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Products Liability Claims in South Carolina

What is South Carolina's Law on Warnings?

By Brian A. Comer

Introduction

South Carolina products liability law recognizes that many products cannot be made completely safe for use. *Claytor v. Gen. Motors Corp.*, 277 S.C. 259, 264, 286 S.E.2d 129, 132 (1982). However, these products may still be useful, desirable and serve a purpose. *Id.* In such cases, if the product is properly designed, manufactured and packaged with accompanying adequate warnings and instructions, then it is not defective and unreasonably dangerous. *Id.* Otherwise, manufacturers and sellers may be discouraged from marketing many products solely because some danger accompanies the use of the product. *Id.*

Therefore, a central focus in many South Carolina products liability cases is whether a defendant failed to adequately warn the user of the risk accompanying use of the product. This article seeks to answer questions about when the duty to warn arises and whether a warning is adequate under South Carolina law.

The analytical framework for a warnings case

"In order to prevent a product from being unreasonably dangerous, the seller may be required to give a warning on the product concerning its use." *Anderson v. Green Bull, Inc.*, 322 S.C. 268, 270, 471 S.E.2d 708, 710 (1996). If a product includes a warning that—if followed—makes it safe for use, then the product is not defective or unreasonably dangerous. *Id.*; *Allen v. Long Mfg. NC, Inc.*, 332 S.C. 422, 427, 505 S.E.2d 354, 357 (Ct. App. 1998). Furthermore, "South Carolina law does not require that a manufacturer refine a product which is made safe for use by an adequate warning so that the product does not need a warning to be safe." *Allen*, 332 S.C. at 431, 505 S.E.2d at 359. An adequate warning is what renders the product safe. *Id.* When an adequate warning is provided, a manufacturer may assume that it will be heeded by the product user. *Id.* at 433, 505 S.E.2d at 360.

This foundation of South Carolina warnings law is discussed at length in comment j. to Restatement (Second) of Torts § 402A, and South Carolina has incorporated this comment by reference into its strict liability statute as the legislative intent of the chapter. S.C. Code Ann. § 15-73-30 (1976). A review of comment j. and interpretative case law reveals that a warnings analysis is based on a twofold inquiry: (1) whether there is a duty to warn to begin with, and (2) whether the warning provided is adequate so that—if followed—the product is safe for use. *See, e.g., Allen*, 332 S.C. at 427-28, 505 S.E.2d at 357 (separating warnings analysis into a determination of duty to warn and adequacy of the warning).

The duty to warn

A. When the duty arises and methods of proof

No state court has explicitly set forth when the duty to warn arises in a products liability case. However, in *Gardner v. Q.H.S., Inc.*, 448 F.2d 238 (4th Cir. 1971), the Fourth Circuit Court of Appeals provided guidance on the duty to warn in an appeal of a South Carolina products liability action arising in diversity, and the South Carolina Supreme Court cited to *Gardner's* rationale in its negligent failure to warn analysis in *Livingston v. Noland Corp.*, 293 S.C. 521, 362 S.E.2d 16 (1987). *Gardner* supports that the duty to warn arises when (a) the reasonably foreseeable risks of a product—either from its intended use or from the environment in which it is used—pose a potential danger, and (b) the user may not realize the potential danger. In such cases, the manufacturer and supplier have a duty to warn the user. *Gardner*, 448 F.2d at 242-43; *Livingston*, 239 S.C. at 525, 362 S.E.2d at 18.

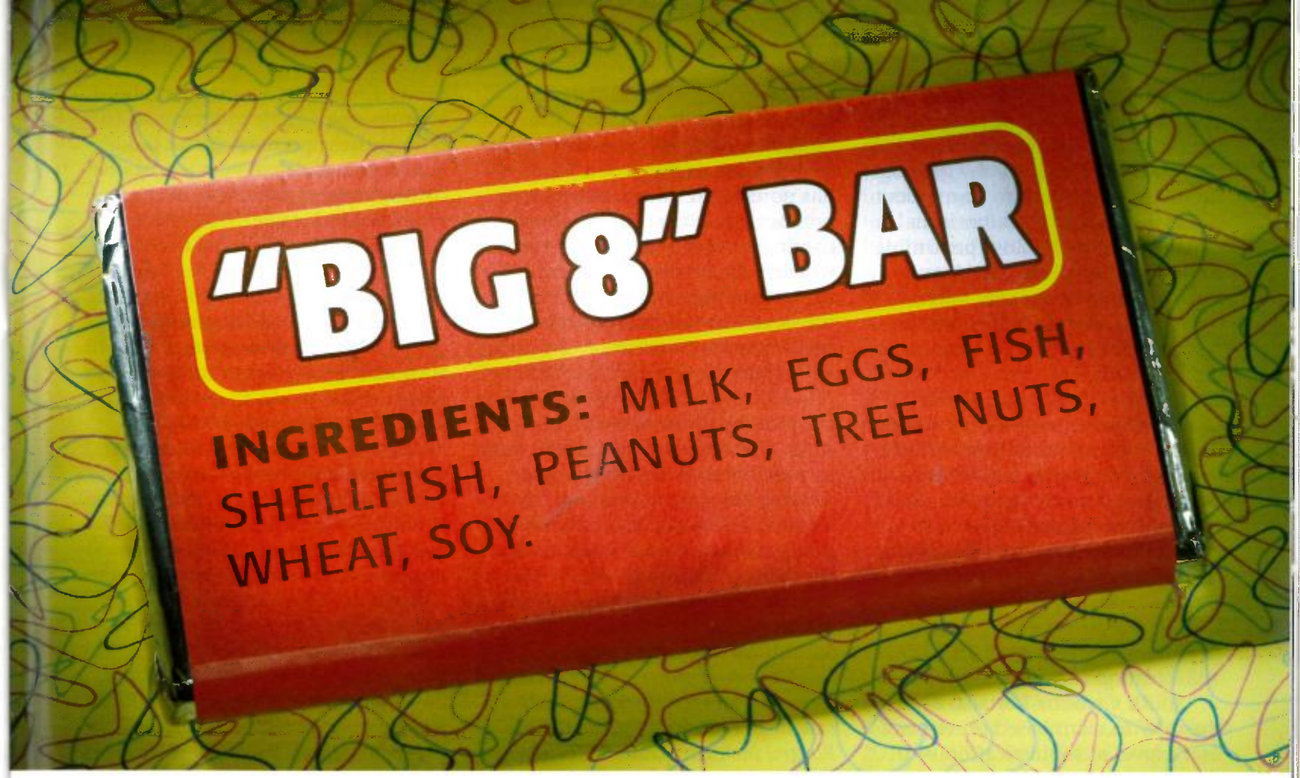
Gardner involved the ignition of hair rollers when the water in which they were heating boiled out of the pot. *Id.* at 240-41. After putting the rollers on the stove to heat, the user fell asleep in the bathtub. *Id.* at 241. The resulting fire substantially destroyed the apartment building, and the building owner sued the hair roller manufacturer to recover his losses. *Id.* at 240. One of his theories for recovery was that the manufacturer's warning about the flammability of the rollers was inadequate. *Id.* The warning at issue stated as follows: "Use plenty of water. Do not let water boil away. Cautionary note: Rollers may be inflammable only if left over flame in pan without water. Otherwise Q.H.S. Setting/Rollers are perfectly safe." *Id.* at 241. The district judge granted a directed verdict in favor of the manufacturer on grounds that the hair rollers were not "inherently dangerous." *Id.* at 240. Therefore, the manufacturer had no duty to provide a more extensive warning than the one provided. *Id.*

However, the Fourth Circuit Court of Appeals reversed the district court's decision and rejected its focus on the inherent danger of the rollers as the determinative factor for the duty to warn. *Id.* at 242. The court suggested that the duty to warn arises if a supplier and manufacturer "(a) . . . know or have reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, [and] (b) they lack reason to believe that the user will realize the potential danger. . . . " *Id.* at 242 (citing Restatement (Second) of Torts §§ 388 and 295 (1965)). The *Gardner* court elaborated that the duty is determined through an analysis of foreseeability, and it cited to *Mickle v. Blackmon*, 252 S.C. 202, 166 S.E.2d 173 (1969) as the applicable South Carolina law. *Gardner*, 448 F.2d at 242-43. The court quoted from *Mickle* as follows:

> Normally a seller or manufacturer is entitled to anticipate that the product he deals in will be used only for the purposes for which it is manufactured and sold: thus he is expected to reasonably foresee only injuries arising in the course of such use. However, he must also be expected to anticipate the environment which is normal for the use of his product and where, as here, that environment is the home, he must anticipate the reasonably foreseeable risk of the use of his product in such an environment. These are risks which are inherent in the proper use for which his product is manufactured.

Id. (quoting *Mickle*, 252 S.C. at 233, 166 S.E.2d at 187).

Using this framework, the *Gardner* court determined that a jury could conclude that a momentary interruption that results in water boiling away is so common that the manufacturer should have foreseen that it could occur while its product was being used. *Id.* at 243. The court also concluded that a jury could find that the manufacturer knew or should have known that the heat to



which the product would be subjected during those occasions could exceed the normal ignition point of the hair roller's contents. *Id.* Therefore, the court concluded that the jury could have found that there was a duty to warn of these risks. *Id.*

From *Gardner* and other cases, it is clear that proving a duty to warn requires presentation of evidence from which a jury can conclude that a manufacturer or seller has reason to believe that a warning is necessary. *Livingston*, 293 S.C. at 525, 362 S.E.2d at 18-19 (holding that supplier and manufacturer had no way of knowing and no reason to foresee that failed refrigerator compressors would be unreasonably dangerous unless a warning was provided). *Gardner* discussed the means by which to determine foreseeability and whether a duty to warn arises. As stated by the court:

> Where the issue is one of foreseeability, evidence of what has actually been experienced in the same or comparable situations constitutes proof of the greatest probative value. The only other way foreseeability can be proved is by expert testimony and in most instances it, too, will depend upon actual experience developed by laboratory or everyday experience.

Id. at 244. Therefore, in any warnings case, prior incidents and expert testimony are critical to proving the existence of a duty to warn. In *Gardner*, the court determined that depositions and complaint letters of other product users who had similar experiences with the hair rollers were admissible to show the manufacturer's knowledge of the problem. *Id.* The court also believed that certain expert testimony should have been admitted to show the nature of the danger. *Id.*

B. Limitations on the duty to warn

Comment j. to Restatement (Second) of Torts § 402A has set certain limitations on the duty to warn, and case law has also limited the duty depending on the nature of the danger and the sophistication of the product user. For example, there is no duty to warn about foods that are common allergens because the seller may reasonably assume that individuals with these allergies will know about them. Restatement (Second) of Torts § 402A cmt. j. However, if the food product is an ingredient and the danger is not generally known, then there may be a duty to warn. *Id.*; *see also* the Food Allergen Labeling and Consumer Act at 21 U.S.C. § 201 *et. seq.* (requiring that packaged foods containing the "Big Eight" food allergens—milk, eggs, fish, crustacean shellfish, peanuts, tree nuts, wheat and soy—must display them prominently in the ingredient list because these eight food allergens account for 90 percent of all allergic reactions). There is also an exception to the duty to warn if the potential danger of a food product relates to its use over a long period of time or in excessive quantities (e.g., alcoholic beverages, foods containing saturated fats). Restatement (Second) of Torts § 402A cmt. j.

A seller is also not required to warn of dangers that are generally known and recognized by users. *Moore v. Barony House Rest., LLC*, 382 S.C. 35, 41, 674 S.E.2d 500, 504 (Ct. App. 2009) (holding that there is no

duty to warn about the risk of operating an unlighted golf cart on a public road at night); *Anderson*, 322 S.C. at 270, 471 S.E.3d at 710 (holding there is not duty to warn about the threat of electrocution from placing a ladder in close proximity to power lines). This exception includes dangers that are open, obvious or matters that should be "common sense" to the user. *Dema v. Shore Enter., Ltd.*, 312 S.C. 528, 435 S.E.2d 875 (Ct. App. 1993) (holding there is no duty to warn a user of a water recreational vehicle to watch out for swimmers). The rationale for this exception is that the product is not defective or unreasonably dangerous because these dangers are contemplated by the ultimate user. *Anderson*, 322 S.C. at 270, 471 S.E.3d at 710 (citing Restatement (Second) of Torts § 402A cmt. g. (1965)).

South Carolina law also limits the duty to warn based on either a user's level of sophistication or if the warning is provided to an intermediary who is better situated to provide any direct warnings. *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995) The "sophisticated user" doctrine holds that "a manufacturer of a product has no duty to warn users of that product of all its potential shortcomings in safety and effectiveness where that person is sufficiently sophisticated in the operations of the device or the field in which it is used." *Jones v. Danek Med., Inc.*, No. 4:96-3323-12, 1999 WL 1133272, at *7 (D.S.C. Oct. 12, 1999). Similarly, the "learned intermediary" doctrine holds that "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."). *Odom v. G.D. Searle & Co.*, 979 F.2d 1001 (4th Cir. 1992) (applying South Carolina law).

Finally, South Carolina limits a manufacturer's duty to warn after sale of the product. In *Bragg v. Hi-Ranger, Inc.*, the South Carolina Court of Appeals agreed with the trial court's charge that a manufacturer "has no duty to notify previous purchasers of its products about later developed safety devices or to retrofit those products if the products were nondefective under standards existing at the time of the manufacture or sale." 319 S.C. at 548, 462 S.E.2d 331.

Adequacy of a warning

The second inquiry in a warnings case is whether the warning itself is adequate. Since a warnings claim relates to the product's design, a plaintiff must provide proof of an alternative warning that would have prevented the product from being unreasonably dangerous. *Branham v. Ford Motor Co.*, 701 S.E.2d 5, 10 (S.C. Sup. Ct. 2010). South Carolina law does not require that a warning make a product itself "safe" in order to be adequate. *Aldana v. R.J. Reynolds Tobacco Co.*, No. 2:06-3366-CWH, 2008 WL 1883404, at *2 (D.S.C. Apr. 25, 2008) (denying plaintiff's motion for reconsideration of dismissal where plaintiff's argument was that "the warnings did not make the defendant's cigarette products safe because the cigarette products caused the decedent's death."). Rather, the plaintiff's burden is to show that a different and adequate warning would have made a difference in the conduct of the person warned. *Allen*, 332 S.C. at 432, 505 S.E.2d at 359 (Ct. App. 1998) (citing 63A Am. Jur. 2d *Products Liability* § 1240 (1997)). Therefore, determining whether a warning is adequate involves an inquiry into causation and whether a different warning would have prevented the injury. *Odom v. G.D. Searle & Co.*, 979 F.2d 1001 (4th Cir. 1992) (affirming district court's grant of summary judgment in failure to warn case involving intra-uterine device where plaintiff failed to prove her doctor would have a prescribed different treatment if a different warning had been given).

Gardner is also instructive on this point. As part of its analysis, the court reviewed the "cautionary note" (discussed *supra*) provided with the hair rollers at issue to determine whether it was sufficient to inform the user "to use the extraordinary degree of caution necessary to avoid the dangerous consequences of improper or extraordinary use of the product." *Gardner*, 448 F.2d at 243. Although the court did not specify that it was analyzing a warning's impact on user conduct, it is clear from this language that changing user conduct (to ensure that it is commensurate with the requisite degree of caution) was a primary focal point of the court's analysis. *Id.* For example, the court stated first that if the user disobeyed the warning at issue, he/she was told only that the product "may" be flammable. *Id.* The warning also failed to inform that the product contained paraffin. *Id.* It also specified that the risk of flammability depended on whether the hair rollers were left over a "flame" in the pan without water, and the court reasoned that some users would conclude that "flame" did not include electrical heat. *Id.* Finally, the warning indicated that "Otherwise Q.H.S. Setting/Rollers are *perfectly safe*." Citing these nuances in wording, the court found that "[t]he user was not told that there was a strong possibility that the paraffin would ignite if the water boiled away and that flames of a considerable height could erupt if the paraffin ignited." *Id.* The court also criticized the appearance of the warning since it was the same size as the general instructions and was inconspicuously included within them. *Id.* From this review, the court determined that there was sufficient evidence for the jury to consider whether the warning was inadequate so as to make the manufacturer liable for negligence or a breach of the warranty of merchantability. *Id.*

From *Gardner*, it is clear that a warning's wording, font size and conspicuousness are relevant factors in determining its adequacy. However, even if a warning provides information about a risk of injury, it may still be inadequate if it fails to address changes in a product during use that may render it more dangerous. For example, *Allen v. Long Mfg. NC, Inc.* involved a portable grain auger that upended and struck the user in the head, fatally injuring him. 332 S.C. 422, 505 S.E.2d 354 (Ct. App. 1998). His estate brought suit against the auger manufacturer and alleged that the auger's warning was inadequate. *Id.* at 425-26, 505 S.E.2d at 355-56. The warning instructed that everyone should be clear before operating or moving the auger and that failure to heed the warning could result in personal injury or death. *Id.* at 426, 505 S.E.2d at 356. The defendant moved successfully for summary judgment at the trial court level, but the South Carolina Court of Appeals reversed the decision on grounds that the plaintiff presented expert testimony that the warning failed to discuss that the auger's center of gravity would change as it emptied, causing it to become unstable. *Id.* at 427-30, 505 S.E.2d at 357-58.

Another important factor in determining the adequacy of a warning is whether it meets the standards applicable to its industry (i.e., for what the product's warning should say, or whether a warning is required at all). *Bragg*, 319 at 546, 462 S.E.2d at 330 (concluding that an aerial bucket was safe as built *without* a warning and stating that "[b]ecause evidence at trial undisputedly established that the aerial device met all appropriate standards regarding warnings at the time of its manufacture and sale in 1984, we further conclude [Plaintiff's] strict liability claim based on an alleged warning defect also fails."). However, compliance with industry standards does not make a warning adequate as a matter of law. *See Allen*, 332 S.C. at 431, 505 S.E.2d at 359 (rejecting that satisfaction of industry standards establishes adequacy as a matter of law "since it would allow the industry to set its own standard of safety, a proposition which finds no support from other jurisdictions, and which is antithetical to the underlying premise of strict liability."). The court may also compare the warnings provided by a product manufacturer to the practices of other manufacturers in the industry. *See Holst v. KCI Konecranes Int'l Corp.*, No. 4736, 2010 WL 3543585 (S.C. Ct. App. Sept. 8, 2010) (holding that crane manufacturer was not liable for negligent failure to warn where crane's

warnings met industry standards and were consistent with practices of other crane manufacturers).

Finally, whether a warning is required by federal or state law is also relevant to its adequacy. For example, if the wording of a warning is specified by federal law and the warning at issue complies with this wording, it may be adequate as a matter of law. Although the doctrine of preemption is beyond the scope of this article, numerous courts have evaluated warnings claims in terms of whether or not the warning at issue complied with federal standards. *See, e.g., Moss v. Parks Corp.*, 985 F.2d 736 (4th Cir. 1993) (holding that mineral spirits paint thinner was properly labeled in accordance with applicable federal standards, and therefore plaintiff's claim of noncompliance failed) (applying South Carolina law); *Aldana v. R.J. Reynolds Tobacco Company*, No. 2:06-3366-CWH, 2007 WL 3020497, at *4-5 (D.S.C. Oct. 12, 2007) (granting defendant's motion to dismiss because the cigarette warnings at issue were required by, and complied with, the Public Health Cigarette Smoking Act).

Once the plaintiff has presented evidence to support that a warning is inadequate, then it becomes an issue for the jury. *Allen*, 332 S.C. at 428, 505 S.E.2d at 357 ("[T]he question of the adequacy of the warning is one of fact for the jury as long as evidence has been presented that the warning was inadequate."). Most jurisdictions employ this same approach once the plaintiff has presented evidence of inadequacy. *Allen*, 332 S.C. at 432 n.3, 505 S.E.2d at 359 n.3 (citing case law from numerous jurisdictions as support). Expert testimony concerning a warning's adequacy may be sufficient to create a genuine issue of material fact for purposes of avoiding summary judgment. *Id.* at 429, 505 S.E.2d at 358; *see also Campbell v. Gala Indus., Inc.*, No. 6:04-2036-RBH, 2006 WL 1073796 (D.S.C. Apr. 20, 2006) (testimony of human factors expert was sufficient to create a genuine issue of material fact with regard to adequacy of warnings on centrifugal dryer to pelletizer line).

Conclusion

The duty to warn is a function of the foreseeability of the risk and whether it is contemplated by the user. Whether a warning is "adequate" is subject to considerable debate since a litigant can always argue that a different form of a warning should have been used. Design or manufacturing defect cases are often limited by technology, the product's utility, or other mechanical considerations. However, in many respects, a warnings case is limited only by human experience and communication. Therefore, discovery of prior incidents/complaints about a product and the use of expert testimony are critical in evaluating a warnings case.

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