THE 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-37-0030

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.

**RESPONDENTS
TRINITY MANUFACTURING, INC. AND
MATRIX OUTSOURCING, LLC'S
PETITION FOR REHEARING (PANEL)
AND PETITION FOR REHEARING EN BANC**

TO: THE HONORABLE JUDGES OF THE SOUTH CAROLINA COURT OF APPEALS:

Pursuant to Rules 219, 221, and 240 of the South Carolina Appellate Court Rules, Respondents Trinity Manufacturing, Inc. and Matrix Outsourcing, LLC respectfully move this Court for rehearing in the instant

matter en banc, or in the alternative, by the panel. Respondents Trinity and Matrix maintain the instant case involves a question of exceptional importance with regard to the law of product liability in South Carolina. The opinion of this Court, which affirmed in part and reversed in part the decision of the Circuit Court, and is the catalyst for this petition, was filed on August 21, 2013.

FACTS/PROCEDURAL BACKGROUND

Engelhard is a world leader in refining precious metals and is a sophisticated user of many chemicals, including the chemical sodium bromate. Sodium bromate is a strong oxidizing agent or "oxidizer." When heated to a certain temperature, it gives off oxygen and, thereby, greatly contributes to the combustion of other material. Engelhard regularly used sodium bromate in its refining process. At the time of the June 1, 2004, accident out of which Appellants' claims arises, Engelhard was purchasing approximately 120 metric tons of sodium bromate per year from Univar.

Engelhard began purchasing sodium bromate from Univar in 2002, having previously obtained the product from another supplier. Univar sourced the sodium bromate it supplied Engelhard through Respondents Trinity and Matrix. Engelhard ordered the product from Univar; Univar then

ordered it from Trinity; Trinity then ordered it from its subsidiary, Matrix. Matrix obtained the product from a Chinese manufacturer, whereupon, it was shipped to the United States and delivered directly to Engelhard by a common freight carrier. Delivery of the product came directly to Engelhard via "drop shipment" or "drop shipping."

The sodium bromate involved in the June 1, 2004, accident corresponds to Engelhard purchase order S006011 (the "Subject Purchase Order"). David Williams was Engelhard's purchasing manager at the time of the subject accident. He testified at the trial of this case that, at that time, Engelhard was purchasing a number of products from Univar, including sodium bromate, and that he regularly dealt with Univar in procuring materials for Engelhard.

In December of 2003, Williams prepared the Subject Purchase Order, which was a "blanket" purchase order for all of the products Engelhard intended to buy from Univar (among others, sodium bromate) to meet its requirements for the coming year, i.e., 2004. As he did with some 40 to 50 other such blanket purchase orders to other suppliers, Williams gathered information regarding Engelhard's budgeted requirements for 2004 and entered it into Engelhard's internal computer system, creating the Subject Purchase Order on December 9, 2003.

The Subject Purchase Order contained the following language:

> EACH PACKAGE MUST BE MARKED TO COMPLY WITH THE OCCUPATIONAL SAFETY AND HEALTH ASSOCIATION [sic] (OSHA) 1910.1200 REQUIREMENTS FOR PACKAGING AND LABELING AND THE DEPARTMENT OF TRANSPORTATIONS [sic] CODE OF FEDERAL REGULATIONS (CFR) 49 REQUIREMENTS. FAILURE TO COMPLY MAY RESULT IN THE CANCELLATION OF THIS AGREEMENT AND REFUSAL OF ANY OR ALL MATERIAL SHIPPED AGAINST THIS ORDER.
>
> ***
>
> THIS PURCHASE ORDER IS SUBJECT TO THE PROVISIONS ON THE FACE HEREOF AND THE INSTRUCTIONS, TERMS AND CONDITIONS ON THE REVERSE SIDE. PLEASE REVIEW THEM CAREFULLY. THEY WILL CONSTITUTE OUR CONTRACT UNLESS WE AGREE IN WRITING TO CHANGES OR ADDITIONS.
>
> ***
>
> TERMS CONDITIONS
>
> EXCEPT AS MAY OTHERWISE BE SPECIFICALLY PROVIDED ON THE FACE SIDE HEREOF THE PARTIES AGREE THAT THE FOLLOWING TERMS AND CONDITIONS SHALL GOVERN THE TRANSACTION DESCRIBED ON THE FACE HEREOF. AS USED HEREIN THE TERM "BUYER" SHALL MEAN AND INCLUDE ENGELHARD CORPORATION AND/OR ITS SUBSIDIARIES.

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COMPLIANCE WITH APPLICABLE LEGAL STANDARDS

> . . . Vendor [i.e., Univar] warrants that it is and will be in compliance with all applicable provisions of federal, state and local laws and rules, regulations and standards promulgated thereunder, including without limitation the following, as amended from time to time: (a) Occupational Safety and Health Act of 1970.

The shipment of sodium bromate involved in the June 1, 2004, accident was delivered by truck to Engelhard on February 16, 2004, whereupon, it was inspected, verified, and accepted by Engelhard without complaint.

Engelhard followed an express, written procedure for receiving, inspecting, and verifying the different types of materials delivered to its Seneca facility. Among the types of materials addressed by this procedure were "Purchased Materials." Engelhard's procedure defined Purchased Materials as "Raw Materials purchased by the Purchasing Department." Sodium bromate was such a Purchased Material.

According to Engelhard's procedure:

> Raw materials purchased by the Purchasing Department . . . are received in the Shipping/Receiving Area of the Warehouse and, after

> appropriate verification and inspection, are accepted into CIMS inventory by the Receiving Department. Acceptable raw materials are stored in the warehouse until required by the Production Departments.

"CIMS" stands for Customer Information Management System. It was Engelhard's computerized inventory control system. Materials received and accepted were entered into the system and identified by lot number so that the physical location within the facility of each shipment of material received was tracked.

Harriet Simmons was Engelhard's distribution manager, a position had shortly before the time of the June 1, 2004 accident. In this position, she oversaw Engelhard's receiving dock, shipping dock, and warehouse facilities. She confirmed that Engelhard's procedures required her department to check deliveries for compliance with the language in the Subject Purchase Order, in particular, that the goods were compliant with OSHA labeling requirements and DOT regulations. This procedure required every pallet of the shipment of the sodium bromate involved in this case to be checked for such compliance, and Simmons felt "certain" that this procedure was followed on February 16, 2004. All of Engelhard's receiving employees were aware of the product lines Engelhard was receiving and, if a material was delivered to

Engelhard without appropriate hazard labels, the shipment would be refused and the vendor, along with the appropriate safety and/or management authorities, would be contacted. The record is clear that, after its acceptance by Engelhard, Univar and Respondents Trinity and Matrix had no responsibility for–or ability to control–the storage, use, or handling of the subject sodium bromate in the Engelhard facility.

When it arrived at Engelhard on February 16, 2004, the sodium bromate involved in the June 1, 2004, accident was in a metal shipping container, sometimes referred to as a "connex box." The sodium bromate was in DOT and United Nations approved, individual, 25 kilogram, plastic woven bags, every one of which displayed the internationally recognized yellow diamond oxidizer warning label on one side and written information on the reverse side.[1] This written information included the words "sodium bromate" and other information that could be used to look up the material safety data sheet ("MSDS") for sodium bromate. Univar provided the MSDS for sodium bromate to Engelhard, and it was accessible to the Plaintiff Workers–and the other workers in the Engelhard Seneca facility–via

[1] To be clear, the yellow diamond oxidizer warning label was the label utilized by Engelhard within its workplace.

terminals located throughout the plant.

The bags were stacked on 20 individual wooden pallets, with 36 bags of sodium bromate per pallet. Each of the pallets was wrapped in clear plastic, i.e., shrink wrapped.

As required by Engelhard's procedures, once inspected and verified, the sodium bromate that it accepted on February 16, 2004, was inventoried and logged into Engelhard's internal computer system. The shipment, a total of 720 bags, was taken to the D-1 area of Engelhard's warehouse – i.e., the specific area of its warehouse where oxidizers are stored – where it would stay until it was specifically requested to be brought from storage for use in production.

On May 20, 2004, four pallets from the February 16, 2004, shipment of sodium bromate were transported by forklift from the D-1 area of Engelhard's warehouse to the refinery for use in Engelhard's production operations. The week of May 30, 2004, was a "complete shutdown week" at Engelhard, during which production was stopped for scheduled maintenance projects at the facility. During a shutdown week, production materials, such as sodium bromate, was not be left in the refinery.

One of the maintenance projects during the shutdown week was the removal of a section of a condensate return pipe in the refinery hallway. This project was scheduled and planned in advance of the shutdown week by Engelhard management.

The condensate return pipe was made of carbon steel and was suspended some 15 to 20 feet above the floor along with numerous other pipes in what is referred to as a "pipe rack." Engelhard knew that removal of the section of pipe would require the use of an oxyacetylene cutting torch. Using the torch, an approximately 60 to 100-foot section of pipe was to be cut and removed in a number of smaller pieces. Use of the torch to cut the pipe was certain to produce and scatter hot molten slag.

The work crew involved in the actual removal of the condensate pipe consisted of four men: Keith Black, Curtis Martin, Scott Lawing, and Steve Knox. Knox was Engelhard's maintenance "lead," i.e., the leader of the work crew. He selected Black, Martin, and Lawing to work with him on the project and had supervisory authority over them. Another employee, Mark Powell, served a "fire watch" for the project. He did not take part in the actual removal of the pipe but was required by, inter alia, Engelhard's hot work procedure to have a fire extinguisher immediately available for use.

Use of the oxyacetylene torch to remove the pipe constituted a type of work known by Engelhard to be hazardous. Specifically, it was known as "hot work" and, before it was commenced, it required the issuance of a hazardous work permit authorizing hot work pursuant to Engelhard's procedures.

Prior to commencement of the pipe removal project on June 1, 2004, Knox obtained a hazardous work permit authorizing hot work. The permit was issued by Engelhard permit supervisor Tim Wald.

Engelhard had express written procedures to be followed for issuance of a hazardous work permit authorizing hot work. Among other things, these procedures provided that:

> The Permit **shall contain all data/information known or suspected** in reference to the work to be performed and the system on which it will be performed. In all cases, **a conservative approach will be used** when determining P[ersonal] P[rotective] E[quipment] requirements and other relevant safety features. All individuals involved in the work shall review, approve, and sign the Permit. If any questions or doubts are encountered, personnel shall contact the Safety Manager for clarification and guidance.

(emphasis added).

Engelhard's procedure further required that:

> Immediately prior to the start of Hotwork, the Work Supervisor (or designee) **shall perform a thorough inspection of the immediate work area and all areas adjacent for the presence of combustible and/or flammable materials. All such materials will be removed to a safe location for the duration of the Hotwork**. All Hotwork performed on the Inside of a building must have atmospheric monitoring performed prior to the start of the work evolution.

(emphasis added).

Per Engelhard procedure, prior to issuance of the hazardous work permit authorizing hot work, the entirety of the hot work area was marked with red "danger" tape. Knox and Wald walked through the entire area within the red "danger" tape, i.e., the hot work area. Knox expressly testified that, although he did not at the time know what chemical they contained, he personally noticed the pallets of sodium bromate within the hot work area, i.e., where they were located at the time of the accident. Knox walked over to the pallets and viewed the bags thereon close enough to tell there was black writing on the sides of the bags that were facing up. He did not look at the bags close enough to read this writing. While he testified that he did not see a yellow diamond oxidizer warning label on the sides of the bags that

were facing up, he admitted that he did not make any attempt to turn the bags over to look for the label. Knox acknowledged that, pursuant to Engelhard procedure, a supervisor was supposed to be contacted when unidentified materials were encountered and that, despite the fact that he did not know what material was on the pallets in the hot work area, he did not do so.

After this inspection of the entirety of the hot work area–which, of course, gave Knox personal knowledge of the existence of the pallets (i.e., combustible and/or flammable material) within the hot work area–a hazardous work permit authorizing hot work was nonetheless issued. On this permit, it was wrongfully stated that the "Work Area [was] Clear of All Flammable Materials. The record is clear that, in addition to being signed by the Engelhard permit supervisor, Wald, the hazardous work permit authorizing hot work was signed by Knox, who acknowledged that his signature represented his affirmation that he had reviewed and approved of the permit. Nonetheless, Knox expressly conceded that the hot work area was not cleared of all flammable materials, in fact, acknowledging that simply leaving the then unidentified plastic bags and wooden pallets in the

work area was a failure to clear the hot work area of flammable materials.[2]

With the hazardous work permit authorizing hot work having been improperly issued, the pipe removal project began on the morning of June 1, 2004. During the course of the project (i.e., before the accident) Knox, Black, and Lawing where in the pipe rack, with Knox and Black taking turns operating the oxyacetylene torch to cut the condensate pipe into approximately eight-foot sections and with Lawing assisting in lowering the removed sections down from the pipe rack to the floor. Martin was in a man lift situated nearby also assisting in lowering the removed sections of pipe.

The accident occurred around lunchtime. The men were in the proximity of Area 12 in the refinery, an area known as the "bromate" leech. Knox had come down from the pipe rack. Black and Lawing remained harnessed in the pipe rack with Martin in a lift nearby. According to Knox, while the cutting operation was ongoing, there was a "flash on the pallet" which, within two to three seconds thereafter, became a fiery inferno. After seeing the flash on the pallet, Knox (not Powell) attempted to retrieve the fire

[2] There is also testimony that a number of other Engelhard supervisory or management personnel, including the plant safety manager, Dan Hogan, walked through or in the vicinity of the hot work area on the morning of June 1, 2004. Of course, none of these persons made sure that hot work procedures were followed by removing the subject sodium bromate.

extinguisher (which Powell was supposed to have immediately available), but was unable to do so in time to prevent the chemical reaction and fire that injured the plaintiffs.

Mr. and Mrs. Martin commenced a products liability action against the Univar and Respondents Trinity and Matrix by filing a summons and complaint on July 18, 2005. Their complaint alleged causes of action against all defendants for strict products liability, negligence, and breach of implied warranty arising out of their involvement in the sale of the chemical sodium bromate, which was involved in a workplace accident that injured Mr. Martin on June 1, 2004. Mrs. Martin asserted a claim for loss of consortium.

On the same day, Mr. and Mrs. Black commenced an action against these same defendants, alleging the same causes of action arising out of the same workplace accident. Mrs. Black's claim was later dropped.

On January 11, 2006, Mr. and Mrs. Lawing commenced an action against the same defendants, alleging the same causes of action arising out of the same workplace accident.

All defendants timely answered the aforementioned complaints, denying their material allegations and asserting numerous affirmative defenses.

Prior to trial, Univar and Respondents Trinity and Matrix made a number of motions, including motions for summary judgment on the plaintiffs' claims for strict liability. The trial court granted the defendants' motion for summary judgment on the plaintiffs' strict liability claim.

The plaintiffs' cases were consolidated and the trial thereon was bifurcated into a liability phase and a damages phase, with the liability phase beginning before The Honorable J.C. Nicholson, Jr. and a jury on October 20, 2008.

Five total causes of action where submitted to the jury. Three against all defendants: negligence as to packaging, negligence as to warning labels, and breach of implied warranty of merchantability. Two causes of action were against Univar only: breach of express warranty as to packaging and breach of express warranty as to warning labels.

On November 17, 2008, the jury returned a verdict in favor of the Plaintiffs on only one cause of action, breach of express warranty as to warning labels against Univar. The jury found in favor of Respondents

Trinity and Matrix on all other causes of action of liability.

Univar timely moved for JNOV or, alternatively, a new trial. The trial court heard these motions on November 18, 2008 and, thereafter, entered an order denying Univar relief and also stating that the issues raised in Univar's motions would be addressed again after the damages portion of the trial.

Univar made an immediate appeal from the result of the liability phase of trial. Although this Court found Univar's appeal to be proper, it declined to stay the damages trial, instead holding Univar's liability appeal in abeyance until the trial on damages was concluded.

The damages phase of trial began on December 1, 2008. On December 12, 2008, the jury rendered the following damages verdicts: $2,600,000 in favor of Mr. Black; a total of $1,500,000 in favor of the Martins ($100,000 being an award to Mrs. Martin for loss of consortium); a total of $2,000,000 in favor of the Lawings ($100,000 being an award to Mrs. Lawing for loss of consortium).

Univar timely filed/renewed its JNOV motion and also moved to have the awards in favor of Black and the Martins set off in accordance with their settlements with Trinity and Matrix. All the plaintiffs' moved for new trials absolute on the issue of damages or, alternatively, new trial nisi additur on

the issue of damages.

The trial court heard post-trial motions on January 21, 2009, denying Univar JNOV at that time. On March 31, 2009, the trial court entered orders denying Univar a setoff and also denying all motions of the plaintiffs but Martin and Lawing's motions for new damages trials. On the same date, the trial court entered orders granting Martin and Lawing new trials nisi additur on the issue of damages only, forcing Univar to chose between accepting additurs of $1,400,000 to Martin and $2,000,000 as to Lawing or proceeding directly to a new damages trial.

This consolidated appeal timely followed. During the pendency of the appeal, Univar settled with the plaintiffs. Only the plaintiffs' appeal of the grant of summary judgment to Respondents Trinity and Maxtrix, along with the appeal of the jury verdict of Respondents Trinity and Maxtrix proceeded to disposition.

LAW/ANALYSIS

I. The Reason for Respondents' Petition for Rehearing

On appeal, before this Court were the following key issues:

> Whether the Circuit Court properly charged the Sophisticated User Doctrine as a defense to Appellants' negligence and implied warranty claims?
>
> Whether the application of the Sophisticated User Doctrine as a defense is preempted by federal law?
>
> Whether the Circuit Court properly granted summary judgment to Respondents Trinity and Matrix and Univar on Appellants' strict liability cause of action based upon the holding that Appellants did not come within the ambit of "users" and/or "consumers" for purposes of the South Carolina Product Liability Act, S.C. Code Ann. § 15-73-10 et seq.?

In its August 21, 2013, opinion, the Court held the Sophisticated User Doctrine was applicable in South Carolina and was not preempted by federal law. The Court additionally held that any error that existed concerning the language employed by the trial judge with regard to the Sophisticated User Doctrine charge was not preserved for appellate review.

The Court, however, reversed the grant of summary judgment to Respondents on the strict liability cause of action. Simply stated, the Court of Appeals held the circuit judge's definition of the term "user" was too narrow.

The Court of Appeals' reversal and remand of the Circuit Court's summary judgment on the strict liability count is the sole basis for Respondents Trinity and Matrix's petition for rehearing.

II. The Court's Decision Concerning Whether Appellant Scott Lawing Was a "User" for Purposes of the Strict Liability Analysis

In its disposition of the summary judgment issue and the determination of whether Appellant Scott Lawing was a "user," this Court concluded:

> The parties' dispute over the meaning of "user" is a question of statutory interpretation, the goal of which is to give effect to the legislature's intent. Kerr v. Richland Mem'l Hosp., 383 S.C. 146, 148, 678 S.E.2d 809, 811 (2009); see also Bray, 356 S.C. at 117 n. 6, 588 S.E.2d at 96 n. 6 (noting in its discussion of section 15–73–10 that "the judiciary is limited to interpretation and construction of that statute"). In enacting section 15–73–10 and several related sections, the legislature did not use specific definitions to express its intent regarding these terms. Rather, the legislature stated that the American Law Institute's comments to section 402A of the Restatement (Second) of Torts (1965) are "the legislative intent." S.C.Code Ann. § 15–73–30 (2005). Therefore, to determine what the legislature meant by "user," we look to the comments to section 402A.
>
> Several comments illustrate who is a user. First, comment 1 is entitled "User or consumer." Although the comment does not specifically define either of the terms, it indicates they are to be construed broadly. The comment explains that a person may recover in strict liability even though he did not buy the product: "He may be a member of the family of the final purchaser, *or his employee,* or a guest at his table, or a mere donee from the purchaser." § 402A cmt. 1 (emphasis added). In addition, " 'Consumers' include not only those who in fact consume the

product, but also those who prepare it for consumption." Id. Finally, user is not limited to someone actively operating or manipulating the product; rather, it "includes those who are passively enjoying the benefit of the product." Id.

Second, comment j discusses the requirement that a seller provide directions and warnings on the container of a product. The comment contemplates that the seller will warn people of the product's dangerous qualities so that certain people who see the warning will *not* use the product. Comment j provides an example:

> Where ... 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 ....

§ 402A cmt. j. Thus, the comment contemplates that a person will "use" the warning to determine whether it is safe for the person to use or consume the product, or in a situation like the one we face in this case, whether he should move the product to another location before doing work that may be dangerous in the vicinity of the product.

Finally, comment o helps define "user" and "consumer" by illustrating what those terms do not mean. When the American Law Institute adopted section 402A, it stated it expressed no opinion as to whether the rule should apply "to persons other than users or consumers." § 402A caveat. Explaining that caveat, comment o describes a "non-user" as a "[c]asual bystander" and others whose contact with the product is incidental, such as "a passer-by injured by an exploding bottle, or a pedestrian hit by an automobile." § 402A cmt. o. These examples illustrate that the Institute intended that the people to be excluded from the

definition of "user" and "consumer" are much farther removed from the product than Lawing and his co-workers were from the sodium bromate.

Considering the comments together, we believe the legislature intended that the term "user" include persons who could foreseeably come into contact with the dangerous nature of a product. Thus, a person who examines a product for warnings and other safety information is one whom the seller intends will use that information to avoid the dangers associated with the product, and thus is a person who foreseeably could come into contact with its dangerous nature. Such persons enjoy the benefit of the warning by learning how to use the product safely, or by learning that they should avoid the product altogether. They are not "casual bystanders," but instead use the product by reading the warning to learn what, if anything, they can safely do with it.

Surprisingly, there is little case law on the definition of "user" under section 402A. In Patch v. Hillerich & Bradsby Co., 361 Mont. 241, 257 P.3d 383 (2011), the Supreme Court of Montana addressed a completely different factual situation that nevertheless helps us understand whether Lawing is a user on the facts of this case. In Patch, a young man pitching in a baseball game died when he was struck by a batted ball. 257 P.3d at 386. His parents sued the manufacturer of the bat, asserting a failure-to-warn claim under Montana's strict liability statute. Id. They claimed the bat was defective and unreasonably dangerous because the manufacturer did not warn that balls hit by the bat could travel with such high velocity that other players, particularly pitchers, could be hit by the ball before normal human reaction time would allow them to put up a hand or glove. Id. The jury found for the plaintiffs. Id. On appeal, the manufacturer argued it should have been granted summary judgment because the pitcher was not a user or consumer of the bat. 257 P.3d at 387. It argued that the person who bought the bat and those who swung it to hit the ball were the only users or

consumers under Montana's strict liability statute, and therefore the plaintiffs could not recover. Id.

The court disagreed. Noting that Montana's strict liability statute is a codification of section 402A, the court found the manufacturer's "narrow interpretation of the terms user and consumer is contrary to the definition of the terms as contained in" section 402A. Id. The court reviewed comment l and found the drafters of section 402A "broadly defined" user and consumer. Id. In light of the comment, and "the realities of the game of baseball," the court held that "[t]he risk of harm accompanying the bat's use extends beyond the player who holds the bat in his or her hands.... [A]ll of the players, including [the pitcher], were users or consumers placed at risk by the increased exit speed caused by" the bat. 257 P.3d at 388. Therefore, the supreme court concluded the trial court did not err in denying the manufacturer's summary judgment motion. Id.

Like the bat manufacturer in Patch, Trinity and Matrix define "user" and "consumer" too narrowly by considering only whether Lawing was doing something with the sodium bromate at the time of the accident. They argue Lawing was not a user or consumer of the sodium bromate because the chemical itself was not involved in the pipe removal operation. However, in light of the comments discussed above illustrating the legislative intent of section 15–73–10, and the realities of modern industrial practice, we hold Lawing was a user of the sodium bromate. Warnings and other safety information on packaging are part of the product. See § 402A cmt. h ("No reason is apparent for distinguishing between the product itself and the container in which it is supplied; and the two are purchased by the user or consumer as an integrated whole.... The container cannot logically be separated from the contents when the two are sold as a unit ...."). Manufacturers and suppliers of chemicals and other products not only foresee, but intend, that workers like Lawing will use the information on the packaging even if they are not actually using the chemical within the packaging. See Owen, supra, at 621

("The purpose of warnings ... is to provide information to people about hazards and safety information they do not know about so they may avoid the product altogether or avoid the danger by careful use.").

Trinity and Matrix make two other arguments regarding Lawing's status as a user under section 15–73–10. First, they argue Bray supports their narrow interpretation of the term user. In Bray, the supreme court held the plaintiff was a user because she was physically operating the trash compactor's controls at the time of her co-worker's death. 356 S.C. at 115, 116–17, 588 S.E.2d at 94, 95–96. We see nothing in *Bray* that contradicts our interpretation of section 15–73–10. Trinity and Matrix also argue that even if Lawing was a user of the sodium bromate, he cannot recover because his use was not an intended use. See Claytor v. Gen. Motors Corp., 277 S.C. 259, 264, 286 S.E.2d 129, 132 (1982) ("A product may, by reason of its nature and use, be unreasonably dangerous unless proper instructions and warnings are supplied for its intended use." (emphasis added)). This argument has the same flaw as their argument that Lawing was not a user—it focuses exclusively on the sodium bromate itself, rather than the product as a whole, including the packaging and particularly the warning. Trinity and Matrix cannot seriously suggest they did not intend for Lawing to examine the bags for information warning him it would be unsafe to leave them in the work area. Lawing testified he looked at the pallets and the bags for any labels, and he saw nothing indicating he should not work near them. In that respect, Lawing used the product exactly as Trinity and Matrix intended.

Id. at 16-19 (footnote omitted).

III. Respondents' Arguments Supporting Rehearing on the Instant Case

Respectfully, this Court overlooked or misapprehended the aegis of S.C. Code Ann. 15-73-10 and Restatement (Second) of Torts § 402A in

including Appellant Scott Lawing as a "user" for purposes of the strict liability analysis. Further—respectfully—this Court has overlooked the actual holding found in the Supreme Court's decision in Bray v. Marathon Corporation, 356 S.C. 111, 588 S.E.2d 93 (2003). Simply stated, this Court has created too expansive of a definition of "user" and/or "consumer" in its opinion.

Appellant Scott Lawing was not a "user" or "consumer" of the sodium bromate. Based on the precedent established in this jurisdiction by the Bray Court, which recognized its limitations to fashion remedies outside of what was delineated by the General Assembly within S.C. Code Ann. 15-73-10 et seq., Respondents Trinity and Matrix respectfully assert this Court is constrained as well from crafting the analytical fix sought by Appellants in this case. See State v. Elmore, 368 S.C. 230, 628 S.E.2d 271 (Ct. App. 2006) (holding that as an "error correction" court, the Court of Appeals would "leave it to the Supreme Court" to determine if a departure from the currently-applied case law established by the Supreme Court was warranted).

A. The Law of Strict Liability in South Carolina and the Parameters of Its Application

South Carolina imposes strict liability on a seller for selling "any product in a defective condition unreasonably dangerous to the user or consumer or his property. S.C. Code Ann. § 15-73-10. Importantly, the General Assembly expressly adopted § 402A of the Restatement (Second) of Torts and all of the corresponding comments to § 402A as the legislative intent of Title 15, Chapter 13. S.C. Code Ann. §§ 15-73-10 to -30; Branham v. Ford Motor Company, 2010 WL 3219499 (2010); Curcio v. Caterpillar, Inc., 355 S.C. 316, 585 S.E.2d 272 (2003); Bray v. Marathon Corporation, 356 S.C. 111, 588 S.E.2d 93 (2003); Schall v. Strum, Ruger Co., Inc., 278 S.C. 646, 300 S.E.2d 735 (1983); Claytor v. General Motors Corp., 277 S.C. 259, 286 S.E.2d 129 (1982); Anderson v. Green Bull, Inc., 322 S.C. 268, 471 S.E.2d 708 (Ct. App. 1996).

Restatement (Second) of Torts § 402A states:

> (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 thereby 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) applies 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.

A "consumer" is a "person who buys goods or services for personal, family, or household use, with no intention of resale; a natural person who used products for personal rather than business purposes." "User" is defined as "[s]omeone who uses a thing." Black's Law Dictionary 265 & 1289 (8th ed. 2005).

Comment *l* to the Restatement discusses the intended meaning of "user" and "consumer." The comment states that "consumption includes all ultimate uses for which the product is intended" and "user includes those who are passively enjoying the benefit of the product." Restatement (Second) of Torts § 402A cmt. *l*.[3]

[3] Comment *l* of Restatement (Second) of Torts § 402A states:

Comment *o* to the Restatement discusses the intended extent of liability for non-users and non-consumers, stating that courts – in applying the rule stated in § 402A, "have not gone beyond allowing recovery to users and consumers, as those terms are defined in comment l." Restatement (Second) of Torts § 402A cmt. *o*.[4] The comment expressly states that "casual

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> **User or consumer.** In order for the rule stated in this Section to apply, it is not necessary that the ultimate user or consumer have acquired the product directly from the seller, although the rule applies equally if he does so. He may have acquired it through one or more intermediate dealers. It is not even necessary that the consumer have purchased the product at all. He may be a member of the family of the final purchaser, or his employee, or a guest at his table, or a mere donee from the purchaser. The liability stated is one in tort, and does not require any contractual relation, or privity of contract, between the plaintiff and the defendant.

[4] Comment *o* of Restatement (Second) of Torts § 402A states:

> Thus far the courts, in applying the rule stated in this Section, have not gone beyond allowing recovery to users and consumers, as those terms are defined in Comment l. Casual bystanders, and others who may come into contact with the product, **as in the case of employees of the retailer**, or a passer-by injured by an exploding bottle, or a pedestrian hit by an automobile, have been denied recovery. There may be no essential reason why such plaintiffs should not be brought within the scope of protection afforded, other than that they do not have the same reasons for expecting such protection as the consumer who buys a marketed product; but the social pressure which has been largely responsible for the development of the rule stated has been a consumers' pressure, and there is not the same demand for the

bystanders, and other who may come in contact with the product .... [h]ave been denied recovery." Id.

Moreover, the American Law Institute expresses no opinion as to the expansion of the rule to permit bystander recovery, thus further emphasizing the Restatement does not recognize bystander recovery under a § 402A theory of recovery. Id.; see also Lightner v. Duke Power Company, 719 F.Supp. 1310, 1314 (D.S.C. 1989) (holding that "only a 'user or consumer' of a defective product can base a cause of action on strict liability.").

As referenced above, Bray v. Marathon Corporation, 356 S.C. 111, 588 S.E.2d 93 (2003), is a Supreme Court decision involving strict liability and negligence claims of a worker who was operating a trash compactor when her co-worker was crushed to death while in it due to a manufacturing defect. At issue on appeal was, inter alia, whether the claimant was a "user" for purposes of prosecuting her claims sounding in strict liability.

The Bray Court found the determination of whether an individual is a "user" or "consumer" is not based on a forseeability standard, but is instead

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> protection of casual strangers. The Institute expresses neither approval nor disapproval of expansion of the rule to permit recovery by such persons.

(emphasis added)

premised upon the finding of whether the individual's injury was a result of the individual's **direct** use or consumption of the allegedly dangerous product. Id. at 117, 588 S.E.2d at 95. The Court determined in Bray the claimant was a "user" because she was actually operating the controls of the defective trash compactor (i.e., **using** the product) at the time her co-worker was killed while in it.

Additionally, the Bray Court held that it lacked authority to modify § 15-73-10 and its effect where the General Assembly had already spoken by passing the statute. Id. at 117 n.6, 588 S.E.2d at 96 n6.

Specifically, the Bray Court stated the following concerning the constraints of its purview to fashion a remedy for persons alleging bystander claims under a strict liability theory via § 15-73-10:

> [W]e are without authority to graft the Kinard [v. Augusta Sash & Door Co., 286 S.C. 579, 336 S.E.2d 465 (1985)] bystander analysis on § 15-73-10. Where the legislature has, by statute, acted upon a subject, the judiciary is limited to interpretation and construction of that statute. Barnwell v. Barber-Colman Co., 301 S.C. 534, 393 S.E.2d 162 (1989) (finding punitive damages are not recoverable under Defective Products Act); Schall v. Sturm, Ruger Co., Inc., 278 S.C. 646, 300 S.E.2d 735 (1983) (absent clear legislative direction, strict liability cause of action under § 15-73-10 does not exist in South Carolina where product entered stream of commerce prior to enactment of statute and is alleged to have caused injury thereafter). If the Act is to be amended so as to provide for the requirement of a close relationship in the

> context of a strict liability cause of action, this must be accomplished by the legislature, not the court.

Id. at 117 n.6, 588 S.E.2d 93, 96 n.6 (2003).

Thus, applying the holdings of Bray, respectfully, this Court cannot extend the right to recovery via strict liability to any person other than a direct "user" and/or "consumer."

B. Support from Other Jurisdictions Limiting Recovery in Strict Liability Claims to Only Those Persons Demonstrated to be the Intended "Users" or "Consumers"

The case law is legion as it pertains to the limitation of recovery to injured persons who are not demonstrated to be the "intended" users of a product in question. Those cases include the following decisions, which Respondents Trinity and Matrix aver this Court overlooked when disposing of this issue.

In Van Buskirk v. West Bend Company, 100 F. Supp. 2d 281 (E.D.Pa. 1999), the federal district court denied strict liability recovery to a toddler who suffered severe burns after he pulled a portable deep fryer kitchen appliance on top of his head and upper torso. The court rejected the plaintiff's argument the child was a "user" and "passive beneficiary" of the "benefits of the deep fryer." Id. at 284. Specifically, the court analyzed:

> **In order for section 402A strict liability to apply in this case, [the plaintiff] has to be an intended user of the [allegedly dangerous product].** "In strict liability, the focus is on a defect in the product, regardless of fault, and that defect is determined in relation to a particular subset of the general population: the intended user who puts the product to its intended use." Griggs v. BIC Corp., 981 F.2d 1429, 1438 (3d Cir. 1992) (citation omitted).

Id. at 284 (emphasis added).

The court determined the toddler was not the intended user of the deep fryer; thus, applying comment *l*, the court deemed him a "bystander." Accordingly, the court concluded the toddler was barred from recovering under § 402A. Id. at 284-85.

In Riley v. Warren Manufacturing, Inc., 688 A.2d 221 (Pa. Super. Ct. 1997), the court denied strict liability to a child bystander after the child stuck his hand into a bulk feed trailer, which severed his fingers. The court – emphasizing that only users and consumers can recover under strict liability – determined the child was not a "user of the trailer merely 'by coming into contact with the trailer and being injured while in its proximity.'" Id. at 227 (internal citations omitted).

In In re Voluntary Purchasing Groups Litigation, 2003 WL 21499262 (N.D.Tex. June 24, 2003), the federal district court denied strict liability recovery to communities with environments contaminated with arsenic due to

the defendant arsenic company's leakages and spills of the product, holding the communities were not "users" or "consumers" of the arsenic.

In Griggs v. BIC Corporation, 981 F.2d 1429 (3rd Cir. 1992), the Third Circuit held that a child could not recover under Pennsylvania products liability law under a strict liability cause of action for injuries caused by a lighter, which was not defective because children were not intended users of the lighter. The court based its holding upon Azzarello v. Black Brothers Co., Inc., 391 A.2d 1020 (Pa. 1978), where the Pennsylvania Supreme Court stated that a product is defective when it leaves "the supplier's [or manufacturer's] control lacking any element necessary to make it safe for its intended use or possessing any feature that renders it unsafe for the intended use." Id. at 559, 391 A.2d at 1027 (emphasis added). The Third Circuit Court held that this concept of "intended use" included the demonstration of the participation of an "intended user" using a product for its "intended use." Griggs, at 1433.

The Pennsylvania Supreme Court addressed the identical issue in Phillips v. Cricket Lighters, 841 A.2d 1000 (Pa. 2003). There, a majority of the court held that a product must be made safe only for its intended user.

In Phillips, a two-year-old child accidentally started a fire after removing a butane lighter from his mother's purse and setting fire to some linens. The fire spread throughout the family's apartment, and resulted in the deaths of the two-year old child, his mother, and another minor. Id. at 1002-03. One child managed to escape through an open window and survived. Id. at 1003. The administrator of the decedents' estates, who was also the guardian of the child who survived, sued the manufacturer and distributor of the lighter, alleging, inter alia, strict liability for a defective design under Section 402A, as well as negligent design, because the lighter was not equipped with "childproof features." Id. The trial court granted summary judgment to the manufacturer on the Section 402A claim because the manufacturer only intended its lighter to be used by adults, and it was perfectly safe for use by adults. Id.

The Superior Court reversed based on its belief that a product must be safe for anyone who uses it. Id. at 1004. The court concluded that Cricket's lighter was defective because it was not equipped with a child safety feature that would have prevented a child from starting a fire. In the Superior Court's view, that defect exposed intended users to grave risk of harm. Id.

The Supreme Court granted allocatur and reversed because it agreed with the trial court.

The majority in Phillips began by observing that Azzarello "did not answer ... whether the 'intended use' doctrine necessarily encompasses the requirement that the product need be made safe only for its 'intended user.'" Id. at 1005. The majority explained that, although it had never faced that question in a strict liability design defect case, it had faced it in Mackowick v. Westinghouse Electric Corp., 575 A.2d 100 (Pa. 1990), a case alleging strict liability for failure to warn. Phillips, 841 A.2d at 1005.

In Mackowick, an electrician had sued to recover injuries caused by arcing electricity in a high voltage capacitor. He alleged that the capacitor was defective because it did not warn of the dangers of exposed electrical wires. The Mackowick Court "rejected that argument ... [,] reason[ing] that a product need only be made safe for its intended user." Phillips, 841 A.2d at 1005 (citing Mackowick, 575 A.2d at 102, 103). The "electrical capacitor was intended to be accessed and used only by qualified electricians, and not general members of the public. As experienced electricians are aware of the dangers of live exposed electrical wires, [the Mackowick court] concluded

that the product was safe for its intended user even absent a [specific] warning." Id. at 1005.

In applying the holding of Mackowick, the majority in Phillips reasoned:

> While Mackowick was a failure to warn case, ... we cannot perceive how it could be confined exclusively to the failure to warn context. Mackowick stands for the proposition that a product is not defective so long as it is safe for its intended user. Whether the product is allegedly defective due to a lack of warnings, or because it was ill-conceived, the standard that the product need be made safe only for the intended user appears to be equally applicable.

Id.

The administrator in Phillips argued the lighter's design was defective because it was reasonably foreseeable that a child might play with it, and therefore the manufacturer should be liable under Section 402A whether the user was the intended adult or the foreseeable child. Although the majority conceded that the argument had "some visceral appeal," it noted that the visceral appeal **"has been memorialized in our tort law as a negligence cause of action."** Id. at 1006 (emphasis added).

By the time Phillips was decided, the Pennsylvania Supreme Court had drawn a clear distinction between negligence actions based on notions of

foreseeability and a cause of action based on a theory of strict liability. The court declared that "negligence concepts have no place in a case based on strict liability." Id. (quoting Lewis v. Coffing Hoist Div., Duff-Norton Co., Inc., 528 A.2d 590, 593 (Pa. 1987)).

C. Application of the Governing and Guiding Law to the Facts of the Case Sub Judice

Respectfully, Respondents Trinity and Matrix aver this Court overlooks the precedent established within Bray v. Marathon Corporation, 356 S.C. 111, 588 S.E.2d 93 (2003) and the other related authorities enunciated above and instead hinges its holding upon a decision of the Montana Supreme Court, Patch v. Hillerich & Bradsby Co., 361 Mont. 241, 257 P.3d 383 (2011), to erroneously broaden the definition of "user" to include a bystander employee for purposes of the strict liability analysis.

Respondents Trinity and Matrix assert the application of Patch to reverse the summary judgment was discordant and incongruent with the Supreme Court's holding in Bray. Bray clearly stands for the proposition that strict liability can only lie when the subject injury was a result of the **direct** use or consumption of the allegedly dangerous product by its intended user.

Id. at 117, 588 S.E.2d at 95. This requires actual engagement by the injured claimant with the subject product.

Moreover, in Patch, the plaintiff was directly engaged in the play/activity that employed the subject bat. In the case at bar, the sodium bromate was not related to or even incidental to the work conducted by Appellant Scott Lawing. His relationship to the sodium bromate was analogous to the example of **"employees of the retailer"** found in Comment *o* of Restatement (Second) of Torts § 402A states, which have been historically characterized as bystanders and thus precluded from recovering under a strict liability theory.

Respondents Trinity and Matrix note that while strict liability does not lie for an injured employee who was not using the product in question at the time of injury in South Carolina, this employee is not without remedy. Specifically, the employee may pursue recovery from the product manufacturer, distributor, and seller via a theory of negligence. 30 S.C. Jur. Products Liability § 15. Unlike strict liability, the focus of the theory is on the conduct of the defendant and liability is determined according to fault. Id. (citing Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995)). A manufacturer or other supplier of a defective and harm producing

product is accountable to an injured party on ordinary negligence principles regardless of a lack of contractual relations with such party. Id. (citing Carolina Home Builders, Inc. v. Armstrong Furnace Co., 259 S.C. 346, 191 S.E.2d 774 (1972)).

In the instant case, in addition to their strict liability claim, Appellants pled and prosecuted negligence-based claims against Respondents Trinity and Matrix and Univar. Upon its review of the evidence and application of the same to the law, the jury elected to return a verdict in favor of Respondents Trinity and Matrix and Univar. Though they ultimately did not obtain a verdict from Respondents Trinity and Matrix, Appellants nevertheless were afforded due process and the opportunity to pursue recovery for their alleged damages. Thus, Respondents Trinity and Matrix implore this tribunal to not deviate from the holdings of Bray and fashion a strict liability-based approach/remedy in this case, which has no current basis in South Carolina law.

CONCLUSION

Applying § 15-73-10, the common law (including Bray v. Marathon Corporation, 356 S.C. 111, 588 S.E.2d 93 (2003)), and Restatement-based principles enunciated above to the facts of the case sub judice, Appellant

Scott Lawing was not a "user" or "consumer" of the subject sodium bromate. Accordingly, Respondents Trinity and Matrix respectfully request this Court granting rehearing of the instant case and issue an opinion, which affirms the Circuit Court's grant of summary judgment to them on the strict liability count.

Respectfully submitted,
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Columbia, South Carolina
September 5, 2013

THE 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-37-0030

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

Counsel for Respondents Trinity Manufacturing, Inc. and Matrix Outsourcing, LLC certifies it has served the Respondents Trinity Manufacturing, Inc. and Matrix Outsourcing, LLC's Petition for Rehearing (Panel) and Petition for Rehearing En Banc on all parties by depositing a copy of it in the United States Mail, postage prepaid, on September 5, 2013, addressed to the following attorneys of record:

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