was unnecessary because the intermediary was already well aware of the danger. *Eagle-Picher Indus., Inc. v. Balbos*, 326 Md. 179, 604 A.2d 445, 465 (1992).

Several factors must be considered in determining whether the supplier reasonably relied upon the intermediary to warn users:

> (1) the dangerous condition of the product; (2) the purpose for which the product is used; (3) the form of any warnings given; (4) the reliability for the third party as a conduit of necessary information about the product; (5) the magnitude of the risk involved; and (6) the burdens imposed on the supplier by requiring that he directly warn all users.

Eagle-Picher, 604 A.2d at 464.

O'Neal, at 252. These are the identical six (6) factors set forth in *Goodbar v. Whitehead Bros.*, 391 F. Supp. 552, 557 (W.D. Va.1984), the case the Lawings cited in their Brief of Appellant (App. pp. 101-177), the Petition for Rehearing (App. pp. 21-22) and the Petition for Writ of Certiorari (pp. 16-19).

Accordingly, *O'Neal* is also distinct from this case in a meaningful way.

E. *Emory v. McDonnell Douglas Corp.*, 148 F.3d 347 (4th Cir. 1998)

Emory also arose out of Maryland. Mrs. Emory was killed when an F/A-18 jet fighter crashed and slid into her truck. Her husband sued McDonnell Douglas, the aircraft's manufacturer, "under myriad strict liability and negligence theories." 148 F.3d at 348.

The District Court dismissed the case under the "government contractor defense" recognized in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). The Fourth Circuit noted that "many circuits have since held that the defense should also apply to failure to warn claims," adding "[w]hile we find these decisions to be reasoned soundly, we hold that Emory's claim founders on an even more fundamental point – the failure to satisfy the basic state-law requirements of his negligence claim." 148 F.3d at 350. The Court stated:

> Under Maryland law, a manufacturer has no duty to warn of an open and obvious danger in its product. *Mazda Motor of Amer., Inc. v. Rogowski*, 105 Md. App. 318, 659 A.2d 391, 395 (1995); *Nicholson v. Yamaha Motor Co., Ltd.*, 80 Md. App. 695, 566 A.2d 135, 145 (1989). Of course the question of whether a danger is open and obvious cannot be analyzed in a vacuum. Rather, the determination turns on the expected user's knowledge of that product: "Whether there is a duty to warn and the

> adequacy of warnings given must be evaluated in connection with the knowledge and expertise of those who may reasonably be expected to use or otherwise come into contact with the product...." *Mazda*, 659 A.2d at 395 (quoting 1 American Law Product Liability 3d § 32:61 (1987)); *see also* W. Page Keeton *et al.*, *Prosser and Keeton on the Law of Torts* § 96, at 686-87 (5th ed. 1984) ("[C]ourts have usually meant by 'obvious danger' a condition that would ordinarily be seen and the danger of which would ordinarily be appreciated *by those who would be expected to use the product*.") (emphasis added). Accordingly, if the expected user possesses extensive knowledge about the relevant product, it is difficult to establish a duty to warn on the part of the manufacturer. Under Maryland law, "a manufacturer or supplier has no duty to warn if the hazard is one of which the plaintiff or other user has equal knowledge.... The duty to warn extends only to those who can reasonably be assumed to be ignorant of the danger." *Mazda*, 659 A.2d at 395 (quoting 1 American Law Product Liability 3d § 32:61 (1987) (footnotes omitted)).
>
> This elementary principle controls this case. Emory asserts that MDC's on-site representative, Michael Kidder, knew the crash aircraft was unsafe and yet failed to alert the Navy of this fact. To establish that MDC had a duty to warn the Navy, however, Emory must prove that the Navy could "reasonably be assumed to be ignorant" of the dangers present in the aircraft. The evidence submitted to the district court, however, establishes convincingly that the Navy had extensive knowledge of the hazards associated with the F/A-18 aircraft.

148 F.3d at 350. The Court then pointed to the Navy's "significant and instrumental role in the design and production of the F/A-18" and "in the F/A-18's evolution...." *Id.* These facts were critical in the Court's analysis.

Importantly, the Fourth Circuit concluded:

> Moreover, Emory cannot maintain a claim that MDC failed to warn the particular pilots about the unsafe condition of the crash aircraft. As the district court noted, "nothing in the case law suggests that a military contractor is responsible for directly warning the individual military personnel who fly the planes under military command." Under Maryland's sophisticated user defense, a supplier is not negligent when it relies on an intermediary "already well aware of the danger" to relay any necessary warning. *Eagle-Picher Indus., Inc. v. Balbos*, 326 Md. 179, 604 A.2d 445, 463-65 (1992). Indeed, when the Navy possesses the same knowledge as

> its contractor, a requirement that the contractor provide additional warnings to individual pilots risks disruption of the chain of command. A contractor cannot be forced to provide warnings to officers that would contradict orders received from their superiors. When, as here, the Navy examines and decides upon the content of specific warnings, the requirement of further warnings to particular pilots presents a real conflict with-and seriously undermines-the Navy's structure of command. The district court therefore correctly concluded that "whether or how those warnings are conveyed to individual Naval officers under military command seems beyond the scope of any duty appropriate to impose on the contractor."
>
> The settled grounds of state products liability law thus suffice to protect the precise federal interest identified by the Supreme Court in *Boyle* – the government's ability to make discretionary decisions about military defense. *See Boyle*, 487 U.S. at 511, 108 S. Ct. 2510. The government's capacity to exercise its discretion is implicated whenever the allegedly tortious decisions attributed to the contractor are actually discretionary decisions made by the government itself. *See id.* at 512, 108 S. Ct. 2510. In this case, the evidence demonstrates that the Navy participated extensively in the F/A-18 program. It knew the aircraft intimately, and it ultimately called the shots. Its decision to fly the plane in the face of potential FCS failures was an informed, if ultimately incorrect, one. Under Maryland law, MDC had no duty to warn. The government contractor defense adopted in *Boyle* rests at bottom on conflict between federal and state law. *See id.* at 507-08, 108 S. Ct. 2510. Application of Maryland law here, because it in fact reinforces the federal interest protected by the *Boyle* defense, poses no conflict. *Inasmuch as Maryland law reflects the general rule that the Navy's intimate participatory role negates the existence of a duty to warn on MDC's part, it affords a sound basis upon which to affirm the judgment of the district court.*

148 F.3d at 352-353 (emphasis added). Thus, the Court in *Emory* was persuaded to affirm under Maryland's version of the "sophisticated user" doctrine against the backdrop of the *Boyle* "government contractor's defense," which obviated *any* duty to warn the user.

Here, there is no evidence that Englehardt had any part in developing the product or even the warning. Further, there is ample evidence that the warnings given were inadequate. Finally, there is no discussion in *Emory* of preemption, nor would there be,

since the Fourth Circuit was ruling on the basis of a very narrow rule (the "government contractor's defense") which would conflict with any preemption claim.

Emory is, therefore, meaningfully distinct from this case.

The cases Trinity and Matrix cite to this Court in their brief are distinct from this case in various ways that matter. The Lawings request that the Court disregard those cases, reverse the Court of Appeals' decision in this case, and remand the matter for a new trial.

II. NO COURT HAS BEEN ASKED TO APPLY THE *GOODBAR V. WHITEHEAD* TEST

Trinity and Matrix point out "in the almost 20 years since [*Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995)], this six-factor test propounded by [the Lawings] has never been expressly adopted by a South Carolina court." (Resp. Br. p. 25). Trinity and Matrix then note that while *Bragg* mentions *Goodbar*, it did not adopt the use of the six-factor balancing test. (Resp. Br. p. 25, n. 9). Trinity and Matrix add that the Court of Appeals "implicitly" rejected the Lawings' argument that the warnings given to Engelhard were inadequate. (Resp. Br. p. 30). The Court should not be persuaded by this argument.

Whether the trial court should have considered the six-factor test under *Goodbar v. Whitehead* was not an issue in *Bragg*. Instead, *Bragg* merely cited to *Goodbar* and the appellate opinion in the case, *Beale*, as examples of application of the defense. Furthermore, no South Carolina case has addressed whether a court must consider the six factors set forth in *Goodbar* when deciding whether to instruct the jury as to the sophisticated user defense.

Unless a party asks an appellate court to address an issue, the appellate court will not do so. *See, e.g., Herron v. Century BMW*, 395 S.C. 461, 719 S.E.2d 640 (2011) ("[A]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked."). Since the issue was not presented to the Court in *Bragg* (or apparently in any other case decided by our appellate courts), it is not surprising that the research by Trinity and Matrix would not turn up any case in South Carolina where these factors are discussed.

CONCLUSION

For the reasons stated here and in the Brief of Petitioners, the Lawings request that this Court reverse the Court of Appeals' decision and remand this matter for a new trial.

Respectfully submitted,

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November 17, 2014

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PROOF OF SERVICE

The undersigned hereby certifies on the date indicated below, she served counsel for the Respondents/Petitioners with a copy of the *Lawing's Reply Brief* by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:

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November 17, 2014

VIA HAND DELIVERY

The Honorable Daniel E. Shearouse
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Re: *Lawing v. Trinity Manufacturing, Inc.*
Case Tracking No.: 2013-002464

Dear Mr. Shearouse:

Please find enclosed for filing the original and fifteen (15) copies of the Lawing's *Reply Brief* in reference to the above matter. I have also enclosed a proof of service of the Reply Brief on counsel for the Respondents/Petitioners. Please return the additional filed copy to me via our courier.

Thank you for your attention to this matter. If you need any additional information, please do not hesitate to contact me.

Sincerely,

Erin Bridges

Erin Bridges
Paralegal to John S. Nichols
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