

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

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SC Court of Appeals

2006-CP-37-0030
Appellate Case No. 2009-112467

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' RETURN TO
APPELLANTS' PETITION FOR REHEARING**

In their Petition for Rehearing, Appellants Scott F. Lawing and Tammy R. Lawing (“Appellants”) enumerate six (6) points which they assert the Court overlooked or misapprehended in affirming the trial court’s decision to charge the jury on the Sophisticated User Doctrine. Respondents will address these points in turn:

1. The Court has adequately and fully addressed Appellants’ argument that the Sophisticated User Doctrine is not the law of South Carolina. In its opinion, the Court explicitly stated that in affirming the decision to charge the jury on the doctrine in Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 551, 462 S.E.2d 321, 332 (Ct. App. 1995), it thereby “recognized the sophisticated user doctrine if part of the products liability law of South Carolina.” Lawing v. Trinity Mfg. Inc., Op. No. 5166 (Ct. App. filed August 21, 2013).

2. Appellants' argument that §388 of the Restatement (Second) of Torts requires application of a six-factor balancing test and, if conducted, this balancing test would render the Sophisticated User Doctrine unavailable to Respondents as a matter of law is without merit. As an initial matter, this six-factor test has never been adopted by a South Carolina court. Even assuming this test is the applicable law of South Carolina, its content was adequately considered by the Court. The six factors are simply circumstances that may be considered in determining if the supplier acted reasonably in relying upon the purchaser/employer to warn its employees of the product's dangers. The Court discussed the requirement of reasonable reliance under the circumstances at length in Section III.B.1 of its opinion. Finally, because the record is replete with evidence from which the jury could conclude Respondents acted reasonably under the circumstances in relying on Engelhard to warn its employees, it was not error to charge the Sophisticated User Doctrine to the jury. The Court directly addressed this issue and discussed the pertinent testimony supporting the charge in detail in Section III.C of its opinion.
3. The Court did not overlook or misapprehend Appellants' contention that the sophisticated user defense is inapplicable to this case because the warnings provided to the intermediate user were inadequate. In holding the evidence supported the trial court's decision to charge the jury on the Sophisticated User Doctrine, the Court implicitly rejected Appellants' argument that the warnings given to the intermediate user (Engelhard) were inadequate. The Court discussed at length the evidence presented at trial from which a jury could infer Respondents "acted reasonably in providing warnings on the bags and in the MSDS, relying on Engelhard to provide its employees any additional warnings about the dangers of sodium bromate." Accordingly, the adequacy

of the warnings given to Engelhard was a question for the jury. Furthermore, in the Appellants' Brief, this argument was couched as the charge given on the Sophisticated User Doctrine being improper because it did not instruct the jury that to apply the defense it must first find the warnings were adequate. As discussed in Section II.D of this Court's opinion, this argument is not preserved for appellate review because Appellants failed to object to the substantive correctness of the charge.

4. Appellants' contend "the Defendants" contractually assumed an obligation to warn Engelhard's employees apart from any warning given to sophisticated intermediaries. This argument is not preserved for appellate review as to Respondents. In their brief, Appellants very clearly and specifically directed this argument only to Univar, USA, Inc. See, e.g., App. Br. p. 24 ("Did Univar's Contract and Express Warranties With Engelhard Preclude the Defense From Being Applied to Plaintiffs' Negligence and Implied Warranty of Merchantability Claims Against Univar?"), p. 25 ("Univar assumed a duty owed to the employees of Engelhard"), p. 29 ("[i]n summary, as to Univar, the sophisticated user charge should not have been given at all"). This argument is inapplicable to Respondents and, because Univar is no longer involved in this appeal, the Court correctly declined to address it.
5. The Court fully addressed Appellants' argument that federal preemption applies where state common law defenses conflict with federal law. The Court's analysis regarding preemption was not confined to state statutory law. In fact, the origin of the state law claimed to be preempted is irrelevant to the Court's analysis. The Court considered the sophisticated user doctrine in conjunction with the federal regulations at issue and concluded "what the regulations require coincides with the reasonableness requirement

on which the sophisticated user doctrine is based” and “there is no conflict between the two.” Because the Sophisticated User Doctrine and the federal regulations were consistent, the Court correctly ruled the doctrine is not preempted. Respondents further crave reference to the arguments raised in their final brief on the issue of preemption. (Resp. Br. pp. 53-65).

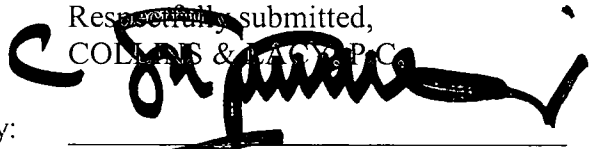
6. Likewise, the Court adequately addressed Appellants’ argument that state law incorporating federal regulations precludes application of the Sophisticated User Doctrine. The Court specifically noted Appellants contended the federal regulations on which their preemption was premised have been adopted by the state of South Carolina. The Court’s analysis regarding the federal preemption issue applies with equal force to Appellants’ contention that the Sophisticated User Doctrine is inapplicable because it conflicts with state regulations. Like the federal regulations, the state regulations do not conflict with the Sophisticated User Doctrine and the doctrine remains applicable in South Carolina.

For the reasons set forth above, Respondents respectfully request the Court deny Appellants’ Petition for Rehearing.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,
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PROOF OF SERVICE

Counsel for Respondents Trinity Manufacturing, Inc. and Matrix Outsourcing, LLC certifies it has served the Respondents Return to Appellants' Petition for Rehearing on all parties by depositing a copy of it in the United States Mail, postage prepaid, on September 20, 2013, addressed to the following attorneys of record:

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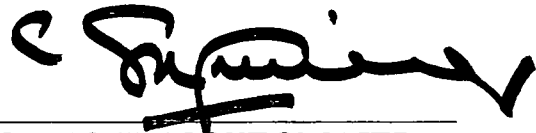
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