

THE 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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S.C. Supreme Court

Opinion No. 5166 (S.C. Ct. App. Filed August 12, 2013)
Case Tracking No. 2009-112467

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

**TRINITY MANUFACTURING, INC. AND
MATRIX OUTSOURCING, LLC'S
CROSS PETITION FOR WRIT OF CERTIORARI**

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CERTIFICATE OF COUNSEL

Counsel for Cross Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on October 22, 2013.

QUESTION PRESENTED

Did the Court of Appeals erroneously reverse the grant of summary judgment to Cross Petitioners Trinity and Matrix and Univar on Petitioner Scott F. Lawing's strict liability cause of action?

Specifically, does the Court of Appeals holding that Lawing was a "user" and/or "consumer" of the product at issue comport with the established precedent found within, *inter alia*, this Court's holding in Bray v. Marathon Corporation, 356 S.C. 111, 588 S.E.2d 93 (2003)?

STATEMENT OF THE CASE

Engelhard was a world leader in refining precious metals and a sophisticated user of many chemicals, including the chemical sodium bromate.¹ (R. p. 2423, lines 18-22; R. p. 2434, lines 22-25; R. p. 2444, line 25 – p. 2445, line 19; R. p. 2446, line 12 – p. 2451, line 1; R. p. 2452, lines 6-23.) Sodium bromate is a strong oxidizing agent or “oxidizer.” (R. p. 2343, lines 24-25; R. p. 2354, lines 22-23; R. pp. 1532 - 1536.) When heated to a certain temperature, it gives off oxygen and thereby contributes to the combustion of other material. (R. p. 2357, line 23 – p. 2358, line 22; R. p. 785, line 23 – p. 788, line 1; R. p. 2418, lines 5-18.) Engelhard regularly used sodium bromate in its refining process. (R. p. 2452, lines 6 – p. 2453, line 3.) At the time of the June 1, 2004, accident out of which the Petitioners Scott F. Lawing and Tammy R. Lawing’s claims arise, Engelhard was purchasing approximately 120 metric tons of sodium bromate per year from Univar. (R. p. 2417, lines 12-18).

Engelhard began purchasing sodium bromate from Univar² in 2002, having previously obtained the product from another supplier. (R. p. 760, line 24 – p. 761, line 3; R. p. 2416, lines 1-9; R. p. 2417, lines 12-18; R. p. 2425, line 3 – p. 2427, line 19; R. p. 2430, line 19; R. p. 1564; R. p. 1565; R. p. 1566; R. pp. 1567-1568.) Univar sourced the sodium bromate it supplied Engelhard through Cross Petitioners 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

¹ Before Engelhard was purchased in 2006, Engelhard operated a 400,00 square-foot facility in Oconee County, where it produced a precious metal catalyst for use in the automobile industry and reclaimed precious metals from recycled materials. BASF Corporation now operates the facility.

² Univar was a defendant in this matter, which settled the plaintiffs’ claims in this case following verdict and appeal to the Court of Appeals. See pages 11-12, infra.

United States and delivered directly to Engelhard by a common freight carrier, never having physically passed through the “workplace” of any of the distributors. (R. pp. 1472 – 1474; R. p. 1475; R. p. 1564; R. p. 2314, lines 19-25; R. p. 2318, line 25 – p. 2319, line 12; R. p. 2324, line 22 – p. 2325, line 1; R. p. 2414, line 23 – p. 2415, line 17; R. p. 880, line 15 – p. 881, line 24; R. p. 2419, line 23 – p. 2420, line 17; R. p. 2421, line 16 – p. 2424, line 6; R. p. 1160, line 17 – p. 1161, line 16.)³

The shipment of sodium bromate involved in the June 1, 2004, accident was delivered to Engelhard on February 16, 2004, **whereupon, it was inspected, verified, and accepted by Engelhard without complaint.** (R. pp. 1519 - 1523; R. pp. 1524 - 1531; R. p. 2315, line 6 – p. 2317, line 13; R. p. 2318, line 25 – p. 2319, line 12; R. p. 2326, line 22 – p. 2328, line 10; R. p. 2329, line 11 – p. 2332, line 20; R. p. 2333, line 8 – p. 2337, line 12; R. p. 2338, line 7 – p. 2343, line 1; R. p. 2352, line 8 – p. 2353, line 14; R. p. 2429, lines 19-22.) When it arrived at Engelhard, the sodium bromate involved in the accident was in a metal shipping container, sometimes referred to as a “connex box.” (R. p. 2321, lines 6-23; R. p. 855, line 17 – p. 856, line 8.) 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. R. p. 2431, lines 13-21; R. p. 2432, lines 10-14; R. p. 2436, lines 17-20; R. p. 1257, lines 12-13; R. pp. 1539-1540; R. pp. 1557-1563.)⁴ 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

³ As will be further discussed, *infra*, “workplace” is a defined term under the OSHA HazCom standard. 29 C.F.R. § 1910.1200(c).

⁴ To be clear, the yellow diamond oxidizer warning label was the label utilized by Engelhard within its workplace. (R. p. 2437, lines 12-18; R. p. 995, lines 7-23.)

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 terminals located throughout the plant. (R. p. 2439, line 21 – p. 2441, line 12.)

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. (R. p. 1422; R. p. 843, line 25 – p. 849, line 2; R. p. 2406, line 12 – p. 2413, line 11.)

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. (R. p. 2343, line 24 – p. 2351, line 3; R. p. 2402, line 3 – p. 2403, line 25; R. p. 2404, line 12 – p. 2405, line 23; R. pp. 1485 - 1486.)

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. (R. p. 2343, line 24 – p. 2351, line 3.) 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. (R. p. 2361, line 20 – p. 2362, line 18.) During a shutdown week, production materials, such as sodium bromate, should not be left in the refinery. (R. p. 2356, lines 1-17; R. pp. 1519 - 1523.)

One of the maintenance projects to take place during the shutdown week was the removal of a section of a condensate return pipe in the refinery hallway. (R. p. 2359, line 22 – p. 2361, line 8.) This project was scheduled and planned in advance of the shutdown week by Engelhard

management. (R. p. 2366, line 19 – p. 2368, line 8; R. p. 2397, lines 16-24.) Cross Petitioners Trinity and Matrix, of course, had no involvement whatsoever with the project. (R. p. 1035, line 20 – p. 1036, line 1.)

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.” (R. p. 817, line 22 – p. 818, line 25; R. p. 2363, line 24 – p. 2365, line 5.)⁵ Engelhard knew that removal of the section of pipe would require the use of an oxyacetylene cutting torch. (R. p. 2398, lines 5-12.) Using the torch, an approximately 60 to 100-foot section of pipe was to be cut and removed in a number of smaller pieces. (R. p. 2363, lines 20-23.) Use of the torch to cut the pipe was certain to produce and scatter hot molten slag. (R. p. 2398, lines 5-12.)

The maintenance project work crew involved in the actual removal of the condensate pipe consisted of four men: Keith Black, Curtis Martin, Steve Knox, and Lawing. 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 man, 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 Engelhard’s hot work procedure – as well as OSHA’s welding code⁶ – to have a fire extinguisher “immediately” available for use. (R. p. 814, line 4 – p. 815, line 21; R. p. 817, line 22 – p. 818, line 4; R. p. 2369, line 2 – p. 2371, line 20; R. p. 1514.)

⁵ The pipe rack is depicted in the Plaintiffs’ liability phase Exhibit No. 85. (R. pp. 2501 – 2515).

⁶ To be clear, under OSHA, welding includes the operation of gas welding and “cutting” equipment. 29 C.F.R. 29 § 1910.251(a). In 29 C.F.R. § 1910.252(a)(ii), OSHA requires that “[s]uitable fire extinguishing equipment shall be maintained in a state of readiness for instant use.”

Use of the oxyacetylene torch to remove the pipe constituted a type of work known by Engelhard to be hazardous.⁷ 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. (R. p. 2371, line 25 – p. 2373, line 9; R. p. 1464.)

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. (R. p. 2372, line 19 – p. 2373, line 13; R. p. 2400, line 19 – p. 2401, line 17.)

Engelhard has 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.

(R. p. 1514); R. p. 2387, line 13 – p. 2388, line 25 (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.

⁷ That this work is well known to be hazardous is reflected in OSHA lengthy regulation specifically addressing “[o]xygen-fuel gas welding and cutting,” 29 C.F.R. § 1910.253.

(R. p. 1514; R. p. 2389, line 1 – p. 2391, line 5 (emphasis added).)⁸ Additionally, OSHA expressly requires that, “[i]f the object to be welded or cut cannot readily be moved, all movable fire hazards in the vicinity shall be taken to a safe place.” 29 C.F.R. § 1910.252(a)(i). OSHA investigated the accident the day after it happened.

As 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. (R. p. 2375, line 8 – p. 2376, line 19; R. p. 2383, line 21 – p. 2384, line 4; R. p. 1484.) 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. (R. p. 2375, line 8 – p. 2376, line 19; R. p. 2385, line 20 – p. 2386, line 2; R. p. 2387, line 13 – p. 2390, line 2; R. p. 832, line 17 – p. 833, line 16; R. p. 2394, line 3 – p. 2395, line 3; R. p. 1484.) 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. (R. p. 2392, line 18 – p. 2393, line 1; R. p. 2395, lines 4-24.)

⁸ Though not relevant here, because the subject sodium bromate was readily movable via forklift, where combustible and/or flammable materials cannot be removed from a hot work area, procedure requires that they be covered with fire retardant blankets, which Engelhard keeps on site. (R. p. 2396, lines 12-17; R. p. 2454, lines 15-22.)

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. (R. p. 2372, line 19 – p. 2374, line 14; R. p. 1464.) 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. (R. p. 2387, line 2 – p. 2388, line 9; R. p. 1514.) 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. (R. p. 2388, lines 10 – p. 2390, line 2.)⁹

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 were 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. (R. p. 2377, line 22 – p. 2379, line 15.)

⁹ 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. (R.. p. 2442, line 9 – p. 2443, line 10.)

The accident occurred around lunchtime. The men were in the proximity of Area 12 in the refinery, an area known as the “bromate” leech. (R. p. 2399, lines 1-5; R. p. 2438, lines 16-21.) 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 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. (R. p. 2380, line 16 – p. 2381, line 15; R. p. 2382, lines 17-24.)

These injuries led these employees to seek and receive workers’ compensation benefits, and the Plaintiffs to pursue this third-party litigation.

On January 11, 2006, Petitioner Scott F. Lawing and his wife, Tammy, commenced an action against the same defendants, alleging the same causes of action arising out of the same workplace accident. (R. pp. 1758-1765.)

All the defendants timely answered the aforementioned complaints, denying their material allegations and asserting numerous affirmative defenses. (R. pp. 1720-1757; R. pp. 1766-1785.)

All Plaintiffs amended their complaint in September of 2008 to assert, for the first time, a cause of action against Univar for breach of express warranty. (R. pp. 1810-1841.) Univar timely answered these amended pleadings responding to and denying the material allegations of this claim and also asserting affirmative defenses. (R. pp. 1842-1870.)

Prior to trial, the defendants (including Cross Petitioners Trinity and Matrix) made a number of dispositive motions, including motions for summary judgment on the plaintiffs’

claims for, inter alia, strict liability. (R. pp. 49-139; R. pp. 42-48; R. pp. 2060-2104; R. pp. 2105-2246; R. pp. 2247-2248; R. pp. 2048-2059.) The trial court addressed these motions and other matters during a two-day pre-trial hearing, granting the defendants' motion for summary judgment on the strict liability claim. (R. pp. 391-726.)

The cases were consolidated and the trial thereon was bifurcated into a liability phase and a damages phase, with the liability phase beginning before the circuit judge and a jury on October 20, 2008. (R. p. 2309, lines 1-21; R. pp. 1654.)

Five total causes of action were 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. The jury returned a verdict in favor of the plaintiffs on one cause of action, breach of express warranty as to warning labels against Univar. The jury found against the plaintiffs on all other causes of action, thereby absolving Trinity and Matrix of liability. (R. pp. 1413-1420; R. p. 1269, line 16 – p. 1271, line 3.)

Following the damages phase of trial began on December 1, 2008, the jury rendered the following verdicts: \$2,600,000 in favor of 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). (R. pp. 2498-2500; R. pp. 1668-1670.)

The trial court heard post-trial motions, denying Univar's motion for JNOV. (R. pp. 1355-1412.) The trial court thereafter entered orders denying Univar a setoff and also denying all plaintiffs but Martin and Lawing's motions for new damages trials. (R. pp. 12-20; R. pp.

1671-1673.) The trial court entered orders granting Martin and Lawing new trials nisi additur on the issue of damages only, requiring Univar to choose between accepting additurs of \$1,400,000 as to Mr. Martin and \$2,000,000 as to Mr. Lawing or proceeding directly to a new damages trial. (R. pp. 1674-1686.).

A consolidated appeal timely followed. (R. pp. 1871-2047; R. pp. 1695-1703.) During the pendency of the appeal, Univar settled with the plaintiffs. Only Petitioners' appeal of the grant of summary judgment to Cross Petitioners Trinity and Matrix, along with the appeal of the jury verdict in favor of Cross Petitioners Trinity and Matrix proceeded to disposition.

Following briefing and oral argument, the Court of Appeals affirmed the trial court's decision to charge the Sophisticated User Doctrine to the jury on the counts pertaining to negligence and breach of implied warranty of merchantability, but reversed the decision to grant summary judgment to Cross Petitioners Trinity and Matrix, finding the Circuit Court employed too restrictive of the term "user." Consequently, the Court of Appeals remanded the matter for new trial on Petitioners' strict liability claim.

The cross petition for writ of certiorari of Trinity and Matrix follows.

LAW/ANALYSIS

I. The Court's Decision Concerning Whether Petitioners 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 Petitioner Scott Lawing was a "user," the Court of Appeals 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 l 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. l (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 Clayton 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).

Respectfully, the Court of Appeals was in error regarding its expansion of the aegis of S.C. Code Ann. 15-73-10 and Restatement (Second) of Torts § 402A to include Petitioner Scott Lawing as a “user” for purposes of the strict liability analysis. Specifically, the Court of Appeals disregarded and/or misapplied the holding found in this Court’s decision in Bray v. Marathon Corporation, 356 S.C. 111, 588 S.E.2d 93 (2003). Simply stated, the Court of Appeals created too expansive of a definition of “user” and/or “consumer” in its opinion.

Petitioner Scott Lawing was not a “user” or “consumer” of the sodium bromate. Based on the precedent established by this Court in Bray, 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., Cross Petitioners Trinity and Matrix respectfully assert the Court of Appeals was precluded from crafting the analytical fix it did, which was sought by Petitioners 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). Cross Petitioners therefore seek certiorari in the instant case to pursue reversal of this holding.

**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*.¹⁰

¹⁰ 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 1.” Restatement (Second) of Torts § 402A cmt. *o*.¹¹ The comment expressly states that “casual bystanders, and others 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

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.

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

(emphasis added).

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.”).

Bray v. Marathon Corporation, 356 S.C. 111, 588 S.E.2d 93 (2003), is a decision of this Court 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 foreseeability standard, but is instead 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.¹²

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 n.6.

¹² Specifically, this Court held:

Bray was a user of the trash compactor because she operated the controls on the compactor in an effort to assist Blackmon. See Restatement (Second) of Torts § 402A, cmt. 1 (1965) (“user” includes those who are utilizing the product for purpose of doing work upon it);⁵ Curcio v. Caterpillar, Inc., 344 S.C. 266, 543 S.E.2d 264 (Ct.App.2001) (employee performing maintenance on equipment was “user” of product).

Bray v. Marathon Corp., 356 S.C. 111, 116, 588 S.E.2d 93, 95 (2003)

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).

This constraint articulated by this tribunal runs contrary to Petitioners' desire to obtain such a fix to the aegis of the statute and its supporting authority.

Respectfully, Cross Petitioners Trinity and Matrix aver the Court of Appeals improperly hinged 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. Cross Petitioners 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 Petitioner 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,¹³ which have been historically characterized as bystanders and thus precluded from recovering under a strict liability theory.

Cross Petitioners Trinity and Matrix note that while strict liability does not lie for an injured employee who was not directly 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, inter alia, 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, Petitioners pled and prosecuted negligence-based claims against Cross Petitioners 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 Cross Petitioners Trinity and Matrix and Univar. Though they ultimately did not obtain a verdict from Cross Petitioners Trinity and Matrix, Petitioners nevertheless were afforded due process and the opportunity to pursue recovery for their alleged damages. Thus, Cross Petitioners Trinity and Matrix implore this tribunal to not deviate from the holdings of

¹³ See footnote 11, supra.

Bray and fashion a strict liability-based approach/remedy in this case, which has no current basis in South Carolina law.

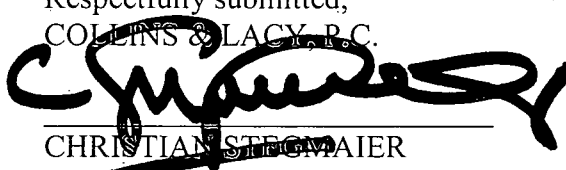
The case law is legion as it pertains to the limitation of recovery to injured persons who are not demonstrated to be the “intended” users of a product in question. Those cases include the following persuasive decisions, which Cross Petitioners Trinity and Matrix aver this Court overlooked when disposing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

- Van Buskirk v. West Bend Company, 100 F. Supp. 2d 281, 284-85 (E.D.Pa. 1999) (determining injured toddler was not the intended user of the deep fryer; thus, applying comment I, the court deemed him a “bystander.” Accordingly, the court concluded the toddler was barred from recovering under § 402A: “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].”)
- Riley v. Warren Manufacturing, Inc., 688 A.2d 221, 227 (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.’”) (internal citations omitted).
- In In re Voluntary Purchasing Groups Litigation, 2003 WL 21499262 (N.D.Tex. June 24, 2003) (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).
- Griggs v. BIC Corporation, 981 F.2d 1429, 1438 (3rd Cir. 1992) abrogated on other grounds by Surace v. Caterpillar, Inc., 111 F.3d 1039 (3d Cir. 1997) (“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.”) (citation omitted).
- Phillips v. Cricket Lighters, 841 A.2d 1000 (Pa. 2003)
- Mackowick v. Westinghouse Electric Corp., 575 A.2d 100 (Pa. 1990)

CONCLUSION

Applying S.C. Code Ann. § 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, Petitioner Scott Lawing was not a “user” or “consumer” of the subject sodium bromate. Accordingly, Cross Petitioners Trinity and Matrix respectfully request this Court grant the instant cross petition for writ of certiorari in order to enable them to pursue reversal of the Court of Appeals’ opinion regarding the Circuit Court’s grant of summary judgment to them on the strict liability count.

Respectfully submitted,
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Columbia, South Carolina
January 21, 2014

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM OCONEE COUNTY
Court of Common Pleas
J.C. Nicholson, Jr., Circuit Court Judge

RECEIVED

JAN 21 2014

Op. No. 5166 (S.C. Ct. App. Filed August 12, 2013) **S.C. Supreme Court**
Case Tracking No. 2009-112467

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

PROOF OF SERVICE

Counsel for Cross Petitioners Trinity Manufacturing, Inc. and Matrix Outsourcing, LLC certifies it has served Trinity Manufacturing, Inc. and Matrix Outsourcing, LLC's Cross Petition for Writ of Certiorari on all parties by depositing a copy of it in the United States Mail, postage prepaid, on January 21, 2014, addressed to the following attorneys of record:

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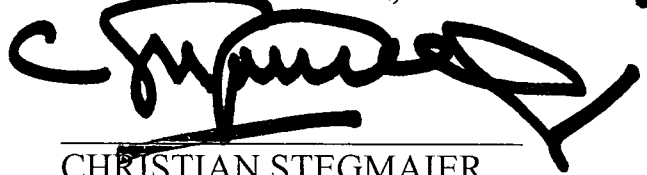
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