

2013-002464

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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Opinion No. 5166 (S.C. Ct. App. filed Aug. 21, 2012) **S.C. Supreme Court**

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.

JOINT APPENDIX

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INDEX

Opinion of the Court of Appeals, Op. No. 5166
(S.C. Ct. App. filed August 21, 2013) 1

Petition for rehearing of Appellants 20

Petition for rehearing of Respondents 24

Order denying rehearing 63

Brief of Appellants 65

Brief of Respondents 135

Materials in the Record on Appeal (submitted separately)

Orders

Order of December 2, 2008 1

Order of December 3, 2008 6

Order of March 30, 2009 12

Pleadings and Motions

Amended Complaint of September 24, 2008 21

Answer to Amended Complaint of October 10, 2008 29

Defendant’s Motion for Summary Judgment on Plaintiff’s Negligence and Failure to
Warn Claims of September 18, 2008 42

Defendant’s Motion for Summary Judgment on Plaintiff’s Strict Liability Claims
of September 19, 2008 49

Plaintiff’s Memo in Response to Defendant’s Motion for Summary Judgment on
Plaintiff’s Negligence and Failure to Warn Claims of October 1, 2008 140

Plaintiff's Reply to Defendant's Motion for Summary Judgment on Strict Liability Claims of October 1, 2008	202
Plaintiff's Joint Motion for Judgment Notwithstanding a Verdict or, in the Alternative, New Trial of November 26, 2008	372
Plaintiff's Joint Motion for a New Trial Nisi Additur of December 22, 2008	377

Transcripts

Pretrial Transcript of October 2-3, 2008	391
--	-----

Trial Transcript

<u>Pretrial Motions</u>	727
-------------------------------	-----

Testimony of Witnesses:

Harriett Simmons	749
David Williams	758
Richard Henderson	767
David Herrington	802
John Steven Knox	813
Paul Bailey	838
James Norris	861
Angela Granados	876
John Munson	887
Jerry Purswell	917
James Ashton	969
Tim Griffin	971
Charles Davis	974
Keith Black	984
Curtis Martin	1001
Scott Lawing	1016

<u>Oral Motions</u>	1037
---------------------------	------

Testimony of Witnesses:

Frank Lamson-Scribner	1095
Dwayne Nichols	1122
James Satterfield	1138
Karen Mesana	1148
Robert Acree	1179

Tommy Garrett	1229
<u>Oral Motions</u>	1234
<u>Jury Charges</u>	1256
<u>Jury Question</u>	1263
Post-Trial Hearing Transcript of November 18, 2008	1272
Post-Trial Motion Hearing Transcript of January 21, 2009	1355
 Forms and Exhibits	
Jury Verdicts Forms	1413
 <u>Plaintiff's Exhibits</u>	
1 - Sodium Bromate bag	on file with this Court
2 - Oxidizer label 10x10	1421
4 - Photo, bags and barrels	1422
8 - Consignment Procedures	1423
9 - Marking and Labeling Regulations	1426
10 - IMDG Code	1428
11 - DOT Appendix	1439
12 - 29 C.F.R., §1910.1200, pages 460-482	1441
13 - Hazardous Work Permit	1464
14 - Engelhard Purchase Order	1465
15 - Matrix Outsourcing Purchase Order	1472
16 - Hipage Company Delivery Order dated February 6, 2004	1475
17 - Univar Invoice	1476
18 - Engelhard Photographs	1478
19 - Engelhard Photographs	1479
20 - Engelhard Photographs	1480
21 - Engelhard Photographs	1481
22 - Engelhard Photographs	1482
23 - Engelhard Photographs	1483
27 - DVD bag burn	on file with this Court
46 - Schematic of Plant Area	1484
48 - Computer Print Screen	1485
51 - PO Inventory Receipt Inquiry	1487
95 - DOT Regulation	1488

96 - IMDG Regulation	1492
97 - IMDG Over-Pack definition	1495
100 - The Hipage Co	1496
110 - Diagram of plant area where fire occurred	1498

Defendants' Exhibits

12 - Engelhard Investigation Report	1499
15 - Flour Daniel Investigation Report	1504
21 - Engelhard Procedure	1509
25 - Engelhard Procedure	1519
26- Receipt of Purchased Material	1524
29 - MSDS for Sodium Bromate	1532
85 - Letter of September 14, 2004	1537
94 - Photograph	1539
100 - Purchase Order with the Terms and Conditions	1541
103 - Photographs	1557
106 - Email of April 26, 2002	1564
107 - Email of July 17, 2002	1565
109 - Email of July 18, 2002	1566
110 - Email of September 9, 2002	1567
114 - Hipage Company Entry Summary, Bill of Lading, etc.	1569
115 - OSHA Standard for Retention of DOT Markings and Placards	1576

Court's Exhibits

9 - Charge conference supplementation	1578
23 - Questions from jury - Re: Identity of sophisticated user	1651
23-A - Foster's requested charge in response	1652
Certificate of Counsel	1653

Materials in the Addendum to the Record on Appeal (submitted separately)

Orders

Order entered July 30, 2007, Consolidating and Bifurcating Cases for Trial	1654
Order Granting Leave to Delete Channon Black as a Plaintiff, entered September 29, 2008	1655

Court of Appeals Orders, dated December 4, 2008 (Black, Martin, and Lawing)	1657
Court of Appeals Letter, dated December 9, 2008 (Black, Martin, and Lawing)	1663
Trial Court's Orders, dated December 15, 2008 entering judgment on the jury's damages verdicts	1668
Orders on all Plaintiffs' Motions for New Damages Trials	1671
Order Granting Motion for New Trial Nisi Additur for Plaintiff Chris Martin	1674
Order Granting Motion for New Trial Nisi Additur for Plaintiff, Scott F. Lawing . . .	1680
Order entered March 31, 2009, Denying Setoff	1687
Court of Appeals Letter and Order, dated August 24, 2009	1695
 Pleadings and Motions	
Summons and Complaint (Black and Martin) of July 18, 2005	1704
Answer of Defendant Univar USA Inc. to Black and Martin Complaint of September 30, 2005	1720
Answer to the Complaint (Black and Martin) on Behalf of Trinity Manufacturing, Inc. and Matrix Outsourcing, LLC, dated October 4, 2005 . .	1738
Summons and Complaint (Lawing), dated January 11, 2006	1758
Answer of Defendant Univar USA Inc. (Lawing Complaint), dated March 6, 2006	1766
Answer to the Complaint (Lawing) on Behalf of Trinity Manufacturing, Inc. and Matrix Outsourcing, LLC, dated April 3, 2006	1775
Amended Answer of Univar USA Inc., dated September 16, 2008 (Black, Martin & Lawing)	1786
Amended Summons and Complaint (Black, Martin & Lawing), dated September 24, 2008	1810

Second Amended Answers (Black, Martin & Lawing), dated November 24, 2008	1842
Notices of Appeal (Black, Martin, & Lawing), dated November 26, 2008	1871
Second Amended Notices of Appeal (Black, Martin & Lawing), dated April 22, 2009	1901
Third Amended Notices of Appeal with Request for Immediate Resumption of Appeal (Black, Martin & Lawing), dated April 30, 2009	1976
Defendant Univar USA, Inc.'s Motion for Summary Judgment, dated December 18, 2007	2048
Defendants' Joint Motion for Summary Judgment on Plaintiff Black's and Plaintiff Martin's Causes of Action for Strict Liability, Negligence, Breach of Warranty for Lack of and/or Inadequate Warnings, dated September 19, 2008	2060
Defendants' Joint Motion for Summary Judgment to the Extent Plaintiffs' Claims are Based in Whole or, in Part, on Defendants' Alleged Failure to Comply with OSHA's Hazard Communication Standards, dated September 18, 2008	2105
Univar USA Inc.'s Motion for Summary Judgment on Claim of Express Warranty, dated October 3, 2008	2247
Univar USA Inc.'s Motion for a Set Off, dated December 22, 2008	2249
Univar USA Inc.'s Motion for a Judgment Notwithstanding the Verdict and Supporting Memorandum	2253
Univar USA Inc.'s Motion for a Judgment Notwithstanding the Verdict and Supporting Memorandum, dated December 22, 2008	2273
Univar USA Inc.'s Memorandum in Support of its Motion for a Set Off from Plaintiff Black's and Plaintiff Martin's Settlements with Trinity and Matrix, dated January 20, 2009	2302

Transcripts

Trial Transcript

Jury Draw 2309

Testimony of Witnesses:

Harriett Simmons 2310

David Williams 2354

Dr. Henderson 2357

Steve Knox 2359

Paul Bailey 2402

Angela Granados 2414

Kay Cooksey 2431

Jerry Purswell 2433

Keith Black 2438

Scott Lawing 2442

Frank Lamson-Scribner 2444

Oral Motions 2455

Damages Hearing Transcript, dated December 1, 2008 2497

Forms and Exhibits

Jury's Damages Verdict Forms 2498

Plaintiffs' Exhibits

85 - Photos from inside Engelhard showing pipe rack 2501

Certificate of Counsel 2516

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Scott F. Lawing and Tammy R. Lawing, Appellants,

v.

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

Of whom Trinity Manufacturing, Inc. and Matrix
Outsourcing, LLC are Respondents.

Appellate Case No. 2009-112467

Appeal From Oconee County
J.C. Nicholson, Jr., Circuit Court Judge

Opinion No. 5166
Heard June 12, 2013 – Filed August 21, 2013

**AFFIRMED IN PART, REVERSED IN PART, AND
REMANDED**

John S. Nichols, Bluestein, Nichols, Thompson, &
Delgado, LLC, of Columbia; Robert C. Foster, Foster &
Foster, LLP, of Greenville; William P. Walker, Jr. and S.
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FEW, C.J.: Scott Lawing suffered severe burns over almost half his body when a large amount of a highly-flammable chemical caught fire at his jobsite. He brought a products liability lawsuit against several entities in the supply chain for the chemical. After a six-week jury trial, the trial court awarded substantial damages to Lawing and two of his co-workers. Lawing nevertheless appeals, arguing the trial court made two erroneous rulings. First, Lawing contends the court erred in finding he was not a "user" of the chemical and granting summary judgment against him on his strict liability claim. Second, he contends the court should not have charged the jury on the sophisticated user doctrine. We affirm the trial court's decision to charge the sophisticated user doctrine, but reverse the decision to grant summary judgment because we find the trial court employed too restrictive a definition of the term "user." We remand for a new trial on Lawing's strict liability claim.

I. Facts

Engelhard Corporation was a world leader in refining precious metals. Before Engelhard was purchased in 2006, Engelhard operated a 400,000 square-foot facility in Seneca, where it produced a precious metal catalyst for use in the automobile industry and reclaimed precious metals from recycled materials.¹ Engelhard's refining processes involved the use of sodium bromate, which is an oxidizer. When heated to 700 degrees Fahrenheit, sodium bromate releases oxygen, which increases combustion in an existing fire. Engelhard was using approximately 132 tons of sodium bromate per year in its refining operations at the time of this accident.

Beginning in 2002, Engelhard bought sodium bromate from Univar, USA, a chemical distribution company. In December 2003, Engelhard submitted a purchase order to Univar for 170 tons of sodium bromate to cover Engelhard's anticipated needs for 2004.

Univar ordered the sodium bromate from Trinity Manufacturing, a chemical manufacturer. Trinity did not make sodium bromate, so it contracted with its subsidiary, Matrix Outsourcing, to obtain the product. Matrix ordered the sodium

¹ BASF Corporation now operates the facility.

bromate from a Chinese exporting company, which, in turn, bought the chemical from a manufacturer in that country.

The manufacturer packaged the sodium bromate in white plastic bags that held twenty-five kilograms each. The bags had printing on both sides. On one side, "PRODUCT: SODIUM BROMATE 99.7% MIN." appeared in black ink near the top. Other information appeared below that, including the product code; the gross weight, tare weight, and net weight; and "MADE IN CHINA." On the other side of the bags, the manufacturer printed the standard symbol for an oxidizing agent. The symbol is a yellow diamond with black outlines. Inside the diamond is a drawing of a flame on top of a line, followed by "OXIDIZING AGENT" and "5.1" in black ink. The United States Department of Transportation requires this symbol to be used in labeling oxidizers such as sodium bromate. *See* 49 C.F.R. § 172.426 (2003) (requiring "the OXIDIZER label must be as follows," with image of symbol, and "the background color on the OXIDIZER label must be yellow").

Someone in the Chinese portion of the supply chain stacked the bags onto wooden pallets and shrink-wrapped the bags onto the pallets. Each pallet contained thirty-six bags. The shipment involved in the accident consisted of twenty pallets.

The shipment traveled from China to the port in Charleston. From there, a trucking company delivered the shipment directly to Engelhard in February 2004. Upon the shipment's arrival at the facility, Engelhard inspected it. One of the Engelhard employees who unloaded the shipment testified that when he looked at the pallets, some had bags with black writing on them and others had bags with the oxidizer symbol. However, he testified, "we were able to determine the difference and notice that they were the same thing because they do say 'sodium bromate' on them." After inspection, Engelhard accepted the shipment, and its employees moved it to a storage area.

Matrix provided Engelhard a material safety data sheet (MSDS) for the sodium bromate. Among other things, the MSDS said, "DANGER! OXIDIZER. Contact with other material may cause fire," and sodium bromate "[m]ay accelerate burning if involved in a fire. Containers may explode with heat. Prolonged exposure to fire or heat by the material may result in explosion." The MSDS also instructed users not to store sodium bromate next to combustible materials and to keep it from contacting organic matter.

Engelhard was already aware of the dangers described in the MSDS. Engelhard employed between fifteen and twenty chemical engineers in its laboratory at the

facility in Seneca. One engineer testified he knew that sodium bromate, as an oxidizer, "was always dangerous." Another testified the engineers "knew [sodium bromate] would support combustion and was an oxidizer." In addition, Frank Lamson-Scribner, the facility's operations and production manager, was asked at trial whether anyone working in the facility realized there was a risk that the sodium bromate could cause a fire like the one that occurred. He testified, "I think there are people in the plant that knew what the sodium bromate did."

Engelhard used roughly 500 chemicals in its operations at the Seneca facility, including between five and ten different oxidizers. Lamson-Scribner testified that between fifty and seventy-five of those 500 chemicals were hazardous. To protect employees, Engelhard provided safety training on hazardous materials and hazard communications. It taught employees that an MSDS contains information about a chemical and instructed them to look up the MSDS if they had a safety concern. Employees could access copies of MSDSs using computers located in several areas of the facility. Engelhard also trained employees to recognize and understand labels and symbols on chemical containers. One of the labels covered in that training was the oxidizer symbol. Finally, Engelhard taught employees that oxidizers can be hazardous if exposed to combustion.

In May 2004, Engelhard moved several pallets of the sodium bromate out of storage to a staging area in a hallway near some of the refining machinery.

The following month, Engelhard shut down the facility to perform maintenance. Lawing, a maintenance worker, was part of a team assigned to replace a metal pipe suspended from the facility's ceiling in a pipe rack. To remove the old pipe, the team would have to cut it into pieces using a blowtorch. This would cause hot molten bits of metal to fall from the pipe as it was being cut. The pipe rack passed directly over the staging area where Engelhard had chosen to store the pallets.

At the time of the accident, Engelhard had adopted a written procedure requiring that before employees could do any maintenance work that could create an ignition source for combustible or flammable materials, an Engelhard permit supervisor had to issue an internal "hot work" permit. One of the requirements for obtaining the permit was that immediately before the work was to begin, the supervisor of the work had to inspect the work area for the presence of any combustible materials. The procedure further required that "[a]ll such materials . . . be removed to a safe location for the duration" of the project.

On the morning of June 1, 2004, Steve Knox, the leader of the pipe removal team, inspected the work area with Tim Wald, the permit supervisor. Knox noticed the pallets but did not know what was in the bags. Engelhard policy required that when an employee encountered a substance and did not know what it was, the employee was to contact a supervisor. Knox did not contact his supervisor about the bags. He saw black writing on the bags, but he did not look closely enough to read it. Knox knew what the oxidizer symbol meant. He did not see such a symbol on the bags, but he did not attempt to turn any of the bags over. No one removed the pallets from the work area, and Wald issued the hot work permit.

After Wald issued the permit, but before the team began working, Lawing looked at the pallets to see if there was "[a] label or something that told [him he] needed to move" them. He saw nothing on the bags indicating he should not work near them. Seeing nothing to cause concern and knowing Wald had already issued the permit, he thought the pallets "were fine." Lawing testified he knew what the oxidizer symbol meant and would have moved the bags out of the work area if had he seen the symbol.

The team began removing the pipe later that day. Lawing's job was to stand in the pipe rack and lower cut sections of the pipe down from the rack to another man in a lift. At one point, while the men were working near the pallets, Knox saw a "flash" on one of the pallets. Within two or three seconds, an "inferno" "erupted" from the pallets and shot up into the pipe rack. Lawing jumped from the rack to the lift but could not get away from the fire. The flames enveloped him, and he could feel fire go into his mouth. Lawing does not remember whether he jumped or fell from the lift, but the drop to the floor was over twenty feet. The impact shattered his heels, ankles, and four vertebrae. He also lacerated his head in the fall. When he landed, he was still on fire. He testified, "I thought I was going to die. I thought I was dying."

The fire burned forty-two percent of Lawing's skin, including his face, ears, arms, and legs. It also burned his lungs. He needed approximately fifty stitches to close the lacerations on his head. He spent over a month in a hospital burn unit, undergoing skin grafts, orthopedic surgeries, and other treatments. Despite Lawing receiving over \$1,000,000 in medical treatment, many of his injuries are permanent. In addition to causing severe disfigurement, the fire caused Lawing to develop asthma for which he will need medication for the rest of his life. He also has trouble seeing and will need medication for his eyes, which can no longer lubricate themselves and are very sensitive to light.

II. Procedural History

Lawing and the other two workers injured in the accident filed products liability lawsuits against Univar, Trinity, and Matrix. Lawing asserted causes of action against all three defendants for negligence, strict liability, and breach of implied warranty of merchantability. In addition, he asserted a cause of action against Univar for breach of express warranties contained in Engelhard's purchase order.² Lawing asserted these causes of action under two theories: first, the defendants supplied the sodium bromate in bags that were in a defective and unreasonably dangerous condition because the bags were made of combustible material; and second, the defendants failed to adequately warn of the sodium bromate's "propensity . . . to ignite explosively in the presence of the packaging materials used."³

After a lengthy period of discovery, the defendants filed a joint motion for summary judgment on Lawing's strict liability cause of action. They argued that under section 15-73-10 of the South Carolina Code (2005), only a "user" or a "consumer" of a product may recover on a claim for strict liability, and because Lawing was not using or consuming the sodium bromate when he was burned, he could not recover in strict liability. The trial court agreed and granted the motion.

The trial court consolidated Lawing's case with the two others, and then bifurcated the trial into liability and damages phases. In its jury charge in the liability phase, the trial court instructed the jury on the sophisticated user doctrine. The jury returned verdicts for all three plaintiffs on their claims against Univar for breach of express warranty. However, the jury returned defense verdicts on Lawing's other causes of action.⁴

² The purchase order provided that each package must be marked to comply with 29 C.F.R. § 1910.1200 (2003), which is an Occupational Safety and Health Administration hazard communication regulation, and with Department of Transportation labeling and packaging regulations.

³ Lawing's wife asserted a cause of action against all three defendants for loss of consortium.

⁴ The other two plaintiffs settled with Trinity and Matrix before trial.

Lawing filed a joint motion for judgment notwithstanding the verdict or a new trial. He argued the trial court should not have charged the jury on the sophisticated user doctrine and should not have granted the defendants summary judgment on his strict liability cause of action. The trial court denied the motion.

In the damages phase, where the plaintiffs proceeded only against Univar, the jury awarded \$1,900,000 to Lawing and \$100,000 to his wife. Lawing filed a motion for new trial additur. The trial court granted the motion and increased the award to \$4,100,000. Mrs. Lawing also filed a similar motion, which the trial court denied.

The case initially came to this court as a cross-appeal: Univar filed a notice of appeal, and Lawing filed a notice of cross-appeal naming all three defendants as respondents. While the case was pending in this court, Univar settled with Lawing, leaving only Lawing's appeal against Trinity and Matrix.

III. Charging the Sophisticated User Doctrine

Lawing makes several arguments in his challenge to the trial court's decision to charge the jury on the sophisticated user doctrine. We address them in turn.

A. The Sophisticated User Doctrine Is the Law in South Carolina

First, Lawing argues the sophisticated user doctrine is not the law in South Carolina. This court refuted Lawing's argument years ago in *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995). In *Bragg*, the employee of a large electrical contractor died after he jumped from the bucket of an aerial bucket truck that was on fire, and his widow sued the manufacturer. 319 S.C. at 534-35, 462 S.E.2d at 323-24. The trial court charged the sophisticated user doctrine to the jury, which found for the manufacturer. 319 S.C. at 534, 549, 462 S.E.2d at 323, 331-32. We affirmed the decision to charge the jury on the doctrine, and thus recognized that the sophisticated user doctrine is part of the products liability law of South Carolina. 319 S.C. at 551, 462 S.E.2d at 332.

As we will explain in section III.B of this opinion, the sophisticated user doctrine is not some complex or novel concept in products liability law. It is simply the requirement that under the circumstances to which the doctrine applies, in determining whether a seller of a dangerous product acted with reasonable care in fulfilling its duty to warn, the jury must consider (1) what the purchaser already knew about the dangers associated with the product, and (2) whether under that

circumstance, the seller can reasonably rely on the purchaser to warn its employees and others who might come into contact with the product.

B. The Doctrine Is Not Preempted

Lawing next argues that even if the doctrine is the law in this state, federal law impliedly preempts it. He contends the sophisticated user doctrine conflicts with certain federal regulations because it "stands as an obstacle" to their "purposes and objectives." See *Priester v. Cromer*, 401 S.C. 38, 43, 736 S.E.2d 249, 252 (2012) (stating "any state law that conflicts with federal law is" preempted); 401 S.C. at 44, 736 S.E.2d at 252 (stating federal law impliedly preempts state law where "the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives'" of the federal law (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 404, 85 L. Ed. 581, 587 (1941))). We find the doctrine is not preempted.

1. The Sophisticated User Doctrine

To explain that the sophisticated user doctrine is not preempted, we must first explain what it is. The sophisticated user doctrine is based on section 388 of the Restatement (Second) of Torts (1965). *Bragg*, 319 S.C. at 550, 462 S.E.2d at 332; see generally David G. Owen, *Products Liability Law* 624 (2d ed. 2008) (stating the "sophisticated user doctrine[] [is an] offshoot[] of a general principle expressed in *Restatement (Second) of Torts* § 388"). Section 388 is the basis of a products liability claim for negligent failure to warn. See *Livingston v. Noland Corp.*, 293 S.C. 521, 525, 362 S.E.2d 16, 18 (1987) (reciting the elements of a negligent failure-to-warn claim in products liability (citing *Gardner v. Q. H. S., Inc.*, 448 F.2d 238, 242 (4th Cir. 1971) (applying South Carolina law and relying on section 388))).⁵ On any negligence claim, including one for products liability, the plaintiff must prove the defendant failed to exercise reasonable care. *Branham v. Ford Motor Co.*, 390 S.C. 203, 210, 701 S.E.2d 5, 9 (2010). To understand the sophisticated user doctrine, it is particularly important that when determining

⁵ See also *Holst v. KCI Konecranes Int'l Corp.*, 390 S.C. 29, 43-44, 699 S.E.2d 715, 723 (Ct. App. 2010) (quoting *Livingston*). The supreme court in *Livingston* and this court in *Holst* did not cite section 388. However, the elements listed in both opinions for a negligent failure-to warn claim track precisely the elements of section 388, and those elements can be traced directly to *Gardner*, a Fourth Circuit opinion applying South Carolina law, in which the court relied on section 388. See 448 F.2d at 242.

whether any defendant acted with reasonable care, the jury should consider all the surrounding facts and circumstances. *See generally Thomas v. Atl. Greyhound Corp.*, 204 S.C. 247, 253, 29 S.E.2d 196, 198 (1944) ("Negligence is the want of due care; and due care means commensurate care under all the circumstances.").

The seller of a product is under a duty to warn the end user of dangers associated with the use of the product. *See* 63A Am. Jur. 2d *Products Liability* § 1089 (2010) ("The supplier has a duty to warn the ultimate user . . ."). Under some circumstances, however, it may be difficult or even impossible for the seller to meet its duty to warn the end user. One such circumstance is where, as in this case, the seller supplies a product to an intermediary, such as a large employer whose employees are the people who will be using the product. This circumstance is specifically addressed in comment n to section 388, entitled "Warnings given to third person." In this comment, the American Law Institute recognized that products "are often supplied for the use of others, although the [products] . . . are not given directly to those for whose use they are supplied." § 388 cmt. n. The Institute explained, "All sorts of [products] may be supplied for the use of others, through all sorts of third persons and under an infinite variety of circumstances." *Id.*

The sophisticated user doctrine arose from the circumstances contemplated in comment n, where a seller warns the intermediate purchaser, and relies at least in part on that purchaser to warn the end user. *See O'Neal v. Celanese Corp.*, 10 F.3d 249, 251 (4th Cir. 1993) ("The sophisticated user defense is implicated in the situation in which A supplies a [product] to B, B in turn allows C to be exposed to the [product], C is injured by [the] exposure . . . , and C claims that A should be liable . . . for . . . failure to warn . . ."). Because the plaintiff in any negligence action must prove the defendant failed to exercise reasonable care, the question upon which the liability of a seller turns when it relies on an intermediate purchaser to warn the end user is the same as when the seller warns the end user directly—whether the seller acted reasonably. The American Law Institute explained this in comment n, stating, "In all such cases the question may arise as to whether the person supplying the [product] is exercising . . . reasonable care, which he owes to those who are to use it, by informing the third person through whom the [product] is supplied . . ." § 388 cmt. n. Our own Professor Owen has also explained this: "Addressing a seller's duty to warn when it sells a product to an intermediate supplier, comment n to § 388 provides that a seller may rely on the intermediary to provide warnings to the end-user *if that reliance is reasonable under the circumstances.*" Owen, *supra*, at 624 (emphasis added). In this

statement, the professor has explained the sophisticated user doctrine with all the complexity it deserves.

The sophisticated user doctrine does nothing more than require the jury, in determining whether a seller of a product acted with reasonable care in fulfilling its duty to warn, to consider what the seller knew about the sophistication of the buyer with regard to the dangers associated with the use of the product. This is essentially what we explained in *Bragg* when we stated, "In defining the sophisticated user defense, . . . 'the question is whether the supplier . . . acted reasonably in assuming that the intermediary would recognize the danger and take precautions to protect its employees.'" 319 S.C. at 550, 462 S.E.2d at 332 (quoting *O'Neal*, 10 F.3d at 253 n.2). Thus, the sophisticated user doctrine applies when there is evidence the seller of a product was aware that an intermediate purchaser understood the dangers associated with the product and had the ability to effectively communicate those dangers to the end user. See *O'Neal*, 10 F.3d at 252 (stating the sophisticated user doctrine applies "when the supplier shows that it was reasonable to believe that a warning was unnecessary because the intermediary was already well aware of the danger").⁶ The doctrine requires the jury to consider such evidence in determining whether the seller acted reasonably in warning of the dangers associated with the product, and particularly whether the seller acted reasonably in the extent to which it relied on the purchaser to warn the end user.

Lawing's contention that the trial court erred in charging the sophisticated user doctrine applies not only to his negligence cause of action for failure to warn, but also to his breach of implied warranty cause of action. The sophisticated user doctrine originated in the context of a claim for negligent failure to warn, but it also applies to failure-to-warn causes of action based on breach of implied warranty. See *Carrel v. Nat'l Cord & Braid Corp.*, 852 N.E.2d 100, 109 (Mass. 2006) (holding the sophisticated user doctrine applies in claims of "negligent failure to warn and . . . failure to warn under breach of warranty"). This is so because all products liability causes of action turn on the question of reasonableness. See *Branham*, 390 S.C. at 210, 701 S.E.2d at 8 (stating "all products liability actions, regardless of the stated theory, have common elements," including "that the injury occurred because the product was in a defective condition unreasonably dangerous to the user" (quoting *Madden v. Cox*, 284 S.C.

⁶ *O'Neal* was decided under Maryland law. 10 F.3d at 251. As demonstrated by this court's reliance on it in *Bragg*, 319 S.C. at 550, 462 S.E.2d at 332, however, its reasoning as to the sophisticated user doctrine is no less applicable in South Carolina.

574, 579, 328 S.E.2d 108, 112 (Ct. App. 1985))). The jury focuses on the conduct of the seller when analyzing the fault element of a negligence cause of action, but when analyzing the unreasonably dangerous element of any cause of action, the jury focuses on the product. *See Bragg*, 319 S.C. at 539, 462 S.E.2d at 326 (stating "under a negligence theory, . . . unlike strict liability, the focus is on the conduct of the seller or manufacturer, and liability is determined according to fault"). However, to the same extent evidence of the purchaser's sophistication relates to whether the seller's conduct was reasonable, the evidence also relates to whether the product as sold under those circumstances was "unreasonably" dangerous.

2. Lawing's Preemption Argument

Lawing bases his preemption argument on 29 C.F.R. § 1910.1200(F)(1) (2003), which provides that a chemical manufacturer, importer, or distributor must "ensure that each container of hazardous chemicals leaving the workplace is labeled, tagged or marked with the following information: (i) Identity of the hazardous chemical(s); (ii) Appropriate hazard warnings; and (iii) Name and address of the chemical manufacturer, importer, or other responsible party."⁷ He also relies on 49 C.F.R. §§ 172.406 and 172.407 (2003), which include requirements for the design and placement of labels, and § 172.426, which provides the specific design for the oxidizer symbol. Lawing argues these regulations impose a duty on Trinity and Matrix to warn about the dangers of sodium bromate, and the sophisticated user doctrine conflicts with the regulations because it "has the effect of defeating the duty to warn that was clearly imposed as an integral part of the federal regulatory scheme." Because of this conflict, he argues, the federal regulations preempt the state-law doctrine. *See Priester*, 401 S.C. at 43-44, 736 S.E.2d at 252.

Lawing's argument fails, however, because it depends on an incorrect premise—that the sophisticated user doctrine, if applicable, means a supplier had no duty to warn. As we have explained, the sophisticated user doctrine does not operate to defeat any duty. It simply identifies circumstances the jury must consider when determining whether the supplier's duty to warn was breached. The Fourth Circuit explained the error of Lawing's argument in *O'Neal*:

Part of the problem that may lead some to look askance
at [the sophisticated user doctrine] is in the language that

⁷ Lawing also points out that the portions of § 1910.1200 on which he relies have been adopted by the state Department of Labor, Licensing, and Regulation. *See* 9 S.C. Code Ann. Regs. Ch. 71, Art. 1, Subart. 6 (2012).

some courts have used to describe it, in particular the notion that where the elements or prerequisites of it exist, the supplier is "absolved" of any duty to warn ultimate users. That notion is not only unnecessary to the [doctrine] but in fact is inconsistent with the rationale of comment n to Restatement § 388. There *is* a duty to warn of defects or propensities that make a product hazardous, and that duty *does* extend ordinarily to those who may reasonably be expected to use or come into harmful contact with the product. It is *not* a duty, we think, from which the supplier can be entirely *absolved*. The question, rather, is, what conduct will suffice to discharge that duty?

10 F.3d at 251 (quoting *Kennedy v. Mobay Corp.*, 579 A.2d 1191, 1199 (Md. Ct. Spec. App. 1990), *aff'd*, 601 A.2d 123 (Md. 1992)); *see also Gray v. Badger Min. Corp.*, 676 N.W.2d 268, 278 (Minn. 2004) (quoting the above passage from *Kennedy*).

O'Neal, *Gray*, and *Kennedy* demonstrate that the sophisticated user doctrine does not address the legal question of whether the supplier had a duty to warn. It could not do so, because whether a duty exists is a question of law for the court. *See Edwards v. Lexington Cnty. Sheriff's Dep't*, 386 S.C. 285, 290, 688 S.E.2d 125, 128 (2010) (stating the existence of a duty "is a question of law for the court to determine"); *Doe ex rel. Doe v. Batson*, 345 S.C. 316, 323, 548 S.E.2d 854, 857 (2001) (stating "[t]he existence of a duty owed is a question of law for the courts"). As the Fourth Circuit pointed out in *O'Neal*, "[t]here *is* a duty to warn," 10 F.3d at 251, and thus, when courts have stated that under the sophisticated user doctrine there is no duty to warn, they have misspoken. *See, e.g., Willis v. Raymark Indus., Inc.*, 905 F.2d 793, 796 (4th Cir. 1990) (stating that when the doctrine applies, a supplier "is absolved" of its duty to warn) (effectively overruled by *O'Neal*, 10 F.3d at 251). Rather, the sophisticated user doctrine addresses the factual question of whether it was reasonable for the supplier of a product to rely on the purchaser to warn the end user of the dangers associated with that product. In other words, the doctrine addresses breach of duty, not the existence of duty.

Therefore, the sophisticated user doctrine does not stand as an obstacle to fulfillment of the safety objectives embodied in the federal regulations. On the contrary, what the regulations require coincides with the reasonableness requirement on which the sophisticated user doctrine is based. Here, the bags

featured the words "SODIUM BROMATE" printed in black letters on one side and the oxidizer symbol printed on the other. Matrix provided an MSDS that warned of fire and explosion hazards. Whether this was enough for Trinity and Matrix to comply with the OSHA regulations—specifically the key requirement of "[a]ppropriate hazard warnings" under 29 C.F.R. § 1910.1200(F)(1)(ii)—is precisely the same question the jury must answer under the sophisticated user doctrine—what was reasonable under the circumstances. See *In re Welding Fume Prods. Liab. Litig.*, 364 F. Supp. 2d 669, 696 (N.D. Ohio 2005) (stating § 1910.1200 "does not prescribe in any way the language a chemical manufacturer or other employer must use to warn about health hazards;" it requires only that some warning be provided and that the warning be adequate). Because the federal regulations require warnings that are "appropriate" under the circumstances, and the sophisticated user doctrine requires only that certain circumstances be considered in determining what is reasonable (or appropriate), there is no conflict between the two, and the sophisticated user doctrine is not preempted.

C. Evidence Supported Giving the Charge

A trial court is required to charge principles of law that apply to the issues raised in the pleadings and supported by the evidence at trial. *Clark v. Cantrell*, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000). Lawing argues the evidence did not warrant charging the jury on the sophisticated user doctrine. We disagree.

The sophisticated user doctrine should be charged whenever there is evidence that supports a finding that the seller or supplier acted reasonably in relying on the purchaser to warn the end user of the dangers associated with the product. As we stated in *Bragg*, the question posed by the doctrine is "whether the supplier . . . acted reasonably in assuming that the intermediary would recognize the danger and take precautions to protect its employees." 319 S.C. at 550, 462 S.E.2d at 332.

In this case, there is evidence that Trinity and Matrix knew the nature of Engelhard's business, Engelhard's understanding of the dangers of sodium bromate, and the steps Engelhard took to protect employees from the dangers of hazardous materials. Trinity and Matrix knew the large quantities of sodium bromate they were procuring for Univar were ultimately being sold to, and would be used by, Engelhard. They also knew that before Engelhard started buying sodium bromate from Univar, Engelhard inspected and tested samples of the product. A July 2002 email from Tim Griffin of Trinity to Sherry Green of Matrix discusses progress those companies and Univar made towards becoming Engelhard's sodium bromate supplier. The email mentions that Engelhard reviewed their proposed

specifications for the chemical, "eliminate[d] the optical density" specification, and approved the specifications after making that change. The email also states that they delivered a sodium bromate sample to the Seneca facility, and that "they [Engelhard] are to run lab trials and advise results." Explaining that email at trial, Angela Grenados, Matrix's vice president, testified Engelhard required samples be delivered to the facility for testing. Trinity and Matrix sent Engelhard three samples.

Grenados also testified she knew Engelhard was a "large sophisticated manufacturer" that used sodium bromate. At trial, one of the plaintiffs' lawyers asked Grenados whether Matrix ever visited the facility to see how Engelhard was storing sodium bromate. She testified Matrix did not do so because "[i]t's my impression that Engelhard is a very sophisticated company and I'm sure their health and safety regulations are much beyond what my comprehension would be." She never asked Engelhard about its storage and safety practices because "I felt like [Engelhard's] reputation went beyond my asking."

John Munson was the Univar salesman who interacted with Engelhard's purchaser, David Williams. Munson testified Univar employed "safety and regulatory people" who were available to speak with Engelhard if it had any questions or concerns about the chemicals it bought from Univar. Univar did not visit the facility or ask Engelhard whether it had any questions about sodium bromate and safety. Munson testified that in his conversations with Williams, he learned "Engelhard has very qualified people and very strict regulations and they handle this themselves in house." Munson also expected Engelhard would perform hazard analyses on the sodium bromate because it was "the most familiar with the operations of their plant and [was] best suited to do those kinds of evaluations." Finally, Munson testified he knew Engelhard inspected shipments upon arrival, and if a shipment did not comply with OSHA's labeling requirements, Engelhard would refuse it. Munson said, "if this material had ended up in Engelhard's dock and there was anything wrong with it, I would have gotten a call from David Williams immediately and [Williams would have] said, 'we got a problem.' We never got a call like that."

Finally, Griffin testified Trinity and Matrix provided the MSDS for the sodium bromate. Before the shipment would arrive, one of the two companies faxed a copy of the MSDS to Univar. When the shipment arrived at the facility, Engelhard would get a hard copy of the MSDS that warned about the danger that sodium bromate can accelerate existing fires and that containers of it could explode. The

MSDS also instructed users not to store sodium bromate next to combustible materials and to keep it from contacting organic matter.

Considered as a whole, this evidence supports the trial court's decision to charge the jury on the sophisticated user doctrine. It shows Trinity and Matrix knew Engelhard used large quantities of sodium bromate and had tested samples of the product in its laboratory before deciding to buy it. It also shows that employees of Matrix, a wholly-owned subsidiary of Trinity, and Univar, the company to which Trinity directly sold the sodium bromate, believed Engelhard had a safety program that ensured employees were adequately informed of the dangers of the chemicals in the facility. Finally, it shows Trinity and Matrix knew about the MSDS and that Engelhard received it. A jury could infer from this evidence that Trinity and Matrix 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. Although other evidence presented at trial could support a jury finding the sophisticated user doctrine did not apply, or that Trinity and Matrix did not act reasonably, those questions were ultimately for the jury. The question we must answer is whether there is evidence in the record to support giving the charge. We hold there is.

D. Errors in the Substance of the Charge

Therefore, the trial court correctly decided to charge the sophisticated user doctrine to the jury. *See O'Neal*, 10 F.3d at 252. However, the court incorrectly charged the jury that under the doctrine, "a distributor or supplier has no duty to warn of potential risks or dangers inherent in a product if the product is distributed to what we call a . . . sophisticated user," and that "[i]f you find that the sophisticated user defense applies in this case, then you must find that the defendants owed no duty to warn." We will not address this error, however, because it is not preserved for appellate review.

After the jury charge, the trial court asked the lawyers if they had any objections. Lawing's attorney stated, "Other than the fact that we take exception [that] the sophisticated user charge has been given at all, because we don't think it applied." Thus, Lawing did not make an objection to the correctness of the language of the charge, only to whether the doctrine was applicable. Therefore, Lawing's arguments regarding the substantive correctness of the charge are not preserved. *See Harris v. Univ. of S.C.*, 391 S.C. 518, 528, 706 S.E.2d 45, 50 (Ct. App. 2011) (finding argument regarding substance of jury charge unpreserved because it was not raised to and ruled upon by the trial court).

We affirm the trial court's decision to charge the jury on the sophisticated user doctrine.

IV. Granting Summary Judgment on the Strict Liability Claims

South Carolina Code section 15-73-10 provides, "One who sells any product in a defective condition unreasonably dangerous to the user or consumer . . . is subject to liability for physical harm caused to the ultimate user or consumer . . ." *See also Bray v. Marathon Corp.*, 356 S.C. 111, 117, 588 S.E.2d 93, 96 (2003) (stating section 15-73-10 "limits liability to the user or consumer" of a product). In granting summary judgment against Lawing on his strict liability cause of action, the trial court held Lawing was not a user or consumer of the sodium bromate. Lawing argues the trial court took too narrow a view of the term "user." We agree.

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."⁸ 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.*

⁸ Section 15-73-10 is an "almost verbatim" codification of section 402A. *Schall v. Sturm, Ruger Co.*, 278 S.C. 646, 648, 300 S.E.2d 735, 736 (1983).

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.*, 257 P.3d 383 (Mont. 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 1 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.

Accordingly, Lawing was a user of the product. By granting summary judgment on the ground that he was not a user, the trial court erred.

V. Conclusion

We **AFFIRM** the trial court's decision to charge the jury on the sophisticated user doctrine. However, we **REVERSE** the trial court's decision granting summary judgment on Lawing's strict liability cause of action, and we **REMAND** to the circuit court for a new trial only on that cause of action.

GEATHERS and LOCKEMY, JJ., concur.

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-37-00030

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.

PETITION FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, Appellants petition the Court for rehearing. In affirming the trial court's decision to charge the jury as to the "sophisticated user" defense in this case, the Court overlooked or misapprehended the following points:

1. In rejecting Appellants' argument that the sophisticated user doctrine is not the law of South Carolina, the Court stated it had "refuted [Appellants'] argument years ago in *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 462 S.E.2d 321 (Ct. App.

1995).” The Court overlooked Appellants’ argument that although the *Bragg* court held the trial court properly charged the defense as set forth in Section 388 of the Restatement (Second) of Torts (i.e., that the charge as given reflected the doctrine), the *Bragg* Court did not address whether the defense was the law of South Carolina, but that as charged, the doctrine was accurately portrayed. (App. Br. pp. 30-31).

2. In applying the sophisticated user doctrine in this case, the Court overlooked or misapprehended Appellants’ argument that, if the doctrine is part of the law of South Carolina, then Section 388 of the Restatement (Second) of Torts requires the application of a balancing test of six (6) factors, which include:

- a) the dangerous condition of the product;
- b) the purpose for which the product is used;
- c) the form of any warnings given;
- d) the reliability of the third party as a conduit of necessary information about the product;
- e) the magnitude of the risk involved;
- f) the burdens imposed on the supplier by requiring that he directly warn all users.

Goodbar v. Whitehead Bros., 391 F.Supp. 552, 557 (W.D. Va.1984). *See, e.g., Smith v. Walter C. Best, Inc.*, 927 F.2d 736, 739-740 (3d Cir.1990); *Willis v. Raymark Indus., Inc.*, 905 F.2d 793, 796 (4th Cir.1990). A balancing of these considerations is necessary in light of the fact that no single set of rules could

possibly be advanced that would automatically cover all individual situations.

Goodbar, 391 F.Supp. at 557. The Court overlooked Appellants' argument that upon an application of the 6-factor test to the facts of the case, the sophisticated user defense, even if recognized as the law of South Carolina, is unavailable to the Defendants and the Trial Judge was in error charging the defense to the jury. (App. Br. pp. 30-47).

3. In applying the sophisticated user doctrine in this case, the Court overlooked or misapprehended Appellants' argument that the warning given the intermediate user in this case were inadequate, so that even if the sophisticated user doctrine is the law of this State, it affords no defense at all in this case. (App. Br. pp. 48-50).
4. In applying the sophisticated user doctrine in this case, the Court overlooked or misapprehended Appellants' argument that, if the doctrine is part of the law of South Carolina, the Defendants assumed the obligation to warn the end users apart from any warning given to sophisticated intermediaries. (App. Br. pp. 24-30).
5. In rejecting Appellants' argument that the sophisticated user doctrine is impliedly preempted in this case, the Court overlooked Appellants' argument that federal preemption also applies where state common law defenses that conflict with the federal law. (App. Br. pp. 15-18)
6. In rejecting Appellants' argument that the sophisticated user doctrine is implied preempted in this case, the Court overlooked Appellants' argument that state law which incorporates federal regulations also prevent application of the sophisticated user defense. (App. Br. pp. 18-23).

Appellants respectfully request that the Court grant this Petition, rehear this matter, and issue a new opinion reversing the trial court's decision to instruct the jury on the sophisticated user defense.

Respectfully submitted,



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September 5, 2013

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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.

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 combustibile 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 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.

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 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.

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 1 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 1 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. 1.³

³ Comment 1 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*.⁴ The comment expressly states that “casual

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 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

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 foreseeability standard, but is instead

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 South Carolina Court of Appeals

Scott F. Lawing and Tammy R. Lawing, Appellants,

v.

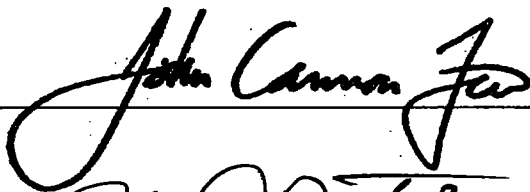
Univar, USA, Inc., Trinity Manufacturing, Inc., and
Matrix Outsourcing, LLC, Defendants,

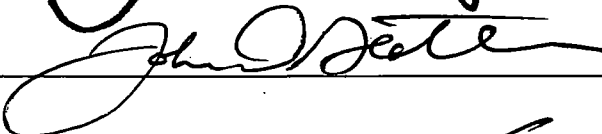
Of Whom Trinity Manufacturing, Inc. and Matrix
Outsourcing, LLC, are Respondents.

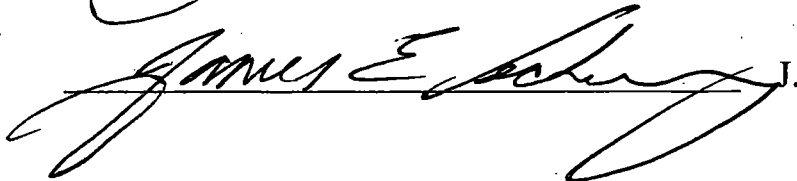
Appellate Case No. 2009-112467

ORDER

After careful consideration of Appellants' and Respondents' petitions for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, both petitions for rehearing are denied.

 C.J.

 J.

 J.

Columbia, South Carolina

cc:

FILED

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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-37-00030

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.

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TABLE OF CONTENTS

	<u>PAGE</u>
Table of Authorities	ii
Statement of the Issues on Appeal	1
Statement of Case	3
Facts	6
Arguments	15
I. Was the sophisticated user defense preempted by applicable federal and state OSHA regulations? (Issues 1, 2, 3)	15
II. Did Univar's contract and express warranties with Engelhard preclude the defense from being applied to Plaintiffs' negligence and implied warranty claims against Univar? (Issues 4, 5, 6)	24
III. Is the sophisticated user defense the law in South Carolina and, if so, did the evidence in this case when weighed in accordance with the six (6) factors set forth in <u>Goodbar v. Whitehead Bros.</u> , 391 F.Supp. 552, 557 (W.D.Va.1984) render the defense inapplicable to the Plaintiffs' negligence and implied warranty claims against Matrix, Trinity and Univar? (Issues 7, 8, 9)	30
IV. Is the sophisticated user defense the law of South Carolina and, if so, does it relieve manufacturers, suppliers and distributors, particularly Matrix, Trinity and Univar, of their duties to warn even if the warnings are inadequate? (Issues 7, 10, 11)	48
V. The Court erred in granting the Defendants' Summary Judgment Motion as to Plaintiffs' strict liability cause of action because the Plaintiffs were "users" and/or "consumers" within the meaning and embrace of S.C. Code Ann. §15-73-10 (2007). (Issue 12)	50
Conclusion	64

TABLE OF AUTHORITIES

CASES

PAGE

Anderson v. Smith, 180 Wis.2d 470, 514 N.W.2d 54 (Ct. App.1993) 62

Bank of New York v. Sumter County, 387 S.C. 147, 691 S.E.2d 473 (2010) . . 51

Barker v. Sauls, 289 S.C. 121, 345 S.E.2d 244 (1986) 24

Bragg v. Hi-Ranger, 319 S.C. 531,
462 S.E.2d 321 (Ct. App. 1995) 30, 31, 48

Bray v. Marathon Corp., 356 S.C. 111, 588 S.E.2d 93 (2003) 58

Bryant v. Babcock Center, Inc., 371 S.C. 123, 638 S.E.2d 650 (2006) 24

Catawba Indian Tribe of South Carolina v. State, 372 S.C. 519,
642 S.E.2d 751 (2007) 51

Coleman v. Shaw, 281 S.C. 107, 314 S.E.2d 154 (Ct. App. 1984) 20

Doe v. American Red Cross Blood Services,
297 S.C. 430, 377 S.E.2d 323 (1989) 19

Edwards v. Lexington County Sheriff's Dep't,
386 S.C. 285, 688 S.E.2d 125 (2010) 51

Fields v. J. Haynes Waters Builders, Inc.,
376 S.C. 545, 658 S.E.2d 80 (2008) 51

Gade v. Nat'l Solid Wastes Mgmt. Ass'n,
505 U.S. 88, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992) 42

Gnirk v. Ford Motor Co., 572 F.Supp. 1201 (D.S.D.1983) 58

Goodbar v. Whitehead Bros., 391 F.Supp. 552 (W.D. Va. 1984) . . . 2, 30, 31, 32

Graham v. Security Savings & Loan, 125 F.R.D. 687 (N.D. Ind.1989) 18

Humble Sand & Gravel, Inc. v. Gomez, 146 S.W.3d 170 (Tex. 2004) 41

TABLE OF AUTHORITIES

CASES	PAGE
<u>In re Campbell</u> , 379 S.C. 593, 599, 666 S.E.2d 908, 911 (2008)	51
<u>In re Hospital Pricing Litigation, King v. AnMed Health</u> , 377 S.C. 48, 659 S.E.2d 131 (2008)	51
<u>In re Zyprexa Products Liability Litigation</u> , 489 F.Supp.2d 230 (E.D.N.Y. 2007)	48
<u>Jamison v. Ford Motor Co.</u> , 373 S.C. 248, 644 S.E.2d 755 (Ct. App. 2007) ..	16
<u>Kately v. Wilkinson</u> , 148 Cal.App.3d 576, 195 Cal.Rptr. 902 (1983)	58
<u>Leibowitz v. Ortho Pharmaceutical Corp.</u> , 224 Pa. Super 418, 307 A.2d 449 (1973)	47, 48
<u>Louisiana Public Service Comm'n. v. FCC</u> , 476 U.S. 355, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1985)	16
<u>Malone v. Mayflower Transit, Inc.</u> , 819 F. Supp. 724 (E.D. Tenn. 1993)	17
<u>Marchant v. Lorain Div. of Koehring</u> , 272 S.C. 243, 251 S.E.2d 189 (1979)	57
<u>Martin v. Survivair Respirators, Inc.</u> , 298 S.W.3d 23 (Mo. Ct. App. E.D.2009) .	59
<u>New York Times Co. v. Spartanburg County Sch. Dist. No. 7</u> , 374 S.C. 307, 649 S.E.2d 28 (2007)	51
<u>Norton v. Opening Break of Aiken, Inc.</u> , 313 S.C. 508, 443 S.E.2d 406 (Ct. App. 1994)	19
<u>Pike v. Hough Co.</u> , 2 Cal. Rptr. 629, 467 P.2d 229 (1970)	57
<u>Raven v. Greenville County</u> , 315 S.C. 447, 343 S.E.2d 296 (Ct. App. 1993) ..	20
<u>Russell v. Wachovia Bank, N.A.</u> , 353 S.C. 208, 578 S.E.2d 329 (2003)	51
<u>Seals v. Winburn</u> , 314 S.C. 416, 445 S.E.2d 94 (Ct. App. 1994)	20

TABLE OF AUTHORITIES

CASES

	PAGE
<u>Smith v. Walter C. Best, Inc.</u> , 927 F.2d 736 (3d Cir.1990)	32
<u>Tant v. Dan River, Inc.</u> , 289 S.C. 325, 345 S.E.2d 495 (1986)	20
<u>Theeke v. BASF Corporation</u> , 45 F.3d 431 (6th Cir. 1994)	27, 28, 40, 49
<u>Tipton v. Secretary of Education</u> , 768 F. Supp. 540 (S.C. W.Va. 1991) ...	16, 17
<u>United States v. Moore</u> , 486 F.2d. 1139 (D.C. Cir. 1973)	17, 19
<u>Veal v. Savings Bank</u> , 914 F.2d 909 (7th Cir.1990)	18
<u>Weston v. Kim's Dollar Store</u> , 385 S.C. 520, 684 S.E.2d 769 (Ct. App. 2009) .	17
<u>Willis v. Raymark Indus., Inc.</u> , 905 F.2d 793 (4th Cir.1990)	32, 38
<u>Wirth v. Clark Equipment Co.</u> , 457 F.2d 1262 (9th Cir. 1972)	60, 62
<u>Wogan v. Kunze</u> , 379 S.C. 581, 666 S.E.2d 901 (2008)	51
<u>World-Link, Inc. v. Mezun.com, Inc.</u> , 14 Misc.3d 745, 827 N.Y.S.2d 642 (N.Y. 2006)	17

STATUTES

48 Fed. Reg. 52380 (Nov. 25, 1983)	18
29 C.F.R §1910.1200	9, 18, 19, 22, 24, 42, 53
49 C.F.R. §172.406	18, 22
49 C.F.R. §172.407	18, 22
S.C. Code Ann. §15-73-10 (2007)	2, 4, 11, 50, 52, 63
S.C. Code Ann. § 15-73-30 (2007)	54

TABLE OF AUTHORITIES

STATUTES

	PAGE
26 S.C. Code Ann. Regulations, Ch. 71, Art. 1, Subart. 6	19
Mich. Comp. Laws Ann. §600.2947(4) (1961)	21
U.S. Const. art. VI	15, 16

OTHER AUTHORITIES

Restatement (Second) of Torts §388	25, 31, 44, 45, 48
Restatement (Second) of Torts §402A	51-58, 63
7 Am Jur Proof of Facts 3d 305 (Page 17)	26

STATEMENT OF ISSUES ON APPEAL

1. The Court erred in charging the sophisticated user defense applied to the negligence and implied warranty claims against Matrix and Trinity because that state common law defense was preempted by the federal regulatory scheme which imposed on the defendants a specific duty to label the sodium bromate in accordance with the applicable federal regulations, including in particular the OSHA Hazardous Communication Regulations (29 C.F.R. §1910.1200).
2. The Court erred in charging the sophisticated user defense applied to the negligence and implied warranty of merchantability claims against Matrix and Trinity because that state common law defense was precluded by and is inconsistent with South Carolina's express regulatory adoption of the federal OSHA regulations which created an independent state duty to warn.
3. The Court erred in charging the sophisticated user defense because, under the facts of the case, the defense was inapplicable as Plaintiffs'/Appellants' claims under the negligence and implied warranty of merchantability causes of action were based upon the Defendants' failure to place the yellow oxidizer labels on the sodium bromate in such a way that the labels were readily visible and/or prominently displayed as required by state and federal regulations.
4. The Court erred in charging the sophisticated user defense applied to the negligence and implied warranty of merchantability claims against Univar because by contracting with and warranting to Engelhard that each and every shipment of sodium bromate to Engelhard would comply with all applicable federal and state statutes and regulations and, specifically that each bag of sodium bromate would be marked and labeled in accordance with DOT and OSHA regulations, Univar expressly assumed the duty the defense would abrogate.
5. The Court erred in charging the sophisticated user defense applied to the negligence and implied warranty claims against Univar because Univar either waived the defense by its contract with Engelhard or was estopped, as a matter of law, from claiming the defense because it expressly undertook a duty to warn the employees of Engelhard about the nature of the sodium bromate by contracting and warranting that each and every bag of sodium bromate would be marked and labeled in compliance with all applicable federal and state statutes and/or regulations, specifically DOT and OSHA regulations.

6. The Court erred in charging the sophisticated user defense applied to the negligence and implied warranty claims against Univar as Univar had by its own actions of contracting and warranting to Engelhard that it would mark the goods with appropriate hazard warnings in compliance with DOT and OSHA regulations and that entitled Engelhard to solely rely upon Univar's labels to warn its employees of the hazards of the materials.
7. The Court erred in charging the sophisticated user defense applied to the negligence and implied warranty of merchantability claims against Matrix, Trinity and Univar inasmuch as they were not, as a matter of law, entitled to the defense upon the facts of this case.
8. The Court erred in charging the sophisticated user defense applied to the claims of negligence and implied warranty of merchantability against Matrix, Trinity and Univar because the evidence, when weighed against the six (6) factors as set forth in Goodbar v. Whitehead Bros., 391 F. Supp. 552, 557 (W.D. Va. 1984), precludes its application as a matter of law.
9. The Court erred in charging the sophisticated user defense applied to the negligence and implied warranty claims against Matrix, Trinity and Univar because the sophisticated user defense is not the law of South Carolina.
10. The Court erred in its charge upon the sophisticated user defense because it failed to instruct the jury that if it found that the warning labels on the bags of the sodium bromate were inadequate, the sophisticated user defense could not be applied to defeat any of the Plaintiffs' causes of action alleged against any of the Defendants.
11. The Court erred in charging the sophisticated user defense applied to the negligence and implied warranty of merchantability claims against Matrix, Trinity and Univar because the charge was inapplicable, as a matter of law, due to the fact that the warning labels were inadequate.
12. The Court erred in granting the Defendants' Summary Judgment Motion as to Plaintiffs' strict liability cause of action because the Plaintiffs were "users" and/or "consumers" within the meaning and embrace of S.C. Code Ann. §15-73-10 (2007).

STATEMENT OF THE CASE

On July 18, 2005, Keith Black and Channon Black (Blacks), and Curtis Martin and Tina Martin (Martins), commenced their cases against the Defendants, Univar USA, Inc. (Univar), Trinity Manufacturing, Inc. (Trinity) and Matrix Outsourcing, LLC (Matrix), by filing a Summons and Complaint seeking damages for personal injuries and loss of consortium resulting from a fire that occurred at the Engelhard plant in Seneca, South Carolina, on June 1, 2004.

Subsequently, on January 11, 2006, Plaintiffs, Scott Lawing and Tammy Lawing (Lawings), filed similar Complaints against the same three (3) Defendants for Mr. Lawing's personal injuries and Mrs. Lawing's loss of consortium damages resulting from the same fire.

All the Complaints were duly served upon each of the Defendants in a timely manner, and the Defendants timely filed their Answers denying liability as to all causes of action. Although Matrix initially pled the "Sophisticated User" defense, Univar's initial pleadings failed to do so.

The cases were designated as complex and assigned to the Honorable J. C. Nicholson, Jr. who, upon his own motion, consolidated the cases for discovery and trial and also bifurcated the trial as to liability and damages.

As discovery and trial preparations progressed, both Plaintiffs and Defendants amended their pleadings, with the consent of all other parties, and the cases proceeded to trial upon the Amended Complaints of the Plaintiffs filed September 29, 2008, the Amended Answers of the Defendants, Trinity and Matrix, filed October 10, 2008, the Second Amended Answers of Univar filed September

16, 2008, and an oral denial by Univar of any liability for Breach of Express Warranty, which Univar's Third Amended Answer, filed on November 24, 2008, was merely filed to record.

The initial Complaints pled three (3) causes of action, to-wit: (1) Strict Liability; (2) Negligence and (3) Implied Warranty as to all three (3) Defendants. The Amended Complaints also pled the original three (3) causes but added a fourth cause of action based upon Breach of Express Warranty as to Univar. Univar's Second Amended Answer added the Sophisticated User defense and, as previously set forth, its Third Amended Answer formally denied the Plaintiffs' Breach of Express Warranty claim.

On October 2 and 3, 2008, the Court heard Summary Judgment and other dispositive Motions filed by the Defendants and issued its Order upon the record as to each of the Motions. The Court granted the Defendants' Motion for Summary Judgment on the Strict Liability claims holding that the Plaintiffs were not "users or consumers" within the meaning of those terms as contained in *S.C. Code Ann., §15-73-10 (2007)*; however, it denied Defendants' Motions for Summary Judgment based upon the Sophisticated User defense holding that there were questions of fact for jury determination as to the application of that defense.

Univar's Summary Judgment Motion as to the Plaintiffs' Breach of Express Warranty claims was also denied as the Court held that under *Rule 56*, as a matter of law, that the contract between Engelhard was formed by the language as set forth in Engelhard's purchase order (R. p. 1465, P. Exh.#14;p. 1541, D. Exh.#100). The Court further held that, based upon that document, an express warranty existed

that Univar would mark the goods in accordance with the requirements of OSHA and DOT.

Prior to the start of the liability trial, Plaintiffs Keith Black, Curtis Martin and Tina Martin settled with Defendants, Trinity and Matrix; however, the Lawings were unable to resolve their claims against Trinity and Matrix. Because the cases had been consolidated, and notwithstanding that Black and the Martins had settled with Trinity and Matrix, the trial was conducted as if all three (3) of the Plaintiffs were proceeding against all three (3) Defendants upon all remaining claims pled.

The liability trial began on October 20, 2008 and ended on November 17, 2008, with jury verdicts in favor of all Plaintiffs against Univar on the claim for Breach of Express Warranty and in favor of Univar, Trinity and Matrix on the remaining causes of action. The Trial Judge then set the damages trial to begin December 1, 2008, before the same jury for the purpose of assessing damages against Univar.

On November 26, 2008, Univar appealed from the liability trial and the orders denying motions made following the liability trial. On December 4, 2008, this Court held that appeal in abeyance pending resolution of trial on damages.

On November 26, 2008, all parties filed post-trial motions; Appellants Scott and Tammy Lawing filed post-trial motions against Trinity and Matrix. The Court denied the Motions by order filed on December 3, 2008. Univar thereafter filed and served a notice of appeal. The Lawings filed and served a Notice of Cross-Appeal to this Court on December 30, 2008 as to all Defendants, Trinity, Matrix and Univar. Black and the Martins also filed a Notice of Appeal with the Court on December 30,

2008, solely as to Univar.

Following initial briefing, all Plaintiffs resolved their claims with Univar. Thus, the Lawings became the primary appellants and Trinity and Matrix became the only respondents in this appeal. On June 11, 2012, the Court issued an order that the Lawings' appeal against Trinity and Matrix continue.

Because the settlement with Univar greatly reduced the issues before the Court, and further limited the material relevant to the remaining issues, counsel for the Lawings and for Trinity and Matrix have worked towards providing an appropriate record for the Court and to edit their briefs accordingly.

FACTS

On or about June 1, 2004, the Plaintiffs, Scott Lawing and Keith Black, were working for Engelhard Corporation at its plant in Oconee County, South Carolina, and were part of a hand-picked maintenance crew, or team, along with Plaintiff Curtis Martin, a contract employee through Fluor Daniel, with the purpose of cutting out and replacing condensate pipe during the plant's annual shutdown week, which began on that date (R. p. 1499, D.Exh.#12; R.p.988, l.21-p.989, l.2; R. p. 1007, ll.8-13; p.1008, ll.10-12). The project upon which the Plaintiffs were working was critical to the operation of the Engelhard plant, as almost all of the plant's operations were dependant on that pipeline being operational. As a result, the plant was unable to conduct most of its business or operations until the project was completed. Before any work commenced Scott Lawing and Steve Knox, the crew's lead, saw several pallets of bags in the area where the work was to be done and looked at the bags

but did not see a yellow oxidizer label that was required to be on the bags by DOT and OSHA regulations (R.p.820, ll.14-22; p.1025, l.1-p.1026, l.2). Prior to the work commencing, a hot work permit was issued by Tim Wald stating that the area had been cleared of all dangers (R.p.986, l.18-p.987, l.6).

As part of the job, Plaintiffs were using a cutting torch to cut out sections of the condensate pipe, which was approximately seventeen (17) to twenty (20) feet above the floor (R. p. 1504, D.Exh.#15; R.p.988, l.21-p.989, l.2; p.1030, l.16-p.1031, l.9). During the course of approximately two hours of the work, Plaintiffs had slowly moved down the condensate pipe a distance of approximately twenty-five (25) to thirty (30) feet from the starting point to a right turn in the pipe and the aisleway (R. p. 1498, P.Exh.#110; p. 1499, D.Exh.#12; p. 1504, D.Exh.#15). It was at this point in the course of the job that a piece of slag from the cutting operation evidently landed on one of the 36 or more bags of the sodium bromate that was stacked on one of the pallets, in the same condition and configuration as they were when delivered to Engelhard (R.p.844, l.25-p.845, l.14; p.848, ll.6-11; p.857, l.13-p.858, l.4; p.869, ll.8-18). Although no one is absolutely sure how much sodium bromate was in the aisle, the best evidence suggests that there may have been as much as 10,000 lbs. of the product involved in the fire (R. p. 1499, D.Exh.#12). Apparently, when the slag landed onto or near one of the bags it caused the bag to begin burning and in a matter of seconds the sodium bromate oxidized the burning bag thereby expanding the highly exo-thermic reaction to all of the other bags and creating a fire ball that engulfed the Plaintiffs in the pipe rack (Black) and in a man lift (Martin and Lawing) (R.p.991, l.22-p.992, l.25; p.1004, ll.2-14; p.1032, ll.1-12).

As a result, each of the Plaintiffs suffered severe burns and other injuries, which have totally disabled them and rendered them in need of substantial medical care (physical and psychological) for the remainder of their lives (R.p.969, l.3-p.970, l.11; p.1005, ll.2-18; p.1033, l.18-1034, l.4).

At the time of the accident, Black and Martin had no knowledge of the specific uses and dangers associated with sodium bromate, but Lawing had assisted the operator of the processor on the night shift load the sodium bromate into the reactors and generally knew its purpose (R.p.994, ll.13-19; p.1006, ll.10-17; p.1018, ll. 4-22). Plaintiffs had, at the time of the accident, received Hazcom and Hazmat training that taught each of them to recognize warning symbols on packages of all the chemicals that would be present in the Engelhard factory, including sodium bromate (R.p. 985, ll.3-12; p. 1003, ll.2-4, 20-22; p. 1018, ll.7-15; p.1132, l.10-21).

Sodium bromate is an oxidizer used by Engelhard in the refinement of precious metals, which when introduced to a combustible material and ignition, will cause the fire to erupt in an extremely violent and dangerous fashion (R.p.785, l.25-p.788, l.1). The sodium bromate that is the subject of this litigation was contained in a combustible bag that acted as the fuel source for the fire that occurred on June 1, 2004 and was in the same condition at the time of the accident as it was when it arrived at the Engelhard dock, which was layer upon layer of bags of sodium bromate stacked upon wooden pallets (R.p.785, l.25-p.787, l.24; p.844, l.25-p.845, l.14; p.848, ll.6-11). The Plaintiffs themselves were unaware of the extent of the dangerous reaction, as was Jimmy Norris, an Engelhard chemical engineer, who

had no idea that such an eruption as the one that occurred on June 1, 2004 would have been possible (R.p.866, l.17-p.867, l.20).

The sodium bromate involved in the fire had been purchased by Engelhard from Univar pursuant to a "blanket" purchase order dated December 9, 2003 and issued to Univar on January 6, 2004, covering the anticipated needs of Engelhard for sodium bromate for the calendar year 2004 (R. p. 1541, D.Exh.#100; p.754, l.23-p.755, l.11; p.760, l.4-p.761, l.6). The purchase order in question expressly stated:

Acceptance of this Order constitutes an express warranty by the Vendor that . . . all goods to be provided hereunder shall be merchantable, fit for the purpose intended and of first quality, involve no unreasonable risk of injury or damage when used as intended, conform to all specifications and samples and be free from all defects in design, materials and workmanship.

(R. p. 1541, D.Exh.#100). Additionally, the purchase order stated:

Vendor warrants that it is and will be in compliance with all applicable provisions of federal, state and local laws and the 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.

(R. p. 1541, D.Exh.#100). Also present on the purchase order was a clause that stated:

Each package must be marked to comply with the Occupational Safety and Health Association (OSHA) (29 C.F.R. §1910.1200) requirements for packaging and labeling and the Department of Transportation Code of Federal Regulations (CFR) 49 requirements.

(R. p. 1541, D.Exh.#100; p.755, ll.16-24; p.762, ll. 7-21; p.911, l.25-p.912, l.10).

This clause was included in the purchase order because Engelhard completely depended on Univar to properly label and package the sodium bromate in

accordance with OSHA and DOT regulations, with the purpose of warning Engelhard's employees (R.p.763, I.7-p.764, I.7; p.765, II.3-11; p.766, II.14-25; p.913, I.12-p.914, I.2; p.1101, II.11-24). The purchase order also provided:

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.

(R. p. 1541, D.Exh.#100).

On January 15, 2004, the shipment of sodium bromate that Engelhard had ordered from Univar left China with a final destination of the Engelhard receiving dock (R. p. 1496, P.Ex.#100). The shipment reached the port of Charleston on February 6, 2004 and remained there until February 13 at which time it was shipped by Trinity overland by Old Dominion Freight Line, Inc. directly to the Engelhard facility in Seneca, South Carolina (R. p. 1475, P.Exh.#16; R. p. 1569, D.Exh.#114; R. p.971, II.17-19). Engelhard received an invoice for this shipment that was dated February 16, 2004 (R. p. 1476, P.Exh.#17). The sodium bromate was purchased by Engelhard from Defendant, Univar, USA, Inc. who, in turn, ordered it from Defendant, Trinity Manufacturing, Inc. Trinity, in turn, utilized its sister company Matrix Outsourcing, LLC, to import the sodium bromate from China to the port of Charleston where it was delivered by agreement between Trinity and Univar directly to Engelhard, with Trinity paying the over-land freight bill from the port of Charleston to Englehard (R. p. 1475, P.Exh.#16; R.p.881, II.11-24; p.971, II.17-19; p.975, II.20-24; p.976, II.1-22). None of the Defendants conducted a safety hazard analysis of the bags of sodium bromate or inspected any of the connex boxes that contained

the sodium bromate at any time (R.p.889, ll.15-17; p.972, ll.2-5; p.977, ll. 4-10; p.982, l.22-p.983, l.10; p.1162, ll.1-8). Paul Bailey, the Engelhard employee in charge of receiving shipments at the loading dock of Engelhard, testified that prior to the fire, shipments of sodium bromate had been received from Univar containing pallets with no oxidizer hazard labels showing (R.p.847, ll.1-5; p.855, ll.3-16). Also, approximately 8 months after the fire, drums of sodium bromate supplied by Univar were, in fact, discovered in the Engelhard plant without the yellow labels on them (R.p.851, ll.9-13). On the day of the fire and prior to beginning their work, Scott Lawing and Steve Knox, the work crew's lead, looked at the pallets of sodium bromate and did not see any warning labels of any kind on the pallets and/or bags and, more particularly, did not see any yellow oxidizer labels required by OSHA (R. p. 1441, P.Exh.#12) and DOT (R. p. 1488, P.Exh.#95), which they had been trained to recognize (R.p.820, ll.14-22; p.1025, l.1-p.1026, l.2). Additionally, numerous employees of Engelhard in management level positions, including the Safety Manager, had passed by the pallets of sodium bromate prior to the fire and not a single one of them recalled seeing the yellow oxidizer label required by OSHA and DOT on the pallets or bags (R.p.1027, l.6-p.1028, l.9; p.1226, l.22-p.1227, l.8; p.1228, ll.10-13; p.1231, l.25-p.1232, l.3).

On October 2 and 3, 2008, the trial court heard Pre-Trial Motions and granted the Defendants' Motion for Summary Judgment on the Plaintiffs' Strict Liability Claim pursuant to S.C. Code Ann. §15-73-10. The Court ruled that the Plaintiffs, Scott Lawing, Keith Black and Curtis Martin, were not "users" or "consumers" of the sodium bromate within the meaning of the Products Liability Act. Defendants'

Motion for Summary Judgment on Plaintiffs' Common Law Negligence and Implied Warranty of Merchantability Claims based on the sophisticated user defense was denied, however, as the Court ruled that there were questions of fact that needed to be developed before the Court could finally rule upon that issue. (Pre-Trial Motions (8/3/2008): R.p.624, ll.4-18).

Upon conclusion of all of the evidence, Plaintiffs moved for a directed verdict as to the sophisticated user defense because its application would negate the duty to label and warn imposed upon each of the Defendants, Matrix, Trinity and Univar, by federal law and, more specifically, that the sophisticated user defense could not be used by Defendants to avoid their obligations to put labels and warnings on the bags of sodium bromate as required by the DOT and OSHA regulations (R.p.1239, ll.8-25). The Court denied the motion but subsequently charged the jury that "*federal regulations did, in fact, impose a duty on suppliers to warn of possible dangers arising from the use of their product*" and that:

[The] requirement comes from the occupational safety and health administration regulations 1910.1200(f) that says that the chemical manufacturer, importer or distributor shall insure that each container of hazardous chemicals leaving the work place is labeled, tagged or marked with the following: identity of the hazardous chemicals, appropriate hazard warnings and the name and address of the chemical manufacturer, importer or other responsible party.

The Court further charged the jury that the federal regulations imposing the duty to warn were in evidence, that "*the circumstantial evidence proves that the bags were labeled*" and that "*Plaintiffs had only alleged that the labels were not clearly visible or prominently displayed, not that there was not a label on the bags.*" (R.p.1256,

I.24-p.1257, I.16)

Notwithstanding the instruction that the federal regulations, particularly OSHA, imposed a duty upon Matrix, Trinity and Univar, the Court further instructed the jury as to the sophisticated user defense and told the jury that if it found that the sophisticated user defense applied, *"then it must find that the Defendants owed no duty whatsoever to warn and that it must find in favor of the Defendants on the Plaintiffs' negligence and implied warranty of merchantability claims."* The Court did not qualify the charge in any way and, in essence, instructed the jury that the sophisticated user defense, if found to be applicable, would, in fact, negate or contradict the federally mandated duty to label and warn contained in OSHA and other federal regulations (R.p.1260, I.9-p.1261, I.16).

Prior to the above charge being given, however, Plaintiffs also moved to reinstate their Strict Liability cause of action but the Court denied that motion as well (R.p.1252, II.13-15). The Court advised that it would "incorporate all your arguments on the summary judgment motion and at the directed verdict stage at the end of the Plaintiffs' cases into the arguments now." (R.p.1253, II.6-9) Previously, Plaintiffs had argued that the sophisticated user defense was not applicable to any of their claims against any of the three (3) Defendants because the warning labels furnished to Engelhard were inadequate and the facts of the case, when weighed in accordance with the six (6) qualifying factors, precluded it. Plaintiffs had also argued that, as to Univar, the defense was not available on any of the claims against it because Univar had breached its contractual duty to Engelhard to adequately label the sodium bromate according to OSHA and DOT regulations (R.

p. 147-148, SJ Brief, pp.8-9; SJ Arguments, R. p. 431, ll.18-22; p.437, ll.10-18; p.438, ll.4-21; p.1075, ll.3-8; p.1077, ll.7-16; p.1079, ll.20-25; p.1081, ll.15-19,21-25). After the jury was charged, Plaintiffs took exception to the fact that the sophisticated user charge was given at all as it did not apply under the facts of the case (R.p.1262, ll.14-19; 1266, l.22-p.1267, l.6). Thereafter, just prior to the jury reaching its verdict, the jury asked who it was to "consider the sophisticated user, Engelhard?" The Judge instructed them "yes" (R. p. 1651, Ct.Exh.#23) clearly indicating that the jury was confused by the Judge's sophisticated user charge and was not, in fact, considering any of the six (6) factors to determine whether the defense should be permitted. Before that matter could be fully resolved by the Court, however, the jury reached its verdict and there was no further attempt by the Court to clarify or to assure that the jury understood the charge or the six (6) factors balancing test (R.p.1263, l.4-p.1264, l.24; p.1266, l.17-p.1269, l.9;p.1268, ll.16-20).

The Plaintiffs' appeal the trial court's grant of Summary Judgment upon their Strict Liability Claims, its denial of their Motion for Directed Verdict upon the sophisticated user defense at the close of all evidence and those issues raised in Plaintiffs' Post-Liability Trial Motion for New Trial upon the negligence and implied warranty of merchantability claims against all three (3) Defendants.

ARGUMENTS

I. WAS THE SOPHISTICATED USER DEFENSE PREEMPTED BY APPLICABLE FEDERAL AND STATE OSHA REGULATIONS? (ISSUES 1, 2, 3)

Throughout the Lower Court proceedings, Plaintiffs consistently objected to the sophisticated user defense being charged to the jury based upon the fact that the defense was in conflict with federal OSHA regulations to such extent that its application completely abrogated the federal regulatory scheme and the duty to label and warn imposed thereby. Although Plaintiffs did not specifically reference the state OSHA regulations in their arguments, the objection fairly embraces the state labeling or warning requirements as they are identical to the federal regulations and are an integral part of the overall federal regulatory scheme imposing the duties to label and warn upon each of the Defendants. Thus, Plaintiffs' position that the sophisticated user defense is inapplicable to this case and should not have been charged to the jury is two pronged, to-wit: (1) It is prohibited by the conflicts preemption doctrine arising under the Supremacy Clause of the United States Constitution (*U.S. Const. art. VI*); and (2) It cannot override or relieve one of duties and/or requirements legislatively imposed by valid state statutes and regulations.

Considering first the Supremacy Clause argument, it was error for the trial court to instruct the jury on the defense of "sophisticated user" because that common law defense has the effect of defeating the duty to warn that was clearly imposed as an integral part of the federal regulatory scheme established by and in

the HazCom regulations. Pursuant to the Supremacy Clause of the United States Constitution (*U.S. Const. art. VI*) federal law "shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." "Such preemption may result not only from action taken by Congress itself, but also when a federal agency acts within the scope of its congressionally delegated authority. See *Louisiana Public Service Comm'n. v. FCC*, 476 U.S. 355, 368-69, 106 S.Ct. 1890, 1898-99, 90 L.Ed.2d 369 (1985)." *Tipton v. Secretary of Education*, 768 F. Supp. 540, 551 (S.D. W.Va. 1991).

First, when acting within constitutional limits, Congress is empowered to preempt state law by so stating in express terms. Second, Congressional intent to preempt state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation. As a third alternative, in those areas where Congress has not completely displaced state regulation, federal law may nonetheless preempt state law to the extent it actually conflicts with federal law. Such a conflict occurs either because "compliance with both federal and state regulations is a physical impossibility," or because the state law stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* In short, any state law that conflicts with federal law is preempted and without effect if it impairs or destroys a federal regulatory scheme. *Jamison v. Ford Motor Co.*, 373 S.C. 248, 644 S.E.2d 755 (Ct. App. 2007). The question as to whether the preemption doctrine negates any state law

in any given situation is a question of law for the court rather than a question of fact for the jury.

Perhaps federal preemption is encountered most often in situations where a defendant asserts that a state law created cause of action or remedy is "preempted" by a federal law or regulatory scheme. See, e.g., Weston v. Kim's Dollar Store, 385 S.C. 520, 684 S.E.2d 769 (Ct. App. 2009). However, federal preemption applies equally to state common law defenses that conflict with federal law. For example, in World-Link, Inc. v. Mezun.com, Inc., 14 Misc.3d 745, 827 N.Y.S.2d 642 (N.Y. 2006) a wholesaler's state common law defenses of waiver and equitable estoppel to the claims of a long distance telecommunications carrier alleging causes of action for services rendered and account stated, were impliedly preempted by provisions governing service and charges and discriminations and preferences in the Federal Communications Act. And in United States v. Moore, 486 F.2d. 1139, 1156 (D.C. Cir. 1973) the court held "Thus while Congress has not explicitly provided that addiction shall *not* be an affirmative defense to a charge of possessing illicit narcotics, the congressional intent to prosecute drug users expressed in D.C.Code § 24-601, buttressed by Congress' legislative activity both before and after that expression of legislative intent, demonstrates that *Congress has preempted this court's authority to create a common law defense.*" (Italics the court's.) And, see, Malone v. Mayflower Transit, Inc., 819 F. Supp. 724 (E.D. Tenn. 1993) (the Carmack Amendment to the Interstate Commerce Act preempted common-law defense of comparative negligence); Tipton, supra at 555, ("Whether

state based common law defenses to the enforceability of a guaranteed student loan are preempted by the HEA and implementing regulations was recently considered in Graham v. Security Savings & Loan, 125 F.R.D. 687 (N.D.Ind.1989), *aff'd* Veal v. Savings Bank, 914 F.2d 909 (7th Cir.1990). Under factual circumstances nearly identical to the case at bar, the *Graham* court held that federal law preempts the rights of business students to rescind their student loans on the basis of allegedly fraudulent misrepresentations made to them by the representatives of the college.”)

The common law defense of sophisticated user is clearly in contradiction of the federal requirements as its application has the effect of conflicting with, and abrogating the federal regulatory schemes of DOT and OSHA in regard to labels and warnings. Thus, the doctrine of federal conflict preemption is clearly applicable and prohibits the sophisticated user defense from being used to negate or contradict those duties imposed by the federal regulations, particularly DOT (49 C.F.R. §172.406; 49 C.F.R. §172.407) and OSHA (29 C.F.R §1910.1200(a)(2); 48 Fed. Reg. 52380, 53322 (Nov. 25, 1983)).

The second prong to the Plaintiffs' argument that the sophisticated user defense is inapplicable to the facts of this case is that, the defense would effectively contradict and abrogate the application of the state requirements legislatively

imposed upon the Defendants through its adoption of the federal standards.¹ The law is clear that the legislative and judicial branches of government are separate and distinct and one cannot infringe upon the functions and powers of the other which are exclusively granted to it by the South Carolina Constitution. Although Courts can, if presented with a constitutional challenge to a state statute, nullify the statute, a common law doctrine can never be used indirectly to nullify the will of the legislature. As stated in United States v. Moore, 486 F.2d 1139, 1156 (D.C. Cir. 1973), "It is hornbook law that when the legislature has spoken, what might have been the common law is altered, and judges (including this court) may not change the law back because they would have favored a different policy, unless there is a constitutional mandate, which, of course, operate irrespective of judicial preferences."

All legislative acts are presumed to be valid and, even in the case where they are being constitutionally challenged, every intendment will be indulged in favor of the act's validity. Doe v. American Red Cross Blood Services, 297 S.C. 430, 377 S.E.2d 323 (S.C. 1989).

It is clearly the law of South Carolina that an action in tort may be predicated on the violation of a state statute. Norton v. Opening Break of Aiken, Inc., 313 S.C. 508, 443 S.E.2d 406 (Ct. App. 1994). Regulations authorized by the

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See 26 S.C. Code of Regulations, Ch. 71, Art. 1, Subart. 6 wherein South Carolina adopted verbatim the federal OSHA standards contained in 29 C.F.R. §1910 with few exceptions, none of which pertain to the OSHA HazCom (29 C.F.R. §1910.1200) requirements; therefore, South Carolina's regulations concerning warning labels are identical to the federal OSHA requirements.

legislature have the force of law. Tant v. Dan River, Inc., 289 S.C. 325, 345 S.E.2d 495 (1986). Violation of a regulation may constitute negligence per se. See, e.g., Id. (violation of state and federal air pollution regulations supports action for negligence); see also Seals v. Winburn, 314 S.C. 416, 445 S.E.2d 94 (Ct. App. 1994) (employer's violation of state and federal regulations prohibiting the employment of children under the age of ten on a farm was negligence *per se*); Raven v. Greenville County, 315 S.C. 447, 343 S.E.2d 296 (Ct. App. 1993) (approving jury instruction charging that violation of a regulation is negligence *per se*); Coleman v. Shaw, 281 S.C. 107, 314 S.E.2d 154 (Ct. App. 1984) (violation of agency regulation governing swimming pool safety was negligence *per se*).

As discussed elsewhere in this Brief, the so-called sophisticated user defense is a common law development in the nature of a defense to a cause of action predicated on a manufacturer's or supplier's failure to warn. In essence, it allows a manufacturer and/or supplier to escape liability completely by the rubric of the manufacturer or supplier owing no duty to warn the end user if an intermediate purchaser of the product is a "sophisticated user." As a common law doctrine, it must fall in the face of a legislatively created duty, including one that is established by authorized regulatory action. Thus, it was error to instruct the jury on the defense of sophisticated user because the Defendants breached a legislatively created duty to warn that was imposed on them when South Carolina expressly adopted as its own law the regulations of HazCom.

As also discussed elsewhere herein, the HazCom regulations clearly impose

duties of labeling and marking on each of the suppliers of the dangerous chemicals involved in this case. The regulations, which by South Carolina's incorporation by reference are also the law of this state, are clearly intended to benefit employees in the workplace. Any argument that if the employer is a "sophisticated user" the clear duty and mandate to the suppliers that the chemicals be marked and labeled with adequate warnings is thereby extinguished is incompatible with the intent of the regulations and their plain meaning. The legislatively authorized federal and state regulatory schemes, did not adopt, and cannot be found to tolerate any common law defense of the "sophisticated user."²

Obviously, the application of the sophisticated user defense in this case relieves the Defendants of duties imposed by both federal and state regulations. The verdicts of the jury on the negligence and implied warranty of merchantability claims against Matrix, Trinity and Univar, and the verdicts against Univar on the express warranty claim, clearly establishes that the operation of the defense nullified and destroyed the requirements of the state regulation that are identical to the federal regulation.

Clearly, the OSHA regulations, both state and federal, require that everyone

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Note: One state, Michigan, has expressly recognized this contradictory character of the sophisticated user defense and in its codification of the defense has specifically provided "except to the extent a state or federal statute or regulation requires a manufacturer to warn, a manufacturer or seller is not liable in a product liability action for failure to provide an adequate warning if the product is provided for use by a sophisticated user." Mich. Comp. Laws Ann. §600.2947(4) (1961). By doing so, Michigan clearly stated that the sophisticated user defense can never trump a state or federal statute or regulation.

in the chain of distribution, from the chemical manufacturer to the importers of the chemical to the distributors and vendors and the ultimate industrial purchaser, jointly and severally, is required to comply with state and federal OSHA requirements of labeling by placing the yellow oxidizer symbol on each bag in a manner that the symbol is clearly visible and/or prominently displayed. 29 C.F.R. §1910.1200(f)(1)(3)(8)(9); 49 C.F.R. §172.406, §172.407; 26 S.C. Code of Regulations, Ch. 71, Art. 1, Subart 6.

Judge Nicholson correctly ruled at trial and charged the jury that, as a matter of law, the OSHA regulations applied to Matrix, Trinity and Univar and that those federal regulations did, in fact, impose a duty on the Defendants to warn of possible dangers and label each container of sodium bromate with appropriate hazard warnings. (R.p.1256, l.22-p.1257, l.11). He further instructed the jury that "*the bags were labeled*" but that the Plaintiffs' cases were premised upon the assertion that the labels were not placed upon the bags in a manner which would render them clearly visible or prominently displayed. (R.p.1257, ll.12-16). In other words, he clearly framed the issue for the jury in such a way that he precluded the sophisticated user defense altogether and instructed the jury that its sole determination on the express warranty claims was whether the labels on the sodium bromate complied with the OSHA requirement that the labels be clearly visible or prominently displayed. 29 C.F.R. §1910.1200(f)(9); 49 C.F.R. §172.406(f). Nevertheless, over Plaintiffs' objections, Judge Nicholson thereafter charged the jury that if it found that the sophisticated user defense applied, it must find that the Defendant's owed no duty to warn or label the product as prescribed by the federal

regulation. (R.p.1260, ll.9-18; p.1261, ll.9-16). The jury then found for Univar, Trinity and Matrix upon the negligence and implied warranty of merchantability causes of action based upon the sophisticated user defense but found that Univar had, in fact, breached its express warranty to label the bags in the manner required by DOT and OSHA; that is, the jury found that the labels/warnings were not clearly visible or prominently displayed and that the failure to so label them proximately caused the Plaintiffs' injuries.

Clearly, the duty warranted by Univar, which the jury found it to have breached, was exactly the same or identical duty that all three (3) of the Defendants, Matrix, Trinity and Univar, owed to the Plaintiffs pursuant to the DOT and OSHA regulations. The jury's verdict against Univar on the express warranty claims is, therefore, a finding that all three (3) of the Defendants, Matrix, Trinity and Univar, breached the federally mandated duties imposed upon them by the federal regulations and that, but for the sophisticated user defense, the jury would have rendered a verdict of liability against all three (3) of the Defendants on the negligence and implied warranty claims. In other words, the jury's verdicts in favor of Matrix, Trinity and Univar were solely premised upon the sophisticated user defense and completely contradicted the federally mandated duty to warn and label the sodium bromate as prescribed. This is clearly error and cannot be allowed to stand. It is, therefore, respectfully submitted that the verdicts in favor of Matrix, Trinity and Univar on the negligence and implied warranty claims should be reversed and judgment entered for the Plaintiffs as to liability on those causes of action.

II. DID UNIVAR'S CONTRACT AND EXPRESS WARRANTIES WITH ENGELHARD PRECLUDE THE DEFENSE FROM BEING APPLIED TO PLAINTIFFS' NEGLIGENCE AND IMPLIED WARRANTY CLAIMS AGAINST UNIVAR? (ISSUES 4, 5, 6)

There are additional, very fundamental reasons why Univar is not entitled to assert a "sophisticated user" defense to the Plaintiffs claims against it. It contractually assumed the very duty that it seeks to avoid by that defense. An affirmative legal duty may be created by contract. "Moreover, it has long been the law that one who assumes to act, even though under no obligation to do so, thereby becomes obligated to act with due care." Bryant v. Babcock Center, Inc., 371 S.C. 123, 136, 638 S.E.2d 650, 656 (2006).

Univar expressly assumed a duty to label and warn in compliance with all applicable federal regulations, including in particular OSHA's HazCom requirements. (See: Page 5 of Engelhard's Purchase Order No. S006011 and the reverse side of each page of the purchase order issued to Univar for the sodium bromate at issue (R. p. 1541, D.Exh.#100)). Based on the language of the contract, Univar was contractually obligated to ensure that the sodium bromate was marked in compliance with OSHA's labeling requirements. Under HazCom, that meant that the packages had to carry "appropriate hazard warnings" 29 C.F.R. §1910.1200(f)(1)(ii).

Having assumed the duty to properly mark and label the bags of sodium bromate, and having expressly warranted its compliance with the applicable regulations, Univar's tortious failure to do so was actionable by the injured Plaintiffs. In Barker v. Sauls, 289 S.C. 121, 345 S.E.2d 244 (1986), our Supreme Court held

that an employee could maintain a negligence action against a third party insurance agent based on the contractual relationship between the agent and the employee's employer. In its opinion, the Court observed that "[a] tort-feasor may be subjected to tort liability for injury to a third party arising out of the tort-feasor's contractual relationship with another, despite the absence of privity between the tort-feasor and the third party."

By its conduct – entering into the contract with Engelhard – Univar assumed a duty owed to the employees of Engelhard; namely, to label and mark the bags of sodium bromate with warnings in a manner sufficiently conspicuously visible that the warnings would be effective. Under applicable law, that duty is actionable in tort. But Univar seeks to avoid that duty via the sophisticated user defense. As has been discussed earlier, the sophisticated user defense essentially denies the existence of a duty to warn in the first instance. By asserting that defense, Univar is arguing that it did not owe the very duty it undertook by express contract and warranted to perform. Whether one wants to label the legal principle by which Univar is precluded from making such an argument waiver (it waived the defense by its contractual undertaking) or estoppel (it is estopped to deny the duty it assumed by its conduct), Univar cannot logically assert the defense.

Interestingly, further consideration of some of the elements of the sophisticated user defense helps demonstrate why it was error for the Court to instruct the jury that the Plaintiffs' negligence and implied warranty actions against Univar were subject to the defense. The six requirements of Restatement (Second) Torts §388(c) have previously been discussed, but let us focus on numbers 3, 4 and

6 for a moment. Again they are: (3) the form of any warnings given, (4) the reliability of the third party as a conduit of necessary information about the product, and (6) the burdens imposed on the supplier by requiring that he directly warn all users.

A supplier is not entitled to the sophisticated user defense unless it can show that it exercised ordinary care in communicating safety information through the allegedly knowledgeable industrial intermediary. The adequacy of the warning under the third prong is evaluated from the following two perspectives: (1) the content of the warning itself (yellow oxidizer label); and (2) the method chosen by the supplier to convey the warning to the ultimate user (location of the label on the bag). 7 Am Jur Proof of Facts 3d 305 (Page 17).

In this case, Univar knew that the sole content of the warning was the yellow oxidizer label on the bag and that it would be the only label or warning passed along to Engelhard's employees. (R.p.913, l.19-p.914, l.2; p.763, l.21-p.764, l.7). If that content and placement was not in compliance with OSHA requirements, as the jury necessarily found by finding a breach of express warranty, then Univar, which was contractually responsible for the warning, by definition failed to exercise due care insofar as the third prong – the form of the warning – is concerned.

As to reliance on Engelhard as a conduit of information, Univar, by its negotiation of and the terms of the contract, knew that Engelhard was relying on it to provide the necessary warnings on the product – warnings that were compliant with OSHA and HazCom. Therefore, as the party contractually responsible for the only warnings that could be expected to reach the end user in a manner to alert the

user to the immediate danger, as a matter of law Univar can not be found to have reasonably relied on Engelhard as a conduit of information.

Although Plaintiffs have not found any cases addressing the issue in an actual contractual setting as here, the Michigan case of Theeke v. BASF Corporation, 45 F.3d 431 (Table), 1994 WL 721632 (6th Cir. 1994) is on point in holding that the sophisticated user defense is not applicable when a supplier makes a representation that it will label a product in a certain way and a downstream user relies upon the representation and depends upon the supplier to label it as promised. In that case, Michael Theeke worked as a welder for Tote Services, a company which specialized in cleaning and repairing totes for BASF and others. BASF delivered to Tote Services one (1) tote which had been out of service for several years. The tote was delivered to the repair area where Michael Theeke worked on it. The first thing he did was check to see if there was a flammable sticker on it or any kind of label which would have told him what had formerly been in the tote. Concluding that the tote contained nothing flammable, Theeke then attempted with his welding torch to remove the rusted lid. The tote exploded presumably because flammable vapors which were present in the tote ignited. BASF argued that, as a matter of law, it owed no duty to warn because Tote Services and Theeke were sophisticated users with equal awareness of the risk. The Court held that although they did not believe that Tote Services and Theeke were sophisticated users, the legal doctrine was inapplicable in any event because BASF, by its own acts, had altered the relationship it had with Tote Services to make Tote Services dependent upon BASF's labeling of hazardous totes.

A full two years before the accident, contractors engaged to clean dirty totes had complained to BASF that they had no way of knowing what a given tote might have previously contained. Accordingly, BASF had circulated to all employees and to Tote Services a notice which ordered that all containers used to hold hazardous materials must be stenciled with codes to identify the contents and specifically required hazard labeling to include hazard stickers such as flammable stickers for flammable materials for DOT purposes. Accompanying the notice was a more extended inter-office memorandum further stating that all containers used for hazardous materials must be labeled with DOT hazard labels and that the only totes leaving the plant would be those with recognizable contents and DOT labels. Since they had taken such action and had advised Totes Services of their policy and intent to label the totes in a certain way, the Court held that they had altered the relationship it had with Tote Services and Tote Services was justified in depending upon BASF's promise to label the hazardous totes. Since it had not labeled the tote, the Court ruled that the sophisticated user defense was not available to BASF.

In the present case, Engelhard relied upon the representations of Univar to specifically mark and label the sodium bromate in accordance with DOT and OSHA regulations. It further relied upon the express warranties of Univar that it would comply with all federal and state laws and regulations and Engelhard clearly depended upon Univar to adequately label the sodium bromate. Engelhard did not change, alter, add to or amend the labels on the sodium bromate but merely passed along to its employees what it had received from Univar. Thus, as in the Theeke

case, the sophisticated user defense is inapplicable to any of the claims against Univar and should not have been charged.

Finally, on the issue of the burden on Univar, it cannot be heard to complain of the burden on it of providing an adequate warning to the end user. That is precisely what Univar contracted to do and was paid to do. (R. p. 763, ll. 12-20; p.911, l.25-p.912, l.10; p.913, l.19-914, l.2).

Even if a court somewhere is inclined to recognize a sophisticated user defense and apply it in such a manner that it contradicts a federal regulation, as it does in this case, the defense still cannot be held to be available to a supplier such as Univar, which expressly contracted to provide the necessary warnings in an appropriate manner under applicable federal law. The act of contractually undertaking to provide warnings should be seen as an express waiver of the defense, or an estoppel by conduct to assert the defense. But in any event, the contractual duties expressly undertaken by Univar, and breached by Univar, are antithetical as a matter of fact to a right to assert the defense.

In summary, as to Univar, the sophisticated user charge should not have been given at all in regards to any of the claims against it. The contract established the duty under all three causes of action and Judge Nicholson, as well as Univar, agreed that the sophisticated user defense did not exonerate Univar from the duty under the express warranty claim (R. p. 728, ll. 15-25; p.1261, ll.15-16; R. p. 1578, Ct.Exh.#9). For the very same reasons that the defense was inapplicable to the express warranty claim, it was inapplicable to the negligence and implied warranty of merchantability claims against Univar as well. In the absence of the sophisticated

user defense, the jury found that the duty was breached on the express warranty claim because the warning label was inadequate -i.e., it was not in compliance with DOT and OSHA regulations because it was not clearly visible and/or prominently displayed on the bags. It further found that the breach proximately caused injury to the Plaintiffs. Nevertheless, because of the erroneous charge the jury rendered verdicts in favor of Univar on the negligence and implied warranty of merchantability claims. The verdicts were/are, therefore, totally inconsistent and cannot be reconciled. As a result, the verdicts in favor of Univar on Plaintiffs' negligence and implied warranty claims should be reversed and judgment entered as to liability in favor of the Plaintiffs on those claims as well.

III. IS THE SOPHISTICATED USER DEFENSE THE LAW IN SOUTH CAROLINA AND, IF SO, DID THE EVIDENCE IN THIS CASE, WHEN WEIGHED IN ACCORDANCE WITH THE SIX (6) FACTORS SET FORTH IN GOODBAR V. WHITEHEAD BROS, 391 F.SUPP. 552, 557 (W.D.VA.1984) RENDER THE DEFENSE INAPPLICABLE TO THE PLAINTIFFS' NEGLIGENCE AND IMPLIED WARRANTY CLAIMS AGAINST MATRIX, TRINITY AND UNIVAR? (ISSUES 7, 8, 9)

The Plaintiffs in this matter are specifically appealing the Trial Judge's instruction to the jury regarding the sophisticated user defense. The sophisticated user doctrine has not been definitely adopted in this state and the Plaintiffs believe that the doctrine's application and availability to the Defendants in the instant case was improper and erroneous. The only relevant South Carolina state court case is Bragg v. Hi-Ranger, 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995). The court, in this decision, states that the question of whether or not a defendant is entitled to the

sophisticated user defense, which would obviate any purported duty on the part of a product's distributor to warn subsequent purchasers and users, is whether or not the defendant acted reasonably in assuming that the intermediary would recognize the danger and take precautions to protect its employees. Id. at 550.

In the Bragg case, the South Carolina Court of Appeals referenced §388 of the Restatement (Second) of Torts as being adopted by numerous jurisdictions, but does not specify whether or not South Carolina recognizes §388 of the Restatement (Second) of Torts as the adopted law of South Carolina.

Section 388 of the Restatement (Second) of Torts provides:

One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier

- a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and
- b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and
- c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

This definition has been further explained by some courts, by determining that a balancing test is necessary when determining whether or not the c) requirement of reasonable care has been satisfied. Goodbar v. Whitehead Bros., 391 F.Supp. 552, 557 (W.D. Va.1984). The test is a balancing of six (6) factors, which include:

- 1) the dangerous condition of the product;
- 2) the purpose for which the product is used;

- 3) the form of any warnings given;
- 4) the reliability of the third party as a conduit of necessary information about the product;
- 5) the magnitude of the risk involved;
- 6) the burdens imposed on the supplier by requiring that he directly warn all users.

Id.; see, e.g., Smith v. Walter C. Best, Inc., 927 F.2d 736, 739-740 (3d Cir.1990); Willis v. Raymark Indus., Inc., 905 F.2d 793, 796 (4th Cir.1990). A balancing of these considerations is necessary in light of the fact that no single set of rules could possibly be advanced that would automatically cover all individual situations. Goodbar, 391 F.Supp. at 557. Upon an application of the facts of the Plaintiffs' case to the test above, the sophisticated user defense, even if recognized as the law of South Carolina, is unavailable to the Defendants and the Trial Judge was in error charging the defense to the jury.

1. **The sodium bromate involved in the June 1, 2004 incident was imported and sold by the Defendants in an extremely dangerous condition.**

Undisputed testimony in this case shows that the Defendants, Univar USA, Trinity Manufacturing, and Matrix Outsourcing, knowingly sold a product to Engelhard that was not only inherently dangerous itself, but was packaged in a manner that exponentially increased the danger to all those who would come into contact with it. Sodium bromate is an oxidizer, which is a chemical that accelerates combustion. (R.p.864, ll.17-25). Oxidizers are always considered to be dangerous, because once an oxidizer mixes with a flammable, it will burn without outside air, and is thus not able to be smothered. (R.p.864, l.25-p.865, l.4). Earlier shipments

of sodium bromate to Engelhard had been packaged in drums, but the sodium bromate shipment that is the subject of this litigation was packaged in a polyethylene inner bag and a polypropylene outer bag, both organic materials. (P.Exh.#1 (filed separately with the Court); R.p.782, ll.10-15; p.886, ll.4-13). The MSDS for sodium bromate actually warns to keep sodium bromate from organic materials at all times. (R.p.798, l.22-p.799, l.16). The bags of sodium bromate were stacked, at least thirty-six (36) at a time onto a wooden pallet, covered in a polyethylene shrink-wrap and double-stacked, which is one pallet of sodium bromate bags stacked on top of another. (R.p.782, ll.8-9; p.844, l.25-p.845, l.5; p.858, l.24-p.859, l.9). The pallets were received into Engelhard's loading dock and placed directly into the plant in the exact form in which they were sold. (R.p.844, l.25-p.845, l.14; p.848, ll.6-11).

At trial, Dr. Richard Henderson was offered as an expert witness to address the reaction of sodium bromate and its packaging when exposed to ignition sources. (R.p.775, l.22-p.776, l.3). He performed an ignition test, using the same make-up of packaged sodium bromate that was shown to be in the Engelhard plant a day or two after the June 1, 2004 fire, and videotaped the test, which was offered into evidence by the Plaintiffs. (P.Exh.27 (filed separately with the Court); R.p.777, l.25-p.778, l.3; p.785, ll.16-21; p.792, ll.7-9). Dr. Henderson testified that the test intended to demonstrate that when you introduce sodium bromate to burning fuel, the fire "takes off kind of like a chain reaction" and "goes up exponentially" kind of like a bomb. (R.p.785, l.25-p.787, l.24; p.792, l.10-p.793, l.16; p.794, ll.2-7). He attempted to calculate the actual amount of energy released at the June 1st fire and

his best estimates were 3,200,000 Kilojoules. (R.p.795, ll.17-24). In an attempt to illustrate how violent a reaction of this magnitude would be, Dr. Henderson stated, "I didn't do a test that big, but that would be a gigantic fireball." (R.p.796, ll.17-18). Steve Knox, a crew leader at Engelhard on June 1st, viewed Dr. Henderson's bag test while testifying. (R.p.823, l.22-24). When asked if the eruption on the video represents the incident that occurred on the morning of June 1, 2004, he replied, "On a very small scale . . . It sounded like a jet taking off." (R.p.826, ll.10-18).

Defendants admit to knowing exactly how dangerous sodium bromate and the way it was packaged and sold could potentially be. Karen Messana, the environmental health and safety director and regulatory compliance manager for Defendant Trinity Manufacturing, in her testimony, admitted to knowing just how dangerous the sodium bromate would be if ignited when packaged in the same bags. (R.p.1163, ll.21-25; p.1175, ll.17-19).

Angela Granados, Vice President of Defendant Matrix Outsourcing, had been alerted by the Chinese manufacturer of the sodium bromate in an email that the packaging of the sodium bromate in bags actually created a hazardous cargo issue. R.p.877, ll.14-22; p.884, l.23-p.885, l.6). She confirmed that she was fully aware that as an oxidizer, sodium bromate was a hazardous chemical and can seriously harm people. (R.p.878, l.25-p.879, l.11). On the other hand, Engelhard employees, including the Plaintiffs in this case, were completely unaware of the extent of the danger sodium bromate in its condition could present in the plant on June 1, 2004. (R.p.866, l.17-p.867, l.20; p.985, ll.3-7; p.1006, ll.10-12; p.787, l.25-p.788, l.12).

The dangerous condition of the sodium bromate that was sold by Defendants in this case is of an indisputably high level. This factor in the sophisticated user balance analysis weighs heavily against the Defendants, who claim they have no duty to warn subsequent purchasers and their employees of the serious dangers associated with sodium bromate in the form in which it was sold.

2. The sodium bromate that was imported and sold by the Defendants in this case was in storage in the process area where it was to be used as intended at the time of the June 1, 2004 incident.

Sodium bromate was used to refine precious metals at the Engelhard plant in Seneca, South Carolina. At the time of the June 1, 2004 incident, the sodium bromate that is the subject of this litigation was in storage, in the form in which it was sold, in the process area of the Engelhard plant where it was to be used as intended. (R. 1498, P.Exh.#110; R.p.836, ll.7-16; p.844, l.25-p.845, l.14; p.848, ll.6-11). Plaintiff Lawing testified that, although he had never seen sodium bromate stored in bags in this same spot before, he had seen sodium bromate stored in this area that was contained in drums. (R.p.1022, ll.4-8).

The fact that the sodium bromate was not being used outside of its intended use is another factor that weighs against the Defendants, especially since Defendants were fully aware of the dangers associated with the sodium bromate as packaged and sold.

3. The sodium bromate involved in the June 1, 2004 incident was not adequately labeled, specifically, the labels were not prominently displayed or clearly visible.

Testimony at trial by Engelhard employees present at the time of the June 1, 2004 incident, including Scott Lawing, shows the pallets of sodium bromate bags purchased from the Defendants were not adequately labeled, in that the oxidizer label required by federal regulations to be present was not prominently displayed or clearly visible. Steve Knox, the maintenance lead for the June 1, 2004 job, testified that he walked the area where the work was supposed to take place, including the area where the pallets of sodium bromate were located. (R.p.819, l.25-p.820, l.2). He testified that he saw the pallets of sodium bromate, looked at them, and saw only black writing and numbers. (R.p.820, l.11; p.821, ll.7-10; p.823, ll.4-10).

Scott Lawing also walked by the actual bags of sodium bromate prior to beginning the work scheduled for that day. (R.p.1024, l.25-p.1025, l.2). He testified that he looked directly at the pallets of sodium bromate, which were soaking wet at the time, specifically looked for a label and did not see one. (R.p.1025, l.1-p.1026, l.2). Many members of Mr. Lawing's supervisory personnel walked through that area, including John Kirby, Dan Hogan, Tommy Garrett, Ron Hicks, and Robbie Acree. (R.p.1027, l.6-p.1028, l.9).

Robbie Acree, a mechanical maintenance supervisor at Engelhard at the time of the fire, testified that he walked by the area where the pallets were located and did not see an oxidizer label, and that if there had been an oxidizer label on the pallets he would have noticed it. (R.p.1226, l.22-p.1227, l.8). He walked through the area four (4) times and nothing grabbed his eye or drew his attention to the pallets. (R.p.1228, ll.10-13).

Tommy Garrett, the site manager for Fluor Daniel, testified that he also saw nothing that stood out to tell him that there was any kind of hazard in the area. (R.p.1231, l.25-p.1232, l.3).

Paul Bailey, who worked in receiving at the time of the June 1, 2004 incident, testified at trial that he would receive shipments of sodium bromate prior to June 1, 2004 that contained pallets that did not show any kind of hazard labels on them at all. (R.p.847, ll.1-5). He testified that this would occur on two or three pallets per truck that was received. (R.p.848, ll.18-24). Paul Bailey also stated that the yellow oxidizer labels, when visible, were "faded", and one would "have to be up on the pallet and look at it very close" to see it. (R.p.849, ll.7-18). He confirmed that there were pallets that came through that had oxidizer labels that were only visible from the top of the pallet, and never on the side of the pallet. (R.p.855, ll.3-16).

Dr. Jerry Purswell, who was offered at trial as an expert in the field of the OSHA regulations, warnings, safety engineering, risk hazard analysis, ergonomics, and human factors before, opined that the warnings/labels on the bags did not satisfy the OSHA HazCom requirements for an appropriate warning label. (R.p.964, l.16-p.965, l.16; p.966, ll.6-9).

The fact that the Defendants sold a product without an adequate warning that was prominently displayed and clearly visible weighs heavily against them when considering the form of any warnings given in this sophisticated user analysis.

4. **The Defendants acted unreasonably when relying solely upon Engelhard to warn its employees of the dangers present in the sodium bromate as it existed at the time of the June 1, 2004 incident.**

The nature of the relationship between the Defendants and Engelhard made the Defendants' reliance upon Engelhard to properly label the sodium bromate unreasonable. The Defendants were uninformed as to Engelhard's level of reliability as a conduit of necessary information, as no Defendant ever investigated Engelhard's safety practices or level of sophistication, nor made any inquiries into Engelhard's activities or uses of sodium bromate. The Defendants never inspected any shipments that entered the United States from China.

The Defendants are unable to avail themselves of the sophisticated user defense without showing they took affirmative steps to determine whether its purchaser, Engelhard, was reliable as a conduit of necessary information. Willis v. Raymark Industries, Inc., 905 F.2 793, 797 (4th Cir. 1990). This they failed to do. They also did not show they took affirmative steps to ensure that their product in the manner in which it was sold was marked with appropriate warnings in the Engelhard plant.

Angela Granados testified that no one from either Trinity or Matrix ever visited Engelhard's plant to see how they were storing, keeping, and maintaining sodium bromate prior to the fire on June 1, 2004 (R.p.880, ll.8-14). No one from Trinity or Matrix examined Engelhard's safety procedure or receiving procedure. (R.p.882, l.22-p.883, l.25).

John Munson, a salesperson for Defendant Univar, testified that no one from Univar visited Engelhard or inquired about safety issues concerning sodium bromate before the June 1, 2004 incident. (R.p.891, ll.6-12).

A matter that further complicates an analysis of Engelhard's reliability as a conduit of necessary information is the fact that Univar expressly warranted to Engelhard that it would mark each package "to comply with the Occupational Safety and Health Association (OSHA) and the Department of Transportation Code of Federal Regulations (CFR) 49 requirements." (See Page 5 of Engelhard's Purchase Order No. S006011 (R. p. 1541, D.Exh.#100), issued to Univar for the sodium bromate at issue).

John Munson testified that he negotiated this contract with Engelhard and agreed to this specific condition and that Engelhard should have been able to receive it and put it in its plant without putting any more labels or marks on it. (R.p.911, l.25-p.912, l.16; p.913, l.19-p.914, l.2). Mr. Munson's understanding of the contract between Univar and Engelhard was consistent with Engelhard's employees' understanding of the nature of the contract.

David Williams, the purchasing manager at Engelhard in 2004, dealt with Univar on behalf of Engelhard. (R.p.759, ll.6-13). He testified that the relevant provision in the contract was an essential and material term of the contract, whose purpose was to ensure that any shipments from suppliers, such as Univar, comply with federal regulations. (R.p.762, l.9-p.763, l.11). He stated that Engelhard depended on Univar to put OSHA and DOT compliant labels on the sodium bromate, and that the cost of labeling was included in the contract price. (R.p.763,

ll.12-20). David Williams further stated that the purpose of having the labels on the bags was, among other things, to warn the employees of Engelhard as to its hazardous identity. (R.p.763, l.21-p.764, l.7).

Harriet Simmons, the Engelhard distribution manager, and Frank Lamson-Scribner, the Engelhard site manager, expressed the same reliance upon Univar to deliver products compliant with federal regulations as to packaging and labeling. (R.p.756, ll.12-21; p.1101, ll.11-24).

In Theeke v. BASF Corporation, 45 F.3d 431 (Table), 1994 WL 721632 (6th Cir. 1994), a case factually indistinguishable from this one, the United States Court of Appeals, Sixth Circuit, held that the sophisticated user defense was inapplicable because the Defendant, BASF, who supplied flammable and toxic "totes" to the Plaintiff, altered the relationship it had with the Plaintiff by communicating its intention to label all hazardous materials with warning labels, thus rendering the Plaintiff dependent upon BASF's labeling.

The Defendants in this case are unable to claim they acted reasonably by solely relying upon Engelhard to ensure proper labeling on products which they sold. Engelhard had effectively contracted this duty away to Univar, who passed responsibility to Matrix and Trinity, who then passed this duty overseas to the Chinese manufacturers, and none of the Defendants ever inspected the results of these delegations of contractual duty. (R.p.893, ll.4-11; p.1162, ll.1-8; p.1173, ll.1-3). The Defendants are unable to claim that they could reasonably rely on Engelhard to mark the sodium bromate in compliance with OSHA, when Univar expressly contracted and warranted for a price that it would do this for Engelhard. This factor

in the sophisticated user analysis undoubtedly should weigh so heavily in the Plaintiffs' favor, the Defendants' conduct in this regard could never be mistaken as reasonable and, standing alone, precludes the defense.

5. The likelihood of serious injury resulting from the Defendants failing to properly label sodium bromate is great.

The Defendants failed to ensure the sodium bromate they sold to Engelhard was properly labeled and thereby disrupted a federally-mandated hazard communication system designed to protect all employees who must depend on those same warning labels as a first line of defense against the hazards of sodium bromate. When an employer and its employees are dependent, contractually and otherwise, upon a supplier to properly label a hazardous chemical such as sodium bromate, the magnitude of risk involved when that supplier fails to properly label a hazardous chemical, particularly sodium bromate packaged in thirty-six (36) or more plastic bags on shrink-wrapped wooden pallets, increases exponentially, much like the fire fueled by the sodium bromate, and renders the magnitude of the risk totally unacceptable.

The inquiry for purposes of determining duty and the likelihood of serious injury from a supplier's failure to warn must be an objective one with a view of enforcing a standard which transcends any one particular case but, rather provides maximum protection to the industry as a whole. Humble Sand & Gravel, Inc. v. Gomez, 146 S.W.3d 170, 192 (Tex. 2004). A supplier with a duty to warn is liable for each injury caused by its failure to do so. Id. Whether such a duty exists,

however, depends in part on whether injury in general is likely to result from an absence of a warning. Id.

The OSHA standard was enacted to protect employees from the dangers of hazardous chemicals and when suppliers, subject to the OSHA standard, fail to meet their burdens under that standard, the employees are not adequately protected and serious harm may befall them. OSHA promulgated the Hazard Communication Standard (HCS) "to ensure that the hazards of all chemicals produced or imported are evaluated, and that information concerning their hazards is transmitted to employers and employees." 29 C.F.R. § 1910.1200(f)(3); *see also Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 92, 112 S.Ct. 2374, 2380, 120 L.Ed.2d 73, 80 (1992).

The Defendants, Univar, Trinity, and Matrix, are all subject to the OSHA HCS standard, and have a duty to warn employees of subsequent purchasers of the hazards of sodium bromate, especially of hazards created in the form in which that sodium bromate is sold. The Federal Register states: "Suppliers" must be included in this regulation to ensure that information does flow from the manufacturer to the user and that the labeling system is to serve as an immediate warning and as a reminder of the more detailed information provided in other forms. Id. at 53301.

During his testimony, Scott Lawing was shown a hazard communication educational video that instructed:

As part of your hazard communication training your employer will explain the labeling system used where you work. Pay special attention to label training because the label is your first line of defense against the hazards of the chemicals you use.

(R.p.1017, ll.20-24) Scott Lawing agreed that in his hazard communication training he was taught to look for the DOT oxidizer label to immediately alert him to the dangers of chemicals in the Engelhard refinery. (R.p.1018, ll.7-15). Mr. Lawing testified that on June 1, 2004, he believed that the work area was clear of all hazardous materials and nothing was there to hurt anyone. (R.p.1024, ll.18-23) because he had looked at the bags, did not see any yellow labels and/or anything else and that told him to stop." (R.p.1024, l.24-p.1025, l.2) The Plaintiffs, as well all other employees, were taught to recognize warning labels, specifically the yellow oxidizer label as their first line of defense. (R.p. p.985, ll.3-12; p. 1002, ll.2-22; p.1132, ll.10-21). Lawing, Black and Knox, like most people at the Engelhard facility on June 1, 2004, stated that had they seen the yellow oxidizer symbol the pallets would have been moved. (R.p.821, ll.13-18; p.997, ll.17-23; p.1036, ll.6-12).

David Herrington, the Executive HSE director for Fluor Global Services, agreed that one of the purposes of the warning requirements was to give the end user, the last guy in line, a chance to see the danger that was present and to react to it. (R.p.812, ll.5-11). Dwayne Nichols, the Engelhard facilities services manager, testified that when a product in the Engelhard facility does not have a label that is prominently displayed, it is a fair assumption that it's non-hazardous. (R.p.1133, ll.4-7). When this federal system of hazard communication is disrupted by the failure of a supplier of hazardous materials to pass along warning labels to employees who depend on those labels, serious injury is most likely to occur.

The Restatement supports this view. The Comments to Section 388 of the Restatement (Second) of Torts, discussed above, are particularly instructive.

Comment (a) provides:

a. The words "those whom the supplier should expect to use the chattel" and the words "a person for whose use it is supplied" include not only the person to whom the chattel is turned over by the supplier, but also all those who are members of a class whom the supplier should expect to use it or occupy it or share in its use with the consent of such person, irrespective of whether the supplier has any particular person in mind. Thus, one who lends an automobile to a friend and who fails to disclose a defect of which he himself knows and which he should recognize as making it unreasonably dangerous for use, is subject to liability not only to his friend, but also to anyone whom his friend permits to drive the car or chooses to receive in it as passenger or guest, if it is understood between them that the car may be so used. So too, one entrusting a chattel to a common carrier for transportation must expect that the chattel will be handled by the carrier's employees.

(Emphasis added). This comment demonstrates that those within the field of foreseeable use enjoy the protections afforded by the required warnings and are covered by the section. Furthermore, comment (g) provides:

g. The duty which the rule stated in this Section imposes upon the supplier of a chattel for another's use is to exercise reasonable care to give to those who are to use the chattel the information which the supplier possesses, and which he should realize to be necessary to make its use safe for them and those in whose vicinity it is to be used. This information enables those for whom the chattel is supplied to determine whether they shall accept and use it. Save in exceptional circumstances, as where the chattel, no matter how carefully dealt with, is incapable of any safe use, or where the person to whom it is supplied is obviously likely to misuse it, the supplier of a chattel who has given such information is entitled to assume that it will not be used for purposes for which the information given by him shows it to be unfit and, therefore, is relieved of liability for harm done by its misuse to those in the vicinity of its probable use.

Next, comment (h) provides:

h. There are many articles which are so defective as to be incapable of safe use for any of the purposes for which they are normally fit or for use in the manner in which such articles are normally capable of safe use, but which are safe for limited uses or if used with particular precautions. If the appearance of such a chattel does not disclose its defective condition, the supplier is under a duty to exercise reasonable care to disclose its condition, in so far as it is known to him, to those who are to use it, or to inform them that it is fit only for these limited uses, or if used with the particular precautions.

(Emphasis added). Finally, comment (*k*) provides:

k. When warning of defects unnecessary. One who supplies a chattel to others to use for any purpose is under a duty to exercise reasonable care to inform them of its dangerous character in so far as it is known to him, or of facts which to his knowledge make it likely to be dangerous, if, but only if, he has no reason to expect that those for whose use the chattel is supplied will discover its condition and realize the danger involved. It is not necessary for the supplier to inform those for whose use the chattel is supplied of a condition which a mere casual looking over will disclose, unless the circumstances under which the chattel is supplied are such as to make it likely that even so casual an inspection will not be made. However, the condition, although readily observable, may be one which only persons of special experience would realize to be dangerous. In such case, if the supplier, having such special experience, knows that the condition involves danger and has no reason to believe that those who use it will have such special experience as will enable them to perceive the danger, he is required to inform them of the risk of which he himself knows and which he has no reason to suppose that they will realize.

(Emphasis supplied).

Under these comments to Section 388, the supplier must provide the information to persons who are in the foreseeable zone of danger to prevent harm resulting from encountering the dangerous condition. That information must be supplied in a reasonable and adequate fashion or it is useless.

In sum, this factor in the sophisticated user analysis overwhelmingly weighs in favor of the Plaintiffs in this case, as the magnitude of risk involved, in a situation

involving the inadequate labeling of hazardous materials, such as sodium bromate in the form it was sold, is so great that those charged with properly labeling the product and warning of its dangers should never be excused for their failure to do so.

6. The burdens on the Defendants to provide adequate and effective warnings to the Plaintiffs are minimal at best.

At trial, several examples of warning labels on bags were shown to be effective, prominently displayed, and economically feasible for the Defendants. The alternatives that were shown at trial were photos of bags with labels on the side rather than merely the top. (R. pp. 1478-1480, 1483; P.Exh.#18-19, 20-23) and pallets of shrink wrapped bags with stickers on the shrink wrap and the option of placing a larger yellow oxidizer placard onto the sides of each pallet of shrink-wrapped sodium bromate was discussed.

Karen Messana, of Trinity Manufacturing testified that there was nothing keeping her company from printing the same oxidizer yellow diamond on the side of the bags and that it could be done with no difficulty. (R.p.1172, ll.13-23). John Munson of Univar, when shown sodium sulfite bags with markings on the side, testified that the labels are visible and able to be read, from every angle. (R. p. 1483, P.Exh.#23; R.p.908, ll.7-21).

Dr. Jerry Purswell testified that to stitch a label onto the side of a bag would be a very simple and that since the bags are stacked sideways, "you would want to have something that shows up along the edge." (R.p.954, l.4-p.955, l.5). Univar, as testified to by John Munson, had previous to June 1, 2004, as well as since then,

sold to Engelhard chemical products with white Univar USA, Inc. stickers on outside of the shrink wrapped pallets. (R. p. 1479, P.Exh.#19; R.p.901, II.1-17). There is absolutely no reason why Univar could not have labeled the shrink-wrapped pallets of dangerous oxidizers with a warning label just as easily as they labeled it with their corporate logo and other markings.

As discussed earlier, it is not only feasible for the Defendants to adequately label sodium bromate sold by them, but it is required. The Defendants were required by the OSHA HCA to provide adequate and effective warnings. Also, Univar expressly warranted that they would provide products compliant with OSHA and DOT. The burden on the Defendants to comply with federal regulations to fulfill contracts that they willfully enter into is zero and the economic burden on the Defendants to do so is clearly inconsequential or nonexistent. This factor, along with all the other factors, weighs heavily against the Defendants and demonstrates that the magnitude of the risks involved in this case, along with the miniscule cost to the Defendant corporations, demanded that the Defendants provide an effective and prominently visible label, for the benefit of the Plaintiffs.

Based upon the above balancing of the factors analysis and a reasonable cost/benefit analysis, it is clear that when all of the factors are considered, each and every one of them weighs so heavily against the Defendants that the Court should have ruled, as a matter of law, that the sophisticated user defense was not available or applicable in this case and the jury should not have been permitted to consider it as a legal defense to any of the Plaintiffs' claims.

IV. IS THE SOPHISTICATED USER DEFENSE THE LAW OF SOUTH CAROLINA AND, IF SO, DOES IT RELIEVE MANUFACTURERS, SUPPLIERS AND DISTRIBUTORS, PARTICULARLY MATRIX, TRINITY AND UNIVAR, OF THEIR DUTIES TO WARN EVEN IF THE WARNINGS ARE INADEQUATE? (ISSUES 7, 10, 11)

As has been previously briefed herein, Defendants raised the defense of sophisticated user in their pleadings and at trial based on Bragg v. Hi-Ranger, 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995), which discussed the defense and referenced §388 of the Restatement (Second) of Torts. The Bragg case was not decided on that defense, however, and the decision never declared it to be the law of South Carolina. It is, therefore, dicta in that case and, to this day, there has not been a single South Carolina case that holds that the sophisticated user defense is recognized in South Carolina in products liability failure to warn cases. Therefore, Plaintiffs submit that the sophisticated user defense is not the law of South Carolina and Judge Nicholson was in error when he charged the defense to the jury.

It is further submitted that even if this Court is inclined to adopt the sophisticated user defense as the law of South Carolina, the defense is still totally inappropriate to the facts of this case. It is firmly the law in South Carolina that manufacturers, suppliers, distributors, etc. have a duty to warn all who come into contact with their products of the hazards of the products that they create and/or sell. It is also firmly established law in those states where the sophisticated user defense is recognized that it affords no defense at all if there is no warning given or the warning that is given to the sophisticated user is inadequate. In re Zyprexa Products Liability Litigation, 489 F.Supp.2d 230, 273-274 (E.D.N.Y.2007); Leibowitz

v. Ortho Pharmaceutical Corp., 224 Pa. Super 418, 307 A.2d 449, 459 (1973);
Theeke, supra.

In this case, the warning that was on the sodium bromate in question was determined to be inadequate as evidenced by the jury verdicts against Univar on the express warranty claim; therefore, the charge given on the sophisticated user defense was not proper as it did not instruct the jury that in order to apply the defense that it must first find that the warnings were adequate. As a result, the jury inappropriately applied the defense to the negligence and implied warranty of merchantability claims to the prejudice of Plaintiffs and rendered verdicts in favor of the Defendants. For that reason, those verdicts in favor of the Defendants must be reversed and verdicts in favor of the Plaintiffs against Defendants must be entered.

It is further the position of Plaintiffs that if this Court decides to adopt the sophisticated user defense as the law of South Carolina, the seemingly broad application and effect of that defense as discussed and/or suggested by Bragg, supra, should not be adopted but rather a much more narrow rule should be declared. The adoption of the defense and the definition of it should take into account the federal conflicts preemption problems, as well as the state legislative conflicts issue and be such that there will be no question left as to the effect of the defense on state and federal regulations which impose duties to warn and label hazardous goods. To adopt the broad view argued by Defendants at trial that allows a manufacturer, supplier, distributor or employer to breach the public laws of the land and injure someone without responsibility for his/her acts, surely should

not be – cannot be – permitted. Tort cases play important roles in policing hazardous materials and in making the world safer for all of us. No rule or defense should ever be permitted to allow anyone to send through the stream of commerce unlabeled goods, goods with no warnings whatsoever or goods with inadequate warnings in violation of legislatively imposed and clearly established common law duties and escape liability simply because it is lucky enough to get it into the hands of a sophisticated user before it hurts someone.

It is with these thoughts and considerations in mind that Plaintiffs respectfully request that this Court consider the issues in this case, determine whether the sophisticated user defense should be the law of South Carolina and, if so, render an opinion that clearly delineates in a practical and sensible way how the defense is to operate upon the duties of manufacturers and suppliers to label and warn of the dangers and hazards of products they manufacture.

V. The Court erred in granting the Defendants' Summary Judgment Motion as to Plaintiffs' strict liability cause of action because the Plaintiffs were "users" and/or "consumers" within the meaning and embrace of S.C. Code Ann. §15-73-10 (2007)

The trial court granted summary judgment for Defendants on Plaintiffs' strict liability claims, adopting the Defendants' position on the definition of "user" for purposes of the South Carolina Products Liability Act and holding Plaintiffs were not "users" under that Act. (R. 624, lines 15-18). This Court should reverse that ruling.

Scope of Review

Summary judgment is appropriate where there is no genuine issue of material fact, and it is clear that the moving party is entitled to judgment as a matter of law. Rule 56(e), SCRCP; Bank of New York v. Sumter County, 387 S.C. 147, 691 S.E.2d 473 (2010); Russell v. Wachovia Bank, N.A., 353 S.C. 208, 217, 578 S.E.2d 329, 334 (2003). On review of an order granting summary judgment, the appellate court applies the same standard as that used by trial court. Edwards v. Lexington County Sheriff's Dep't, 386 S.C. 285, 688 S.E.2d 125 (2010); Wogan v. Kunze, 379 S.C. 581, 585, 666 S.E.2d 901, 903 (2008).

The issue of interpretation of a statute is a question of law for the court. Catawba Indian Tribe of South Carolina v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007). In a case raising a novel question of law regarding the interpretation of a statute, the appellate court is free to decide the question with no particular deference to the lower court. New York Times Co. v. Spartanburg County Sch. Dist. No. 7, 374 S.C. 307, 309, 649 S.E.2d 28, 29 (2007); In re Hospital Pricing Litigation, King v. AnMed Health, 377 S.C. 48, 659 S.E.2d 131 (2008); In re Campbell, 379 S.C. 593, 599, 666 S.E.2d 908, 911 (2008). See also Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 658 S.E.2d 80 (2008) (the Supreme Court reviews questions of law de novo).

Plaintiffs were "Users" for Purposes of S.C. Code Ann. § 15-73-10

The trial court ruled that the Plaintiffs were not "users" or "consumers" for purposes of South Carolina's Defective Product Act, S.C. Code Ann. § 15-73-10 (2007), and accordingly granted summary judgment to all Defendants as to this claim. This Court should reverse this ruling and remand for a new trial on Defendants' liability to the Plaintiffs under the Act.

Section 15-73-10, entitled "Liability of seller for defective product," adopted Restatement (Second) of Torts § 402A and provides, in pertinent part:

(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 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.

S.C. Code Ann. § 15-73-10 (1976 as amended) (emphasis added). This section imposes strict liability upon the manufacturer and seller for an injury to any user or consumer caused by its product if the product is expected to and does reach the user or consumer without substantial change. Id.

The Act does not expressly define "user or consumer." The trial court ruled that the Plaintiffs were not "users or consumers" of the product or the warnings required by state and federal law so that the Defendants were not liable to them under the Act. This ruling is contrary to established authority under Section 402A.

First, under a strict, literal construction of the Act, the Plaintiffs were users of the inadequately labeled sodium bromate. As employees of the industrial purchaser of the chemicals, the Plaintiffs were the very users and consumers for whom the warnings on the volatile and explosive hazardous workplace product were, and should have been, intended. The Defendants provided the sodium bromate to Plaintiffs' employer for eventual use in manufacturing processes run in the employer's plant. Defendants provided the sodium bromate in significant quantities and on pallets that were intended to be stored and moved about in the plant until needed for later use in the employer's chemical process. The warnings required to be placed on the bags were intended and necessary to alert the buyer/employer's employees that the bags contained highly combustible and volatile material so that any and all employees who might be responsible for storing, handling and moving the pallets of bags would recognize what they were and the danger they represented so that the employees could treat the pallets of bags accordingly.

As previously argued, the OSHA standard applicable in this case was enacted to protect employees from the dangers of hazardous chemicals and when suppliers, subject to the OSHA standard, fail to meet their burdens under that standard, the employees are not adequately protected and serious harm may befall them. OSHA promulgated the Hazard Communication Standard (HCS) "to ensure that the hazards of all chemicals produced or imported are evaluated, and that information concerning their hazards is transmitted to employers and employees." 29 C.F.R. § 1910.1200(f)(3). "Suppliers" must be included in this Regulation to ensure that information does flow from the manufacturer to the user and that the

labeling system is to serve as an immediate warning and as a reminder of the more detailed information provided in other forms. Id. at 53301.

Under the trial court's ruling, the warnings were meaningless and directed at no one. The individuals who encounter the pallets in transit would be "mere bystanders" who did not enjoy any benefit of the product so that the warnings were not meant for them. The buyer's management never actually encountered the pallets and did not work around them; the warnings could not have been meant for them, except as they would have been passed on to the workers who actually did work around the pallets. Under the literal construction of § 15-73-10, these Plaintiffs were precisely the "users" and "consumers" for whom the warnings were intended.

Furthermore, the comments to Rule 402A further support the view that the Act applies to employees such as the Plaintiffs. The Act expressly adopts those comments as the expression of legislative intent in enacting the Act. See S.C. Code Ann. § 15-73-30 (2007) ("Comments to § 402A of the Restatement of Torts, Second, are incorporated herein by reference thereto as the legislative intent of this chapter.") Comment (f) provides:

f. 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.

* * *

"User" includes those who are passively enjoying the benefit of the product, as in the case of passengers in automobiles or airplanes, as well as those who are utilizing it for the purpose of doing work upon it, as in the case of an employee of the ultimate buyer who is making repairs upon the automobile which he has purchased.

Restatement (Second) of Torts § 402A, cmt. (l). Under this comment the terms "user or consumer" includes the final purchaser's employee, and even those "passively enjoying the benefit of the product." Industrial workers, such as the Plaintiffs, owe their very employment to – and thus passively enjoy the benefit of – each industrial product the employer purchases and uses in pursuit of its manufacturing processes. Each employee is a constituent part of the employer's collective enterprise, and are the very users of the warnings required to be placed on the product.

Comment (o) is addressed to *caveat* (1) to § 402A, and explains that the ALI expressed no opinion on whether Section 402A should be applied to "persons other than users or consumers." Comment (o) provides:

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 in 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 the 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.

Restatement (Second) of Torts § 402A cmt. (o). Importantly, comment o does not indicate that even casual bystanders or casual strangers are not within the

protections of Section 402A, but rather explains that during the early 1960s (when Section 402A was developed) there was not judicial support for strict liability in *tort* to cover "casual" victims of what was perceived at the time to be liability grounded in warranty claims.

However, even under comment (o), these Plaintiffs would be within the definition of "user or consumer" for purposes of Section 402A. Welders working within close proximity to highly flammable and explosive material their employer purchased for use in the corporate enterprise are hardly "causal" "strangers" or "bystanders" with respect to the hidden risks embedded within the hazardous workplace substance. These workers are the very potential victims for whose benefit products liability law in general, and Section 402A in particular, imposes the duty on sellers of such dangerous products to provide full, fair and adequate warnings of the hazards lurking within that product.

Comment (o) notes that the retailer's employees who "casually" come in contact with the product have been denied coverage. Such an example, however, is a far cry from industrial welders at an industrial plant whose work necessarily exposes them to the hidden risks of hazardous industrial products that have insufficient warning labels. Those employees are the very persons who must be warned about the dangers of the product so that they will treat the product with appropriate caution. They are the very "users or consumers" of the product label described in comment /.

South Carolina's appellate courts have not explicitly addressed the definition of "user or consumer" for purposes of Section 402A. However, several cases are instructive and should be examined.

In Marchant v. Lorain Div. of Koehring, 272 S.C. 243, 251 S.E.2d 189 (1979), two workers were riding in a bucket suspended from a cable on a crane. The crane's operator extended the boom beyond the length of the cable, causing the crane to "double block," the cable to snap, and the bucket to crash to the ground. The Court allowed warning and design defect claims under the Act to proceed against the crane's manufacturer, relying upon Pike v. Hough Co., 2 Cal. Rptr. 629, 467 P.2d 229 (1970). The Marchant Court described the workers in the bucket as "users" although the workers only passively related to the crane that was operated by someone else, stating:

Moreover, there was no showing that the appellant, Marchant, was cognizant of the crane's tendency to two block when he boarded the bucket. Therefore, a jury issue was created as to whether Lorain was liable in strict liability for its failure to warn a user such as Marchant of the possible hazzard.

272 S.C. at 248, 251 S.E.2d at 191 (emphasis added). In fact, the defect in the crane placed the workers in the bucket at greater risk than the crane's operator, just as the inadequate warnings in this case placed the welders at greater risk than the workers who placed the pallets beneath those workers or the employees who utilized the product in the production process. Marchant supports application of Section 402A to the injured Plaintiffs in this case and the finding they were users of the product for purposes of the required warnings.

In Bray v. Marathon Corp., 356 S.C. 111, 588 S.E.2d 93 (2003), the Supreme Court found the employee in that case who suffered emotional injury from watching a coworker being crushed by a defectively designed and manufactured machine was covered by Section 402A. The Court held the bystander analysis under Kinard v. Augusta Sash & Door Co., 286 S.C. 579, 336 S.E.2d 465 (1985) does not apply to a strict liability cause of action, stating:

We find the Court of Appeals properly concluded that the bystander analysis of Kinard does not apply to a strict liability cause of action. A user of a defective product is not a mere bystander but a primary and direct victim of the product defect. Accord Kately v. Wilkinson, 148 Cal.App.3d 576, 195 Cal.Rptr. 902 (1983) (plaintiff, who was owner and driver of boat that killed daughter's friend, allowed to proceed on products liability claim as user of product); Gnirk v. Ford Motor Co., 572 F.Supp. 1201 (D.S.D.1983) (manufacturer owed independent legal duty to plaintiff due to status as user of car involved in accident, rather than as bystander). Because § 15-73-10 limits liability to the user or consumer, there is no need for a limitation on foreseeable victims to avoid disproportionate liability as was found necessary in the bystander setting. It is not unreasonable to conclude the user of a defective product might suffer physical harm from emotional damage if the use of the product results in death or serious injury to a third person, irrespective of the relationship between the user and third person.

Bray, 356 S.C. at 117, 588 S.E.2d at 95-96. The Court noted that "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." Bray, 356 S.C. at 117, n. 6, 588 S.E.2d at 96, n. 6. Bray does not preclude recovery for the workers in the case sub judice. In fact, Bray supports the argument that Plaintiffs, who were primary and direct victims of the defective warnings, were more than "mere bystanders" for purposes of the Act.

Cases from other jurisdictions are also instructive on this issue. For instance, in Martin v. Survivair Respirators, Inc., 298 S.W.3d 23 (Mo. Ct. App. 2009), Derek Martin, a firefighter, died trying to rescue a fellow firefighter (Morrison) who was lost inside a burning building and Martin's family sued the manufacturers of the firefighters' equipment, Survivair Respirators, Inc. ("Survivair") because of alleged malfunctioning of equipment that contributed to Martin's death. The equipment, call a PASS alarm, was designed to activate and emit a loud screeching sound anytime the wearers were motionless for a period of twenty seconds or more. The fellow firefighter's PASS alarm failed, causing Martin to lose him and to ultimately die of smoke inhalation while trying to locate and rescue the fellow firefighter. The Missouri Court of Appeals noted Missouri had adopted Section 402A:

Here, the PASS device has an intended purpose: to sound an alarm when a firefighter has been motionless for a period of twenty seconds. This is to alert the others in the Rescue Squad that one of their men is down. It is these others who need the alarm in order to find the man who is down. This is exactly what the PASS device was designed to do. Once the alarm sounds, the firefighter wearing the device takes no part in its use, rather it is the others who use the device to find him. Martin, as one of the other firefighters seeking to locate Morrison, relied on Morrison's PASS alarm to sound in order to find him. Thus, Martin was the "ultimate user" of Morrison's PASS alarm.

298 S.W.3d at 32.

In the case sub judice, the Plaintiffs who were in the vicinity of the dangerous materials were the "ultimate users" of the warnings that should have been properly placed and visible on the bags of sodium bromate. Those warnings were required to alert those who encountered the pallets that the bags contained material that would explode if exposed to flame, including red-hot slag byproduct from welding.

In Wirth v. Clark Equipment Co., 457 F.2d 1262 (9th Cir. 1972), the plaintiff was a longshoreman on the waterfront at Portland, Oregon, whose duties required him to work as a part of a crew attending a thirty-ton motor driven wheeled vehicle, known as a van carrier. Clark Equipment Company had manufactured the van carrier and had sold it to Matson Navigation Company, in whose service it was being operated at the time of the accident. Much of the cargo transported by Matson's ships was packed in large wooden vans (or containers or boxes) whose dimensions were approximately 24' x 8' x 8', and whose loaded weight was many tons. The carrier concerned was designed and manufactured for the purpose of straddling such a van, lifting it from a flat bed trailer, or from the pavement, or from the top of another van, and transporting it to another location in the waterfront area. Such work required that the carrier be a large and heavy machine. The carrier 26 feet long, 13 feet wide, and 18 1/2 feet high. The carrier could travel at speeds up to 20 miles per hour. The operator sat in a cab at the rear of the top of the vehicle, near the motor. A representative of the defendant testified that this location of the cab was considered to be the best place to facilitate the ability of the operator to drive the carrier and handle the containers. However, because of the location of the cab, the forward view of the driver was seriously limited to the extent that he could not see the ground for a distance of 51' 9" in front of his right front wheel. There was testimony to the effect that similar carriers "kept running into things," and that light poles and fire hydrants located in their areas of operation had to be protected by buffers of concrete or steel.

The carrier did not contain wheel guards, or "cow catchers," nor did it contain mirrors or closed circuit TV cameras and monitors for the purpose of enhancing the operator's forward vision, and the testimony was conflicting as to the practicability of such safety installations on this machine. The noise of the engine could be heard all over the yard, a fact that provided a constant reminder of the carrier's presence, but not necessarily of its approach. The testimony indicated that Matson had affixed a bell to the carrier that was actuated when the vehicle was in motion, but this bell could not be heard if the motor was turning faster than idling.

The plaintiff's function was that of a "block man," whose duty was to disengage or engage the fasteners that held a van securely on a trailer, in order to facilitate the carrier in lifting the van from the trailer or in depositing it thereon. Thus, the plaintiff's work required him regularly to be in close proximity to the carrier.

On the day of the accident, the crew had completed its assignments for the day, and the driver was in process of moving the carrier to the parking area. His route took him the length of a 30-foot wide aisle that was formed by the locations of two rows of vans. As the driver turned to enter this corridor, he could see the length of it and did not observe the plaintiff; after he had proceeded the entire length of the corridor and had parked the carrier, he learned that his right front wheel had run over the plaintiff, inflicting severe injuries that included the loss of a leg. The evidence indicated that at the time the carrier proceeded down the corridor, the plaintiff was leaning against one of the vans that formed the corridor and was having a smoke.

The plaintiff sought recovery on the basis of negligence in the design and manufacture of the carrier, and strict liability by reason of the manufacture and sale of a carrier that was in an unreasonably dangerous and defective condition. At the conclusion of the trial, the judge submitted to the jury the issue of negligence (and a verdict for the defendant resulted), but he withdrew from the jury the matter of strict liability, ruling that, as a matter of law, the plaintiff could not recover on that basis.

The Ninth Circuit, applying Oregon law, reversed, stating:

The plaintiff in this case was not a "casual stranger." He was an employee of the purchaser of the machine; his duties as block man were an integral part of the functioning of the machine; he was obliged to work in close proximity to the machine; and the safety deficiencies that the trial court found to exist in the carrier created a particular hazard to a person in the plaintiff's position. A trier of fact could readily have found that the plaintiff was a "user" of the machine and that he was no more a bystander than was the driver.

Wirth v. Clark Equipment Co., 457 F.2d at 1265.

Like the plaintiff in Wirth, the Plaintiffs in this case were not "casual bystanders" or "casual strangers" to the product and the warnings that should have been placed in compliance with state and federal law. The defect in the product (lack of an adequate warning) jeopardized these Plaintiffs precisely because of their close proximity to the pallets and their use of welding and cutting machinery that could ignite the sodium bromate. It simply makes no sense to hold that these Plaintiffs are not "users or consumers" of the warnings required for the product for purposes of South Carolina's Products Liability Act. See also Anderson v. Smith, 180 Wis.2d 470, 514 N.W.2d 54 (Ct. App.1993) (the "user" of the product includes

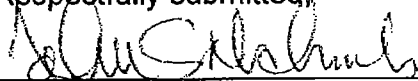
any person who the manufacturer would reasonably foresee coming into contact with its hazardous product; if the product presents a risk to a third person foreseeably endangered by the expected use of the product, additional warnings to remind the immediate user of the latent danger to others may be required). As comment / explains, “[i]t 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.” (Emphasis supplied).

Accordingly, this Court should hold that the Plaintiffs were “users or consumers” for purposes of strict liability under Section 402A with regard to Defendants’ products and the warnings that were required to be on the product. The Court should reverse the trial court’s grant of summary judgment for Defendants and should remand the matter a trial by a jury on Plaintiffs’ claims under Section 15-73-10.

CONCLUSION

For the reasons stated this Court should reverse the trial court's ruling regarding the sophisticated user defense, the verdicts for Defendants on Plaintiffs' negligence and implied warranty claims, and the order granting summary judgment for Defendants on Plaintiffs' strict liability claims. The Court should remand the matter for entry of judgment for the Plaintiffs on the negligence and strict liability claims in light of the jury's verdicts, and for a new trial on the strict liability claims.

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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
FINAL BRIEF**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
PROLOGUE	1
STATEMENT OF ISSUES ON APPEAL	2
STATEMENT OF THE CASE.....	3
STATEMENT OF FACTS.....	9
STANDARD OF REVIEW	27
I. Conduct of Trial: Charging of the Jury	27
II. Exclusive Province of Trial Jury to Make Findings of Fact	28
A. General Rule	28
B. Findings at Trial Regarding Whether a Product Warning was Adequate.....	30
C. Findings at Trial Regarding Whether Individual or Entity Is a Sophisticated User.....	31
III. Summary Judgment	31
LAW/ANALYSIS.....	34
I. The Circuit Court's Decision to Charge the Jury with the Sophisticated User Doctrine as a Defense was Proper	34
A. Sophisticated User Doctrine: A Primer.....	35
1. General Duty to Warn.....	35
2. An Exception to the Rule: Where the Product is Sold to a "Sophisticated User".....	35
3. The Manufacturer and/or Supplier's Right to Rely Upon the Purchaser	38
a. Purchaser's Expertise, Knowledge or Experience	38
b. Purchaser's Requirement to Adhere to OSHA Standard: An Additional Basis for Manufacturer/Supplier Reliance.....	40

4.	Determining Who the End “User” Is for Purposes of Applying the Sophisticated User Doctrine: Employer or Employee	41
5.	Doctrinal Parameters of Application	44
B.	Application of the Sophisticated User Doctrine in South Carolina and the Fourth Circuit.....	46
C.	Application of Sophisticated User Doctrine to Facts of Case <u>Sub Judge</u>	52
II.	The Sophisticated User Doctrine, as Recognized within the South Carolina Common Law, is Not Preempted by Federal Law.....	53
A.	Preemption of State Law Under the Supremacy Clause	54
B.	The Lack of Preemption of Tort Claims (or Their Defenses) via OSHA	55
C.	Sophisticated User Doctrine Remains Operative Even Where Preemption Argument Proves Viable.....	64
III.	The Circuit Court Properly Granted Summary Judgment to Respondents Trinity and Matrix on Respondents/Appellants’ Strict Liability Claim	65
A.	The Law of Strict Liability in South Carolina	67
B.	Application of the Law of Strict Liability in South Carolina Limited Solely to Intended “Users or Consumers”	69
C.	Citation from Other Jurisdictions Limiting Recovery in Strict Liability Claims to Only Those Persons Demonstrated to be the Intended “Users” or “Consumers”	74
D.	Application of the Governing and Guiding Law to the Facts of the Case <u>Sub Judge</u>	80
	CONCLUSION.....	83

TABLE OF AUTHORITIES

Cases

<u>Albrecht v. Baltimore & Ohio R.R. Co.</u> , 808 F.2d 329 (4th Cir. 1987)	59
<u>Allen v. Long Mfg. NC, Inc.</u> , 332 S.C. 422, 505 S.E.2d 354 (Ct. App. 1998).....	30
<u>Anderson v. Green Bull, Inc.</u> , 322 S.C. 268, 471 S.E.2d 708 (Ct. App. 1996)	35, 70
<u>Associated Industries of Massachusetts v. Snow</u> , 898 F.2d 274 (1st Cir. 1990).....	57, 58
<u>Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.</u> , 369 U.S. 355, 82 S. Ct. 780, 7 L. Ed. 2d 798 (1962).....	30
<u>Atlas Roofing Co. v. Occupational Safety Comm'n</u> , 430 U.S. 442, 97 S.Ct. 1261, 51 L.Ed.2d 464 (1976)	60
<u>Azzarello v. Black Brothers Co., Inc.</u> , 391 A.2d 1020 (Pa. 1978).....	76
<u>Baber v. Greenville County</u> , 327 S.C. 31, 488 S.E.2d 314 (1997)	27
<u>Bankers Trust of South Carolina v. Benson</u> , 267 S.C. 152, 226 S.E.2d 703 (1976)	32
<u>Barnwell v. Barber-Colman Co.</u> , 301 S.C. 534, 393 S.E.2d 162 (1989)	74
<u>Baughman v. American Tel. & Tel. Co.</u> , 306 S.C. 101, 410 S.E.2d 537 (1991).....	33
<u>Beale v. Hardy</u> , 769 F.2d 213 (4th Cir. 1985)	40, 46, 50
<u>Bearup v. General Motors Corporation</u> , 2009 WL 249456 (Mich. Ct. App. 2009)	43
<u>Bragg v. Hi-Ranger, Inc.</u> , 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995).....	38, 47, 48, 49, 50, 81
<u>Branham v. Ford Motor Company</u> , 2010 WL 3219499 (2010).....	69
<u>Bray v. Marathon Corporation</u> , 356 S.C. 111, 588 S.E.2d 93 (2003).....	66, 69, 72, 73, 74
<u>Brooks v. Metronic, Inc.</u> , 750 F.2d 1227 (4th Cir. 1984)	51
<u>Burke v. Dow Chemical Co.</u> , 797 F.Supp. 1128 (S.D.N.Y.1992).....	55
<u>Burt v. Fumigation Service and Supply, Inc.</u> , 926 F.Supp. 624 (W.D.Mich. 1996).....	54
<u>Cammer v. Atlantic Coast Line R. Co.</u> , 214 S.C. 71, 51 S.E.2d 174 (1948).....	28
<u>Carolina Home Builders, Inc. v. Armstrong Furnace Co.</u> , 259 S.C. 346, 191 S.E.2d 774 (1972)	81
<u>Carrel v. National Cord & Braid Corp.</u> , 852 N.E.2d 100 (Mass. 2006)	37
<u>Cipollone v. Liggett Group, Inc.</u> , 505 U.S. 504, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992).....	54, 55
<u>Claytor v. General Motors Corp.</u> , 277 S.C. 259, 286 S.E.2d 129 (1982)	70
<u>Companion Prop. & Cas. Ins. Co. v. Airborne Exp., Inc.</u> , 369 S.C. 388, 631 S.E.2d 915 (Ct. App. 2006).....	33
<u>Curcio v. Caterpillar, Inc.</u> , 355 S.C. 316, 585 S.E.2d 272 (2003)	69
<u>David v. McLeod Reg'l Med. Ctr.</u> , 367 S.C. 242, 626 S.E.2d 1 (2006).....	32
<u>Ellis v. Davidson</u> , 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004).....	32
<u>Emory v. McDonnell Douglas Corporation</u> , 148 F.3d 347 (4th Cir. 1998).....	50
<u>English v. General Electric Co.</u> , 496 U.S. 72, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990).....	57
<u>Environmental Encapsulating Corp. v. City of New York</u> , 855 F.2d 48 (2d Cir. 1988).....	59
<u>Fisher v. Monsanto Co.</u> , 863 F.Supp. 285 (W.D.Va. 1994)	39, 40
<u>Florida Lime & Avocado Growers, Inc. v. Paul</u> , 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963).....	55, 56
<u>George v. Fabri</u> , 345 S.C. 440, 548 S.E.2d 868 (2001)	32
<u>Gibbons v. Ogden</u> , 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824).....	56
<u>Goodbar v. Whitehead Bros.</u> , 591 F.Supp. 552 (W.D.Va. 1984)	36, 42, 45, 46, 65
<u>Gray v. Badger Min. Corp.</u> , 676 N.W.2d 268 (Minn. 2004)	36

Griggs v. BIC Corp., 981 F.2d 1429 (3d Cir. 1992)..... 75, 76, 77

Hedgepath v. Am. Tel. & Tel. Co., 348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001)..... 31, 32

Higgins v. E.I. DuPont de Nemours, Inc., 671 F.Supp. 1055 (D. Md. 1987)..... 45

Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707,
105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985)..... 56, 57

Hoffman v. Houghton Chem. Corp., 751 N.E.2d 848 (Mass. 2001)..... 37

Hölst v. KCI Konecranes Intern. Corp., 390 S.C. 29, 699 S.E.2d 715 (Ct. App. 2010)..... 31

in re Voluntary Purchasing Groups Litigation,

2003 WL 21499262 (N.D.Tex. June 24, 2003)..... 76

Jodway v. Kennametal, Inc., 525 N.W.2d 883 (Mich. Ct. App. 1994)..... 41, 46

Jones v. Rath Packing Co., 430 U.S. 519, 97 S. Ct. 1305, 51 L. Ed. 2d 604 (1977)..... 56

Kinard v. Augusta Sash & Door Co., 286 S.C. 579, 336 S.E.2d 465 (1985)..... 74

Koken v. Black & Veatch Constr., Inc., 426 F.3d 39 (1st Cir. 2005)..... 37

Lescs v. Dow Chemical Co., 976 F.Supp. 393 (W.D.Va. 1997)..... 45, 64

Lewis v. Coffing Hoist Div., Duff-Norton Co., Inc., 515 Pa. 334, 528 A.2d 590 (1987)..... 80

Lightner v. Duke Power Company, 719 F.Supp. 1310 (D.S.C. 1989)..... 72

Louisiana Public Serv. Comm'n v. Federal Communications Comm'n,

476 U.S. 355, 106 S. Ct. 1890, 90 L. Ed. 2d 369 (1986)..... 54, 57

Louisiana Public Service Comm'n v. FCC, 476 U.S. 355,
106 S. Ct. 1890, 90 L. Ed. 2d 369 (1986)..... 56

Mackowick v. Westinghouse Electric Corp., 575 A.2d 100 (Pa. 1990)..... 78, 79

Main v. Corley, 281 S.C. 525, 316 S.E.2d 406 (1984)..... 32

Marques v. Bellofram Corp., 550 N.E.2d 145 (Mass. 1990)..... 42

McKinnon v. Skil Corp., 638 F.2d 270 (1st Cir.1981)..... 62

McWee v. State, 357 S.C. 403 n.4, 593 S.E.2d 456 n.4 (2004)..... 27

Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724,
105 S. Ct. 2380, 85 L. Ed. 2d 728 (1985)..... 56

Minichello v. U.S. Industries, Inc., 756 F.2d 26 (6th Cir. 1985)..... 59

Morgan v. Brush Wellman, Inc., 165 F.Supp.2d 704 (E.D.Tenn. 2001)..... 42

National Solid Wastes Management Ass'n v. Killian, 918 F.2d 671 (7th Cir. 1990)..... 58, 60

New Jersey State Chamber of Commerce v. Hughey, 774 F.2d 587 (3d Cir.1985),
appeal after remand, 868 F.2d 621 (3d Cir.), cert. denied,
492 U.S. 920, 109 S. Ct. 3246, 106 L. Ed. 2d 593 (1989)..... 59

O'Neal v. Celanese Corp., 10 F.3d 249 (4th Cir. 1993)..... 49, 50

Odom v. G.D. Searle & Co., 979 F.2d 1001 (4th Cir. 1992)..... 51

Pedraza v. Shell Oil Company, 942 F.2d 48..... 55, 59

People v. Chicago Magnet Wire Corp., 126 Ill.2d 356, 128 Ill.Dec. 517,
534 N.E.2d 962..... 58, 61

Philbrook v. Glodgett, 421 U.S. 707, 95 S. Ct. 1893, 44 L.Ed.2d 525 (1975)..... 57

Phillips v. Cricket Lighters, 576 Pa. 644, 841 A.2d 1000 (2003)..... 77, 78, 79, 80

Portelli v. IR Constr. Products Co., Inc., 218 Mich.App. 591,
554 N.W.2d 591 (1996)..... 43, 44

Pratico v. Portland Terminal Co., 783 F.2d 255 (1st Cir.1985)..... 59, 63

Puffer's Hardware Inc. v. Donovan, 742 F.2d 12 (1st Cir.1984)..... 58

Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947)..... 55, 56

Richards v. United States, 369 U.S. 1, 82 S. Ct. 585, 7 L. Ed. 2d 492 (1962)..... 58

<u>Riley v. Warren Manufacturing, Inc.</u> , 688 A.2d 221 (Pa. Super. Ct. 1997)	75, 76
<u>Russo v. Abex Corp.</u> , 670 F.Supp. 206 (E.D. Mich. 1987)	45
<u>Schall v. Strum, Ruger Co., Inc.</u> , 278 S.C. 646, 300 S.E.2d 735 (1983)	69, 74
<u>Securities Industry Ass'n v. Connolly</u> , 883 F.2d 1114 (1st Cir.1989), <u>cert. denied</u> , 495 U.S. 956, 110 S. Ct. 2559, 109 L. Ed. 2d 742 (1990)	56
<u>Sharp v. Wyatt, Inc.</u> , 627 A.2d 1347 (Conn. Ct. App. 1993)	30, 45
<u>Sizemore v. Georgia-Pacific Corp.</u> , 1996 WL 498410 (D.S.C. 1996)	47, 48
<u>Smith v. Walter C. Best, Inc.</u> , 927 F.2d 736 (3d Cir. 1990)	40, 45
<u>South Carolina Dep't of Highways & Public Transportation v. Galbreath</u> , 315 S.C. 82, 431 S.E.2d 625 (Ct. App. 1993)	27
<u>State v. Brown</u> , 360 S.C. 581, 602 S.E.2d 392 (2004)	29
<u>State v. Elmore</u> , 368 S.C. 230, 628 S.E.2d 271 (Ct. App. 2006)	66
<u>State v. Pittman</u> , 373 S.C. 527, 647 S.E.2d 144 (2007)	28
<u>Strader v. Tennessee</u> , 362 S.W.2d 224 (Tenn. 1962)	27
<u>Taylor v. Airco, Inc.</u> , 503 F.Supp.2d 432 (D.Mass 2007)	39, 41, 42
<u>Town of Belton v. Campbell</u> , 103 S.C. 424, 88 S.E. 30 (1916)	29
<u>Townes Associates, Ltd. v. City of Greenville</u> , 266 S.C. 81, 221 S.E.2d 773 (1976)	29
<u>United States v. Heirs of Boisdore</u> , 49 U.S. (8 How.) 113, 12 L.Ed. 1009 (1849)	57
<u>Van Buskirk v. West Bend Company</u> , 100 F. Supp. 2d 281 (E.D.Pa. 1999)	75
<u>Washington v Department of Transp.</u> , 8 F.3d 296 (5th. 1993)	41
<u>Watson v. Ford Motor Co.</u> , 389 S.C. 434, 699 S.E.2d 169 (2010)	29
<u>Williams v. Riedman</u> , 339 S.C. 251, 529 S.E.2d 28 (2000)	27
<u>Willis v. Raymark Indus., Inc.</u> , 905 F.2d 793 (4th Cir. 1990)	46, 48
<u>Wilson v. Moseley</u> , 327 S.C. 144, 488 S.E.2d 862 (1997)	31
<u>Wisconsin Public Intervenor v. Mortier</u> , 501 U.S. 597, 111 S. Ct. 2476, 115 L. Ed. 2d 532 (1991)	56

Statutes

7 U.S.C. § 136	64
Conn.Gen.Stat. Ann. § 31-293	62
S.C. Code Ann. § 15-73-10	66, 69, 73, 74, 80
S.C. Code Ann. §§ 15-73-10 to -30	69
S.C. Code Ann. § 42-1-560	4

Other Authorities

29 C.F.R. § 1901.2	58
29 C.F.R. § 1910.1200	10
29 C.F.R. § 1910.251	21
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29 C.F.R. § 1910.253	21
29 U.S.C. § 652	58
29 U.S.C. § 653	60, 62

30 S.C. Jur. <u>Products Liability</u>	30, 36, 38, 48, 68
63A Am. Jur. 2d <u>Products Liability</u>	30, 31, 36, 38, 43
7 Am. Jur. <u>Proof of Facts</u>	38, 41
75 Am. Jur. 2d <u>Trial</u>	29
Occupational Health and Safety Act of 1969	63
Restatement (Second) of Torts.....	35, 37, 45, 50, 66, 70, 71, 72, 75, 77, 79, 80
S.C. Const. art. V	27
U.S. Const. art. VI.....	54, 56

Rules

Rule 56, SCRCF.....	31, 33
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Treatises

Allen E. Korpela, Annotation, <u>Failure to Warn as Basis of Liability Under Doctrine of Strict Liability in Tort</u> , 53 A.L.R.3d 239 (1973).....	36
<u>Black's Law Dictionary</u> (8th ed. 2005).....	70
<u>Getting away with Murder: Federal OSHA Preemption of State Criminal Prosecutions for Industrial Accidents</u> , 101 Harv.L.Rev. 535 (1987).....	61
Ralph King Anderson, Jr., <u>South Carolina Requests to Charge – Civil</u> , 2002	47
<u>The Extent of OSHA Preemption of State Hazard Reporting Requirements</u> , 88 Colum.L.Rev. 630 (1988).....	61, 62, 63

PROLOGUE

Here is the problem. The bags were never intended to resist the heat produced by hot molten slag. That's the problem. The problem is not that this is an inferior or dangerous packaging. That's not it at all. The problem is it was exposed to hot molten slag.

The pallets of sodium bromate should have been removed from the hot work area. [The employer] Engelhard had many opportunities to do this, but it did not happen. If it had, this accident would not have happened and these gentlemen would not have been injured. Univar, Trinity, and Matrix are not responsible for this accident.

Ellis Johnston, Respondents Trinity & Matrix's trial counsel at closing argument.

STATEMENT OF ISSUES ON APPEAL

- I. Whether the Circuit Court properly charged the Sophisticated User Doctrine as a defense to Appellants' negligence and implied warranty claims?¹
- II. Whether the application of the Sophisticated User Doctrine as a defense is preempted by federal law?²
- III. 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.?³

¹ In response to Appellants' Issues of Appeal numbers 3, 7, 8, 9, 10, and 11.

² In response to Appellants' Issues of Appeal numbers 1 and 2.

³ In response to Appellants' Issues of Appeal number 12.

STATEMENT OF THE CASE

Mr. and Mrs. Martin commenced a products liability action against the Defendants 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. (R. pp. 1712-1719.)

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. (R. pp. 1704-1711.) Mrs. Black's claim was later dropped. (R. pp. 1655-1656.)

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. (R. pp. 1758-1765.)

All Defendants timely answered the aforementioned complaints, denying their material allegations and asserting numerous affirmative defenses. (R. pp. 1720-1757; R. pp. 1766-1785.) Univar later amended its answer as to each complaint, asserting additional affirmative defenses. (R. pp. 1786-1809.)

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, Univar made a number of dispositive motions, including motions for summary judgment on the Plaintiffs claims for strict liability; for negligence and failure to warn; regarding the Plaintiffs' claims that were based in whole or, in part, on the alleged violation of the HazCom Standard; for strict liability, negligence, breach of warranty for lack of and/or inadequate warnings; for breach of express warranty; and, with respect to Messrs. Black and Martin, for failure to comply with § 42-1-560(b). (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 Plaintiffs' strict liability claim. (R. pp. 391-726.)

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. (R. p. 2309, lines 1-21; R. pp. 1654.) At the close of the Plaintiff's evidence, the Defendants' moved for and were denied a directed verdict on the issue of liability. (R. p. 1037, line 15 – p. 1095, line 15.) At the close of all evidence, the Defendants again moved for and were denied a directed verdict on the issue of liability. At this time, the trial court granted the Plaintiffs' motions for a directed verdict on the issue of the application of the OSHA HazCom Standard and also found, as a matter of law, the existence of the express warranty that the Plaintiffs alleged to have been given by Univar. (R. p. 2455, line 23 – p. 2496, line 22.)

Five total causes of action were thereafter 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 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.)

Univar timely moved for JNOV or, alternatively, a new trial. (R. pp. 2253-2272.) 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. (R. pp. 1272-1354; R. pp. 2-5.)

Univar took 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. (R. pp. 1871-1900; R. pp. 1657-1662; R. pp. 1663-1667.)

The damages phase of trial began on December 1, 2008. (R. pp. 2497) 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). (R. pp. 2498-2500; R. pp. 1668-1670.)

Univar timely filed/renewed its JNOV motion and also moved to have the awards in favor of Mr. Black and the Martins set off in accordance with their settlements with Trinity and Matrix. (R. pp. 2273-2301; R. pp. 2249-2252.) All Plaintiffs' moved for new trials absolute on the issue of damages or, alternatively, new trial nisi additur on the issue of damages. (R. pp. 377-390.)

The trial court heard post-trial motions on January 21, 2009, denying Univar JNOV at that time. (R. pp. 1355-1412.) On March 31, 2009, the trial court entered orders denying Univar a setoff and also denying all Plaintiffs but Messrs. Martin and Lawing's motions for new damages trials. (R. pp. 12-20; R. pp. 1671-1673.) On the same date, the trial court entered orders granting Messrs. Martin and Lawing new trials nisi additur on the issue of damages only, forcing Univar to chose between accepting additurs of \$1,400,000 at to Mr. Martin and \$2,000,000 as to Mr. Lawing or proceeding directly to a new damages trial. (R. pp. 1674-1686.)

This consolidated appeal timely followed. (R. pp. 1871-2047; R. pp. 1695-1703.)

STATEMENT OF FACTS⁴

Engelhard is a world leader in refining precious metals, and is a sophisticated user of many chemicals, including the chemical sodium bromate. (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, greatly 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 uses 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 Plaintiffs’ 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 Univar 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.

⁴ In addition to the factual recitation presented here, where pertinent, facts will be cited within the arguments that follow.

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 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, never having physically passed through the “workplace” of any of the Defendants. (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.)⁵ Delivery of the product directly to Engelhard without its passage through any of the Defendants’ facilities is known as a “drop shipment” or “drop shipping.” (R. p. 2313, line 11 – p. 2314, line 25.)

The sodium bromate involved in the June 1, 2004, accident corresponds to Engelhard purchase order S006011 (the “Subject Purchase Order”). (R. p.

⁵ As will be further discussed, *infra*, “workplace” is a defined term under the OSHA HazCom standard. 29 C.F.R. § 1910.1200(c).

753, line 10 – p. 755, line 2; R. pp. 1541 - 1556.) David Williams was Engelhard's purchasing manager at the time of the subject accident. (R. p. 758, lines 11-19.) He testified 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. (R. p. 759, lines 6-23.)

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. Williams did not actually send the Subject Purchase Order to Univar until January 6, 2004. (R. p. 2324, lines 16-21; R. p. 759, lines 6 – p. 761, line 6; R. pp. 1541 - 1556.) Prior to this date, Williams had engaged in oral negotiations with Univar concerning "pricing." (R. p. 761, lines 7-9) (emphasis added.)

The Subject Purchase Order contained the following language pertinent to the express warranty issues now before the Court:

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.

**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.

(R. pp. 1541 - 1556.)

The shipment of sodium bromate involved in the June 1, 2004, accident left port in China on January 15, 2004, arriving at the Port of Charleston on February 6, 2004. (R. pp. 1569 - 1575; R. p. 1475; R. pp. 1476 - 1477; R. p. 1487; R. p. 753, lines 10 - p. 754, line 8; R. p. 2311, line 22 - p. 2314, line 4; R. p. 2320, lines 6-19; R. p. 2322, line 4 - p. 2323, line 9; R. p. 2347, line 8 - p. 2348, line 11.) It was delivered by truck 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.)

Engelhard followed an express, written procedure for receiving, inspecting, and verifying the different types of materials delivered to its Seneca facility. (R. pp. 1519-1523.) 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.” (R. pp. 1519-1523.) Sodium bromate was such a Purchased Material. (R. p. 758, line 11 – p. 759, line 18.)

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.

(R. pp. 1519 – 1523) (emphasis added). “CIMS” stands for Customer Information Management System. (R. pp. 1519-1523.) It is Engelhard’s computerized inventory control system. Materials received and accepted are entered into the system and identified by lot number so that the physical

location within the facility of each shipment of material received is tracked. (R. p. 2322, lines 4-22; R. p. 2343, lines 2-23; R. p. 2347, line 9 – p. 2351, line 3.)

Harriet Simmons is Engelhard's distribution manager, a position she has held since shortly before the time of the June 1, 2004 accident. In this position, she oversees Engelhard's receiving dock, shipping dock, and warehouse facilities. (R. p. 750, lines 14-20.) 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. (R. p. 2326, line 22 – p. 2328, line 8; R. p. 2333, line 8 – p. 2337, line 12; R. p. 2338, line 7 – p. 2343, line 23; R. pp. 1519 - 1523; R. pp. 1524 - 1531.) 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. (R. p. 2331, line 15 – p. 2332, line 20.) The record is clear that, after its acceptance by Engelhard, Univar had no responsibility for – or ability to control – the storage, use, or handling of the subject sodium bromate in the Engelhard facility. (R. p. 2355, lines 5-24; R. p. 2435, lines 8-21.)

As evidenced by Trinity's preparation of a packing list for the subject sodium bromate on January 1, 2004, and Matrix's issuance of a purchase order to the Chinese exporter for the subject sodium bromate on January 2, 2004, Univar had already taken action to supply Engelhard with the sodium bromate involved in the June 1, 2004, accident by the time the Subject Purchase Order (which contains the purported language of express warranty as to warning labels upon which the Plaintiffs rely) was sent to Univar on January 6, 2004. (R. pp. 1472-1474; R. p. 2310, line 22 – p. 2311, line 12.)

Univar's invoice for the subject sodium bromate was issued to Engelhard on February 16, 2004. This invoice, which Engelhard duly paid, contained the following language pertinent to the express warranty issues now before this Court:

Univar USA Inc. warrants that the goods conform to
Univar USA Inc.'s current published specifications.
UNIVAR USA INC. MAKES NO OTHER

WARRANTY, EXPRESS OF IMPLIED, INCLUDING FITNESS FOR A PARTICULAR PURPOSE OR MERCHANTABILITY, BUYER ASSUMES ALL RISK OF LIABILITY RESULTING FROM USE OF SUCH GOODS. UNIVAR USA INC.'S LIABILITY FOR NONCONFORMING GOODS IS EXCLUSIVELY LIMITED AT UNIVAR USA INC.'S OPTION, TO THE GOOD'S PURCHASE PRICE OR REPLACEMENT OF THE GOODS. UNIVAR USA INC. IS NOT LIABLE FOR INCIDENTAL OR CONSEQUENTIAL DAMAGES.

(R. p. 1476.)

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." (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.)⁶ This

⁶ 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.)

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 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.) For the Court's edification, Univar notes that photographs depicting sodium bromate representative of that involved in the subject accident were introduced at trial as the Defendants' liability phase Exhibit Nos. 94 and 103. (R. p. 2428, line 6 – p. 2429, line 18; R. p. 2433, lines 8-16; R. pp. 1539 - 1540; R. pp. 1557 - 1563.)

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.) Univar, 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.)⁷ 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 work crew involved in the actual removal of the condensate pipe consisted of four men: Mr. Black, Mr. Martin, Mr. Lawing, and Steve Knox. Knox was Engelhard's maintenance "lead," i.e., the leader of the work crew. He selected Mr. Black, Mr. Martin, and Mr. 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

⁷ The pipe rack is depicted in the Plaintiffs' liability phase Exhibit No. 85. (R. pp. 2501 – 2515.)

well as OSHA's welding code⁸ – 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.)

Use of the oxyacetylene torch to remove the pipe constituted a type of work known by Engelhard to be hazardous.⁹ 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.)

⁸ 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.”

⁹ 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.

Engelhard has express written procedures to be followed for issuance of a hazardous work permit authorizing hot work. Among other things, these procedures provide 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 requires 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.

(R. p. 1514; R. p. 2389, line 1 – p. 2391, line 5 (emphasis added).)¹⁰

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

¹⁰ 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.)

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.)

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.)¹¹

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, Mr. Black, and Mr. Lawing were in the pipe rack, with Knox and Mr. Black taking turns operating the oxyacetylene torch to cut the condensate pipe into approximately eight-foot sections and with Mr. Lawing assisting in lowering the removed sections down from the pipe rack to the floor. Mr. 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.)

¹¹ 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. Mr. Black and Mr. Lawing remained harnessed in the pipe rack with Mr. 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 the Plaintiff Workers to seek and receive workers' compensation benefits, and the Plaintiffs to pursue this third-party litigation, which, with respect to Mr. Black and the Martins, has already resulted in a minimum recovery of \$4,500,000.

STANDARD OF REVIEW

I. Conduct of Trial: Charging of the Jury

The conduct of trial is largely within the trial judge's sound discretion, the exercise of which will not be disturbed on appeal absent an abuse of that discretion or the commission of a legal error that results in prejudice for appellant. Williams v. Riedman, 339 S.C. 251, 529 S.E.2d 28 (2000); Baber v. Greenville County, 327 S.C. 31, 488 S.E.2d 314 (1997); South Carolina Dep't of Highways & Public Transportation v. Galbreath, 315 S.C. 82, 431 S.E.2d 625 (Ct. App. 1993).

The conduct of trial includes the trial judge's charging of the law to the jury at the conclusion of the presentation of evidence. See S.C. Const. art. V, § 21 (stating the trial judge's role at trial includes declaring the law to the jury); see also, e.g., Strader v. Tennessee, 362 S.W.2d 224, 229 (Tenn. 1962) ("It is the duty of the circuit judge to charge the law applicable to the evidence").

The judge alone is the arbiter of what law is charged to the jury for its application to the evidence during its determination of culpability. See McWee v. State, 357 S.C. 403 n.4, 593 S.E.2d 456 n.4 (2004) (quoting "standard language that appears in jury charges," which states: "As the

presiding judge, I am the sole judge of the law of this case, and it is your duty as jurors to accept and apply the law as I now state it to you.”).

Whether in the civil or the criminal context, our case law is legion in holding an appellate court will not reverse the trial judge’s decision regarding a jury charge absent an abuse of discretion. E.g., State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007). Therefore, the appellate tribunal reviews the evidence only to determine whether it was sufficient to submit a charge to the jury.

II. Exclusive Province of Trial Jury to Make Findings of Fact

A. General Rule

The tasks of resolving contradictions in evidence, determining witnesses credibility, and deciding what testimony to accept when resolving a case are all left to the jury as factfinder. See Cammer v. Atlantic Coast Line R. Co., 214 S.C. 71, 81, 51 S.E.2d 174, 178 (1948) (holding explicitly that tasks of resolving contradictions in evidence, determining witnesses credibility, and deciding what testimony to accept when resolving a case are all left to the jury as factfinder; and “[t]hese propositions are such elementary observations there is no need to cite supporting authority”).

In an action at law, on appeal of a case tried by a jury, this Court may only correct of errors of law. Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010) (citing Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976)).

Concordantly, the factual findings of the jury will not be disturbed unless no evidence reasonably supports the jury's findings. Id. Stated another way, a reviewing court is constrained from substituting its own factual findings and application of the same to the law for that of the trial jury in an action at law. Cf. State v. Brown, 360 S.C. 581, 602 S.E.2d 392 (2004) (“[A]n appellate court does not sit as a factfinder in a criminal case and should avoid resolving cases in a manner which appears to place the appellate court in the jury box.”); Town of Belton v. Campbell, 103 S.C. 424, ___, 88 S.E. 30, 31 (1916) (holding in a criminal action involving the violation of a town ordinance prohibiting the storing and selling of intoxicants that the Supreme Court would not delve into the question as to whether the substance at issue was forbidden by the ordinance, stating such a finding was “[A] question of fact with which this court has nothing to do. It has no jurisdiction to find the facts in a case at law.”); see also 75 Am. Jur. 2d Trial § 603 at n.1 (“Under the Seventh Amendment to the Federal Constitution, which provides

that 'no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law,' neither the U.S. Supreme Court nor a U.S. court of appeals can redetermine facts found by a jury any more than a U.S. district court can predetermine them.") (citing Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 82 S. Ct. 780, 7 L. Ed. 2d 798 (1962)).

B. Findings at Trial Regarding Whether a Product Warning was Adequate

In the products liability context, the determination of whether a product warning was adequate is one of fact for the jury to decide. See 30 S.C. Jur. Products Liability § 39 (citing Allen v. Long Mfg. NC, Inc., 332 S.C. 422, 505 S.E.2d 354 (Ct. App. 1998); see also Sharp v. Wyatt, Inc., 627 A.2d 1347, 1361 (Conn. Ct. App. 1993) (in a products liability case involving whether the defendants discharged their duty to warn: "Whether a warning is adequate is a decision for the trier of fact."); see also 63A Am. Jur. 2d Products Liability § 1108 ("It is generally for the jury to determine the extent and effect of the plaintiff's knowledge of the product or danger.")).

C. Findings at Trial Regarding Whether Individual or Entity Is a Sophisticated User

Whether an individual or entity is a sophisticated user is ordinarily a question of fact to be decided by a jury. See 63A Am. Jur. 2d Products Liability § 1108.

III. Summary Judgment

Pursuant to the South Carolina Rules of Civil Procedure, summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See Rule 56(c), SCRCPP (“A motion for summary judgment shall be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”); Wilson v. Moseley, 327 S.C. 144, 488 S.E.2d 862 (1997); Holst v. KCI Konecranes Intern. Corp., 390 S.C. 29, 699 S.E.2d 715 (Ct. App. 2010).

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Hedgepath v. Am. Tel. & Tel. Co., 348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001).

When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Id.; Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004). To that end, the circuit judge is not required to “single out some one morsel of evidence and attach to it great significance when patently the evidence is introduced solely in a vain attempt to create an issue of fact that is not genuine.” Main v. Corley, 281 S.C. 525, 527, 316 S.E.2d 406, 407 (1984).

In determining whether any triable issues of fact exist, the trial court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 626 S.E.2d 1 (2006).

When reviewing a motion for summary judgment, the trial court must remain mindful of this admonition: The purpose of summary judgment is to expedite disposition of cases, which do not require the services of a fact finder. George v. Fabri, 345 S.C. 440, 548 S.E.2d 868 (2001). Bankers Trust of South Carolina v. Benson, 267 S.C. 152, 155, 226 S.E.2d 703, 704 (1976).

“A motion for summary judgment is akin to a motion for a directed verdict” because “[i]n each instance, one party must lose as a matter of law.” Main, 281 S.C. at 526, 316 S.E.2d at 407; see also Baughman v. American

Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991) (holding standard for summary judgment “mirrors” standard for directed verdict).

On appeal, the Court of Appeals applies the same standard of review as the trial court when reviewing the grant of a summary judgment motion under Rule 56(c), SCRCP. Companion Prop. & Cas. Ins. Co. v. Airborne Exp., Inc., 369 S.C. 388, 390, 631 S.E.2d 915, 916 (Ct. App. 2006).

LAW/ANALYSIS

I. The Circuit Court's Decision to Charge the Jury with the Sophisticated User Doctrine as a Defense was Proper

In their appeal to this Court, Appellants seek reversal of the jury verdict, which found Respondents Trinity and Matrix not liable for their alleged injuries resulting from the June 1, 2004, explosion at Engelhard. Appellants bottom and premise their pursuit of this relief upon, inter alia, the assertion the trial judge erred by charging the jury with the Sophisticated User Doctrine as a defense to liability. Stated succinctly, Appellants aver:

- The Circuit Court erred by charging the Sophisticated User Doctrine because it is not the law in South Carolina;
- The Circuit Court erred by charging the Sophisticated User Doctrine as a defense to Appellants' negligence and implied warranty of merchantability claims; and
- The Circuit Court erred by charging the Sophisticated User Doctrine as a defense because application of this doctrine is preempted by OSHA.

Respectfully, Appellants' exceptions concerning the applicability of the Sophisticated User Doctrine in South Carolina and its use in the instant case are in error. To the contrary, review of the law and the evidence propounded in the trial of this case demonstrate:

- The Sophisticated User Doctrine is recognized a defense in South Carolina product liability cases;
- Sufficient evidence existed for the jury to determine the Sophisticated User Doctrine precluded recovery by Appellants from Respondents Trinity and Matrix;
- The circuit judge was the sole arbiter of what law was charged to the jury;
- The findings of fact regarding whether the Sophisticated User Doctrine applied as a defense was left to the province of the trial jury, rather than the trial judge or the reviewing appellate court; and
- The Sophisticated User Doctrine as a defense was not preempted by OSHA.

A. Sophisticated User Doctrine: A Primer

1. General Duty to Warn

In order to prevent a product from being unreasonably dangerous, the supplier may be required to give a warning on the product concerning its use.

Anderson v. Green Bull, Inc., 322 S.C. 268, 471 S.E.2d 708 (Ct. App. 1996)

(citing Restatement (Second) of Torts § 402A cmt j.).

2. An Exception to the Rule: Where the Product is Sold to a “Sophisticated User”

A product manufacturer or supplier, however, has no duty to warn of danger in using a product when the ultimate user or party at risk of injury

possesses special knowledge, sophistication, or expertise in relation to the product. 30 S.C. Jur. Products Liability § 46; 63A Am. Jur. 2d Products Liability § 1063; Allen E. Korpela, Annotation, Failure to Warn as Basis of Liability Under Doctrine of Strict Liability in Tort, 53 A.L.R.3d 239 (1973) (“Under the sophisticated user defense to a products liability claim, a product supplier has no duty to warn the ultimate user if it has reason to believe that the user will realize the product’s dangerous condition.”) (citing Gray v. Badger Min. Corp., 676 N.W.2d 268 (Minn. 2004)); see also Goodbar v. Whitehead Bros., 591 F.Supp. 552, 561 (W.D.Va. 1984) (“[W]hen the supplier has reason to believe that the purchaser of the product will recognize the dangers associated with the product, no warnings are mandated.”).

A sophisticated user’s knowledge of the dangers of a product is the equivalent of prior notice to the user of the dangers for purposes of the manufacturer’s products liability. 63A Am. Jur. 2d Products Liability § 1063.

The Sophisticated User Doctrine relieves a manufacturer of liability for failing to warn of a product’s latent characteristics or dangers when “the end user knows or reasonably should know of a product’s dangers.” Carrel v.

National Cord & Braid Corp., 852 N.E.2d 100, 108 (Mass. 2006) (quoting Hoffman v. Houghton Chem. Corp., 751 N.E.2d 848, 855 (Mass. 2001)).

The Sophisticated User Doctrine “applies where a warning will have little deterrent effect,” and it “allows the fact finder to determine that no such duty [to warn] was owed.” Id. at 109 (citation omitted).

The doctrine is derived from the Restatement (Second) of Torts § 388 (1965). It is a corollary of the “open and obvious” doctrine,¹² a theory that has been long recognized as a defense in products liability cases grounded on a claim of failure to warn.¹³ Carrel, 852 N.E.2d 109.

¹² Koken v. Black & Veatch Constr., Inc., 426 F.3d 39, 45-46 (1st Cir. 2005).

¹³ The duties to warn are set forth in the Restatement (Second) of Torts § 388 (1965), which states:

One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel ... if the supplier

- (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and
- (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and
- (c) fails to exercise reasonable care to inform them of its dangerous condition or of facts which make it likely to be dangerous.

3. The Manufacturer and/or Supplier's Right to Rely Upon the Purchaser

a. Purchaser's Expertise, Knowledge or Experience

Applying this precedent, a supplier may rely on the professional expertise of the user and tailor its warnings accordingly. 30 S.C. Jur. Products Liability § 46; 63A Am. Jur. 2d Products Liability § 1063. Where a knowledgeable or sophisticated user is involved, the manufacturer need not warn against dangers of which the user is either actually aware or should be aware. Id.; see also 7 Am. Jur. Proof of Facts 3d 305.

The sophisticated user may be presumed to know of product-related dangers because of the user's familiarity or extensive experience with the product. Id. In such a case, the duty to warn may be negated even if the user lacked actual knowledge of the danger, based on the determination that a user with such experience should have known of the danger. Id.; see also Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995) (recognizing evidence in a products liability action brought by an employee of an electrical contractor against a manufacturer of an aerial device warranted an instruction on the sophisticated user defense - evidence showed that the contractor

frequently used and was familiar with aerial devices and that its management was aware that conductive materials like conductive hoses should not be used on the buckets of such devices).

Ample case law abounds, which confirms that a supplier may reasonably rely on the employer when its experience and knowledge is substantial and equals the supplier's.

In Taylor v. Airco, Inc., 503 F.Supp.2d 432 (D.Mass 2007), the administrator of a decedent worker's estate pursued a products liability action, alleging the decedent's intrahepatic cholangiocarcinoma was caused by his exposure to the vinyl chloride. Suppliers and manufacturers of vinyl chloride filed motions for summary judgment on failure to warn, fraud, and conspiracy, which were granted. The court applied the Sophisticated User Doctrine as a basis for the grant of summary judgment, holding the suppliers and manufacturers were reasonable in relying on employer to provide adequate warnings to employee for purposes of the defense. Id. at 444-45.

In Fisher v. Monsanto Company, 863 F.Supp. 285 (W.D.Va. 1994), the trial court held the defendant supplier reasonably relied on the employer, who had "acquired its knowledge and expertise by developing the specifications for [the chemical], performing research and keeping abreast of public domain

research ..., participating in trade organizations, corresponding with [the defendant] and others, attending meetings, receiving various publications, and issuing its own publications.” Id. at. 288-89.

In Smith v. Walter C. Best, Inc., 927 F.2d 736, 741 (3d Cir. 1990), the court found it reasonable for the manufacturer to assume that the employer knew of the dangers of silica “given the state of common medical knowledge at all relevant times ... and the fact that the employer was a member of the Industrial Health Foundation, a non-profit organization providing information to its members relative to occupations diseases and their prevention.” Id. at. 741.

In Beale v. Hardy, 769 F.2d 213 (4th Cir. 1985), the court found the evidence that a foundry had extensive knowledge of the hazards associated with inhaling silica dust and the disease of silicosis, as well as proper dust control methods, negated a duty to warn foundry employees on part of the corporations which supplied the silica sand. Id. at 215.

**b. Purchaser’s Requirement to Adhere to OSHA Standard:
An Additional Basis for Manufacturer/Supplier Reliance**

Further, even where federal Occupational Safety and Health Act and state laws requiring employer to provide a safe workplace to its employees

exist, a supplier of an allegedly dangerous product has a reasonable basis to rely on the purchaser/employer's compliance with these statutory requirements. See 7 Am. Jur. Proof of Facts 3d 305 (citing Jodway v. Kennametal, Inc., 525 N.W.2d 883 (Mich. Ct. App. 1994)); Washington v. Department of Transp., 8 F.3d 296 (5th. 1993) (holding manufacturer has no duty to warn employees of sophisticated purchaser where employer/purchaser has knowledge of dangers at issue and duty under federal regulations to warn employees). As result, the supplier can avail itself of the Sophisticated User Doctrine as a defense and reasonably rely on purchaser/employer to warn its employees of dangers associated with supplier's products. Id.

4. Determining Who the End "User" Is for Purposes of Applying the Sophisticated User Doctrine: Employer or Employee

An issue that arises in disputes such as the one at bar is who in the equation is the "user" for purposes of analyzing the applicability of the Sophisticated User Doctrine as a defense. Review of the case law reveals that the purchaser employer – rather than the employee – is considered the end "user."

In Taylor v. Airco, Inc., 503 F.Supp.2d 432 (D.Mass 2007), which was action brought by the administrator of a decedent worker's estate who

pursued a products liability action, alleging the decedent's cancer was caused by his exposure to vinyl chloride that was purchased by the decedent's employer from the defendant supplier and manufacturers. The suppliers and manufacturers of the vinyl chloride sought summary judgment, asserting the defense afforded by the Sophisticated User Doctrine.

In applying the Sophisticated User Doctrine as a basis for the grant of summary judgment, the court unequivocally held the decedent's employer was the end (or "relevant") user for purposes of the defense. Id. at 443 (citing Marques v. Bellofram Corp., 550 N.E.2d 145 (Mass. 1990) (where employee was injured using die casting machine, employer corporation considered to be user of product for purposes of comparing skill, knowledge, and experience level of user with that of supplier of machine); Morgan v. Brush Wellman, Inc., 165 F.Supp.2d 704, 718 (E.D.Tenn. 2001) (holding that where employees of government contractors at nuclear armament were injured by exposure to beryllium oxide, United States government considered to be user of beryllium oxide for purposes of sophisticated user doctrine); Goodbar v. Whitehead Bros., 591 F.Supp. 552, 566 (W.D.Va. 1984), (determining that where employee contracted silicosis from on-the-job work with products containing silica, employer foundry's sophistication analyzed

to determine supplier's duty to warn; employer in best and often only position adequately to warn and provide safety for employees).

As a corollary to this theme, Respondents note the case of Bearup v. General Motors Corporation, 2009 WL 249456 (Mich. Ct. App. 2009), where injured employees of a GM plant protested the trial court's extension of their employer's status as a "sophisticated user" label to them. Specifically, the Michigan Court of Appeals held the legal efficacy of the Sophisticated User Doctrine as a defense proved operable even where argued the former employees themselves were not sophisticated users. Id. The Bearup Court further concluded the employer – rather than any other entity – was in the best position to warn its employees of the dangers associated with chemical compounds, rather than the compound:

The rationale for the sophisticated user doctrine also undermines plaintiffs' argument that the sophisticated user defense does not apply unless plaintiffs, employees of GM and the ultimate users of the draw compounds, were sophisticated users. The rationale behind the sophisticated user doctrine is that "where a purchaser is a 'sophisticated user' of a manufacturer' product, the purchaser is in the best position to warn the ultimate user of the dangers associated with the product, thereby relieving the sellers and manufacturers from the duty to warn the ultimate user." Portelli v. IR Constr. Products Co., Inc., 218 Mich.App. 591, 599, 554 N.W.2d 591 (1996). Thus, the manufacturer markets a particular product to professionals that are presumed to have experience in using and handling the product, and because of this special

knowledge, the sophisticated user will be relied upon by the manufacturer to disseminate information to the ultimate users regarding the dangers associated with the product. *Id.* at 601, 554 N.W.2d 591. Hence, the manufacturer is relieved of the duty to warn. *Id.* Because GM was a sophisticated user and plaintiffs, as GM's employees, were the ultimate users of the draw compounds, GM was in the best position to disseminate information to plaintiffs, the ultimate users of the draw compounds, of the dangers associated with the use of the draw compounds. The status of GM's employees as sophisticated users or not does not impact whether GM itself is a sophisticated user. Therefore, whether plaintiffs are sophisticated users is irrelevant to whether GM is a sophisticated user and to whether summary disposition is appropriate under the sophisticated user doctrine.

Id. at *10 (emphasis added).

Therefore, applying Taylor v. Airco and Bearup v. General Motors Corporation, Respondents Trinity and Matrix maintain Appellants are unable to escape application via use of the argument that they were the "end" users of the sodium bromate or that they were "unsophisticated" users. Englehard was the "end" user and Englehard was an undeniably sophisticated user of sodium bromate. Those conclusions control the analysis.

5. Parameters of Doctrinal Application

The Sophisticated User Doctrine as a defense originated in cases involving alleged negligent failure to warn. Russo v. Abex Corp., 670

F.Supp. 206, 207 (E.D. Mich. 1987); Restatement of Torts (Second) § 388. See also, e.g., Goodbar v. Whitehead Bros., 591 F.Supp. 552 (W.D.Va.1984).

The defense is therefore compatible with the concept of negligence because it relates to the issue of reasonableness. Put another way, if a supplier is aware of its purchaser's knowledge and sophistication with respect to the product, the supplier reasonably may choose not to issue warnings.

In practical terms, there is no difference between strict liability and negligence with respect to the law of warnings. Sharp v. Wyatt, Inc., 627 A.2d 1347 (Conn. Ct. App. 1993) (citing Smith v. Walter C. Best, Inc., 927 F.2d 736, 741 (3d Cir. 1990) (applying Ohio law); Higgins v. E.I. DuPont de Nemours, Inc., 671 F.Supp. 1055 (D. Md. 1987) (applying Maryland law)). Accordingly, the Sophisticated User Doctrine is a viable doctrine in actions for negligence and strict liability.

Application of the Sophisticated User Doctrine as a defense also extends to claims based upon alleged breach of the implied warranty of merchantability. See Lescs v. Dow Chemical Co., 976 F.Supp. 393 (W.D.Va. 1997) (stating that if it were not to grant summary judgment to defendants on implied warranty of merchantability claim on the basis that plaintiff failed to demonstrate products was of unreasonably dangerous

design, it would grant the relief sought by defendants via the Sophisticated User Doctrine); Jodway v. Kennametal, Inc., 525 N.W.2d 883 (Mich. Ct. App. 1994) (holding Sophisticated User Doctrine defense applied to action based on breach of implied warranty).

B. Application of the Sophisticated User Doctrine in South Carolina and the Fourth Circuit

As noted above, the Sophisticated User Doctrine has been adopted by numerous jurisdictions. See, e.g. Willis v. Raymark Indus., Inc., 905 F.2d 793 (4th Cir. 1990) (ruling the sophisticated user defense may be permitted in cases involving an employer who is aware of the inherent dangers of a product which the employer purchases for use in its business; if the employer/purchaser has "equal knowledge" of the product's dangers, then the manufacturer may be able to rely on the employer/purchaser to protect its own employees from harm); see also Goodbar v. Whitehead Bros., 591 F.Supp. 552 (W.D.Va.1984), aff'd sub nom. Beale v. Hardy, 769 F.2d 213 (4th Cir. 1985) (holding in failure to warn case brought by employees of foundry suffering from silicosis that because supplier had reason to believe the knowledgeable industrial purchaser of the product would recognize the dangers associated with the product, the supplier's reliance on the purchaser

to warn and protect the workers was reasonable, and the supplier was not mandated to give warnings directly to the employees).

South Carolina as well recognizes and applies the Sophisticated User Doctrine in products liability claims in both the state court and federal court venues. E.g., Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995); Sizemore v. Georgia-Pacific Corp., 1996 WL 498410 (D.S.C. 1996); see also Ralph King Anderson, Jr., South Carolina Requests to Charge – Civil, 2002 § 32-8.¹⁴

¹⁴ Judge Anderson's charge reads:

Under South Carolina law, a manufacturer has no duty to warn of potential risks or dangers inherent in a product is the product is distributed to what we call a learned intermediary or distributed to a sophisticated user who might be in a position to understand and assess the risks involved, and to inform the ultimate user of the risks, and to, thereby, warn the ultimate user of any alleged inherent dangers involved in the product. Simply stated, the sophisticated user defense is permitted in cases involving an employer who was aware of the inherent dangers of a product which the employer purchased for use in his business. Such an employer has a duty to warn his employees of the dangers of the product.

It is not specific knowledge of the intermediary that is relevant. Rather, the question is whether the supplier acted reasonably in assuming that the intermediary would recognize the danger and take precautions to protect its employees.

According to this doctrine as applied in South Carolina courts, the distribution of a product to a sophisticated user “obviate[s] any purported duty on the part of [the distributor] to warn the public” or the product purchaser’s employees about the product’s dangers. Sizemore, 1996 WL 498410, *6.

Further, according to the Bragg Court, the Sophisticated User Doctrine as a defense is “permitted in cases involving an employer who was aware of the inherent dangers of a product which the employer purchased for use in his business. Bragg, 319 S.C. at 549, 462 S.E.2d at 331. Pursuant to this defense, the employer’s “familiarity or extensive experience with the product” permits the product supplier to rely on the employer for warnings to its employees about the product’s dangers. Id. Thus, under the Sophisticated User Doctrine defense, a product distributor has no duty to warn of a product’s dangers if the purchaser of the product has “special knowledge, sophistication, or expertise in relation to the product” and is aware or should have been aware of the product’s dangers. 30 S.C. Jur. Products Liability § 46 (Sophisticated User Defense).

(citing Willis v. Raymark Indus., Inc., 905 F.2d 793 (4th Cir. 1990) and Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995).

Additionally, our appellate entities have emphasized that the Sophisticated User Doctrine also applies if the distributor “acted reasonably in assuming that the [purchaser] would recognize the danger and take precautions to protect its employees.” Bragg, 319 S.C. at 550, 462 S.E.2d at 332 (quoting O’Neal v. Celanese Corp., 10 F.3d 249 (4th Cir. 1993)).

Applying the Sophisticated User Doctrine as a defense, both South Carolina appellate courts and the Fourth Circuit have time and again determined that manufacturers and suppliers of a product have no duty to warn a sophisticated user’s employees of a product’s hazards, including those involving personal injury.

As noted above, in Bragg, the Court of Appeals approved the application of the Sophisticated User Doctrine as a defense because the purchaser of the product was a large company, which “frequently used and was familiar with” the product and its dangers. Id. at 551, 462 S.E.2d at 332. The plaintiff, an employee of a large electrical contractor, died when the aerial bucket devices in which he was working on an electrical pole, caught on fire. The fire started because the plaintiff’s conductive hose came into contact with an energized power line. The Bragg Court held that the defendant manufacturer of the aerial bucket device was entitled to assert the

sophisticated user doctrine as a defense on plaintiff's failure to warn claim because the plaintiff's employer "frequently used" aerial devises and was "well aware that conductive materials like conductive hoses should not be used in the buckets of aerial devises." Id. at 551, 462 S.E.2d at 332.

In Beale v. Hardy, 769 F.2d 213 (4th Cir. 1985), the Fourth Circuit held that a supplier of silica sand had no duty to warn the plaintiffs of the hazards associated with the product because the plaintiff's employers – the purchaser of the silica sand – had "extensive knowledge" of the product's risks. Id. at 214-15 (applying Restatement (Second) of Torts § 338, which sets forth the principles upon which the sophisticated user doctrine is based).

In O'Neal v. Celanese Corporation, 10 F.3d 249 (4th Cir. 1993), the Fourth Circuit upheld a jury instruction based on the Sophisticated User Doctrine, holding the defendant "acted reasonably in assuming that the [plaintiff's employer, a salvage company with extensive experience in removing lead-based paint] would recognize the danger [of] and take precautions to protect its employees" from lead-based paint. Id. at 252-53.

In Emory v. McDonnell Douglas Corporation, 148 F.3d 347, 352 (4th Cir. 1998), the Fourth Circuit emphasized that under the Sophisticated User Doctrine, "a supplier is not negligent when it relies on an intermediary [who

is] 'already well aware of the [product's] danger' to relay any necessary warning." (internal citation omitted).

In Brooks v. Metronic, Inc., 750 F.2d 1227 (4th Cir. 1984), the Fourth Circuit applied South Carolina law to determine that a drug manufacturer has no duty to warn a drug consumer of the drug's risks if the consumer's doctor has received "adequate notice of [the drug's] possible complications." The court reasoned the drug manufacturer's duty to warn was obviated because the doctor constituted a "'learned intermediary' between the manufacturer and the consumer," and the doctor was responsible for relaying the drug's risks to the consumer. Id. at 1231; see also Odom v. G.D. Searle & Co., 979 F.2d 1001 (4th Cir. 1992) (applying South Carolina law that a drug manufacturer is not liable under a failure to warn theory if the plaintiff's doctor knew of the drug's risks).

Thus, Respondents Trinity and Matrix assert there can be no question the Sophisticated User Doctrine is a recognized legal doctrine in South Carolina, which can be successfully employed by defendants in products liability claims. Moreover, Respondents Trinity and Matrix maintain application of this doctrine as a defense is viable in South Carolina in response to whatever products liability-based theory of recovery employed by

a plaintiff, whether the plaintiff's claim sounds in negligence, breach of implied warranty, or strict liability.

**C. Application of Sophisticated User Doctrine to Facts of Case Sub
Judice**

Respondents Trinity and Matrix are protected from liability in the case at bar via the Sophisticated User Doctrine. The evidence propounded at trial was legion in demonstrating the following:

- Englehard was a sophisticated user of sodium bromate, as evinced time and again within the trial record.
- Specifically, Englehard frequently purchased sodium bromate for use in its plant. Moreover, it was a substantial consumer of this product. This is because sodium bromate was essential for this entity to perform its refining activities at Englehard. The record reveals Englehard purchased approximately 120 tons of sodium bromate per year for use at the facility.
- The sodium bromate shipped to Englehard was in packaging that complied with DOT regulations, OSHA HazCom standards, and United Nations protocols.
- Englehard followed an express procedure for receiving, inspecting, and verifying materials delivered to its Seneca facility.
- Englehard inspected, verified, and accepted the shipment of sodium bromate without question or exception.

- Notwithstanding its experience with sodium bromate, Englehard was historically provided with all information needed concerning the chemical's properties and dangers via, inter alia, the material safety data sheet.
- OSHA regulations mandated that Englehard have knowledge of the sodium bromate hazards.
- Moreover, OSHA required that Englehard protect its employees – including Respondent/Appellants – from the chemical's dangers.

Englehard's undeniable status as a sophisticated user of sodium bromate negated any purported common law or statutory duty Respondents Trinity and Matrix may have possessed in this case.

II. The Sophisticated User Doctrine, as Recognized within the South Carolina Common Law, is Not Preempted by Federal Law

Appellants assert the application of the Sophisticated User Doctrine as a defense in the instant case was improper because this doctrine is preempted by federal and state occupational safety regulations. Specifically, Appellants assert the Sophisticated User Doctrine was inapplicable to the instant case and should not have been charged to the jury because:

- It is prohibited by the conflicts preemption doctrine arising under the Supremacy Clause of the United States Constitution (U.S. Const. art. VI); and

- The Sophisticated User Doctrine cannot override or relieve one of the duties and/or requirements legislatively imposed by valid statutes and regulations.

Respectfully, Appellants preemption argument is without merit.

A. Preemption of State Law Under the Supremacy Clause

The case of Burt v. Fumigation Service and Supply, Inc., 926 F.Supp. 624 (W.D.Mich. 1996), provides a comprehensive outline of the jurisprudence as it pertains to the Supremacy Clause and preemption of state law:

The doctrine of federal pre-emption is founded on the Supremacy Clause, United States Constitution art. VI, cl. 2. Federal laws are the supreme law of the land; thus, any "state law that conflicts with federal law is 'without effect.'" See Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516, 112 S. Ct. 2608, 2617, 120 L. Ed. 2d 407, 422 (1992) (citation omitted).

A state law is pre-empted when: 1) Congress expresses a clear intent to preempt state law; 2) when there is outright or actual conflict between the federal and the state law; 3) when compliance with federal and state law is effectively impossible; 4) where there is an implicit federal barrier to state regulation; 5) where Congress has occupied the entire field of regulation; 6) where state law "stands as an obstacle" to the objectives of Congress. See Louisiana Public Serv. Comm'n v. Federal Communications Comm'n, 476 U.S. 355, 368-69, 106 S. Ct. 1890, 1898-99, 90 L. Ed. 2d 369 (1986) (citations omitted). The key question is whether Congress intended to pre-empt state law. Congressional intent may be express or implied:

Congress' intent may be explicitly stated in the statute's language or implicitly contained in its structure and purpose.... In the absence of an express congressional command, state law is preempted if that law actually conflicts with federal law ..., or of federal law so thoroughly occupies a legislative field " 'as to make reasonable the inference that Congress left no room for the States to supplement it.' "

Cipollone, 505 U.S. at 516, 112 S. Ct. at 2617. "**Absent express pre-emption, courts are not to infer pre-emption lightly, particularly in areas traditionally of core concern to the states such as tort law.**" Burke v. Dow Chemical Co., 797 F.Supp. 1128, 1136 (S.D.N.Y.1992) (citing Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 144, 83 S.Ct. 1210, 1218, 10 L.Ed.2d 248 (1963); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947)). This is because the pre-emption doctrine presumes that police powers historically left to the states are not supplanted by federal law. Cipollone, 505 U.S. at 516, 112 S.Ct. at 2617.

Id. at 628 (emphasis added).

B. The Lack of Preemption of Tort Claims (or Their Defenses) via OSHA

The First Circuit's 1991 opinion in Pedraza v. Shell Oil Company, 942 F.2d 48, edifies with regard to the interplay (or lack thereof) between the doctrine of preemption and Occupational Safety and Health Act ("OSHA").

In Pedraza, a former worker asserted an assortment of tort and warranty claims against chemical manufacturer to recover damages for injuries arising from respiratory ailments he allegedly developed from workplace exposure to

Epichlorohydrin, a toxic chemical. The district court dismissed the worker's case on preemption grounds. The court of appeals reversed, holding OSHA did not preempt state law tort provisions like those invoked by the plaintiff:

The Supremacy Clause of the United States Constitution operates to preempt state laws which unduly interfere with federal law or policy. U.S. Const. art. VI, cl. 2. See also Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211, 6 L.Ed. 23, 73 (1824); Securities Industry Ass'n v. Connolly, 883 F.2d 1114 (1st Cir.1989), cert. denied, 495 U.S. 956, 110 S. Ct. 2559, 109 L. Ed. 2d 742 (1990). As we were reminded again recently, however, our preemption analysis begins with "the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 111 S. Ct. 2476, 115 L. Ed. 2d 532 (1991) (quoting Rice v. Santa Fe Elevator Co., 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947)) [W]e will not find federal preemption in the present case unless there is "an unambiguous congressional mandate to that effect." Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146, 83 S. Ct. 1210, 1219, 10 L. Ed. 2d 248 (1963). See also Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 715, 105 S. Ct. 2371, 2376, 85 L. Ed. 2d 714 (1985); Jones v. Rath Packing Co., 430 U.S. 519, 525, 97 S. Ct. 1305, 1309, 51 L. Ed. 2d 604 (1977).

Preemption "always boils down to a matter of congressional intent." Connolly, 883 F.2d at 1115. See also Louisiana Public Service Comm'n v. FCC, 476 U.S. 355, 369, 106 S. Ct. 1890, 1899, 90 L. Ed. 2d 369 (1986) ("The critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law."); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 747, 105 S. Ct. 2380, 2393, 85 L. Ed. 2d 728 (1985) ("in any pre-emption analysis, '[t]he purpose of Congress is the ultimate

touchstone.”) (citations omitted); Associated Industries of Massachusetts v. Snow, 898 F.2d 274, 278 (1st Cir. 1990) (same). The task of interpretation is simplified substantially, of course, whenever “Congress has made its intent known through explicit statutory language.” English v. General Electric Co., 496 U.S. 72, 110 S. Ct. 2270, 2275, 110 L. Ed. 2d 65 (1990).

Absent express preemption, the challenged state law must yield when it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a ‘scheme of federal regulation ... so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,’ or where an Act of Congress ‘touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.’ English, 110 S.Ct. at 2275 (citations omitted).

Finally, preemption will be inferred where the state law “actually conflicts with federal law.” Id. Such a conflict arises where it is physically impossible to comply with both the federal and the state law or where “state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” Id. (citation omitted). See also International Paper Co., 479 U.S. at 491-92, 107 S.Ct. at 811; Louisiana Public Service Comm’n, 476 U.S. at 368-69, 106 S. Ct. at 1898-99; Hillsborough County, 471 U.S. at 713, 105 S. Ct. at 2375.

[A] sound statutory interpretation must encompass the relevant text as well as the structure and context of the enactment. We will “not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law...” Philbrook v. Glodgett, 421 U.S. 707, 713, 95 S. Ct. 1893, 1898, 44 L.Ed.2d 525 (1975) (quoting United States v. Heirs of Boisdore, 49 U.S. (8 How.) 113, 122, 12 L.Ed. 1009 (1849)). See also Richards v. United States, 369 U.S. 1, 11, 82 S. Ct. 585, 591-92, 7 L. Ed. 2d

492 (1962) (“a section of a statute should not be read in isolation from the context of the whole Act.”).

The scope of OSHA preemption is outlined in two sections: (i) section 18, which represents a general statement of preemptive intent, and (ii) section 4(b)(4), the “savings clause,” which excepts from preemption a spectrum of state laws.

At its outer reaches[,] section 18 preemption does not obtain unless there is an unapproved assertion of “jurisdiction under State law over any occupational safety or health issue” as to which a federal “standard” is already in place. See 29 C.F.R. 1901.2 (“Section 18(a) of the Act is read as preventing any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which a Federal standard has been issued under section 6 of the Act.”) (emphasis added); Associated Industries of Massachusetts, 898 F.2d at 278 (Section 18 “provides that if a federal standard on an occupational safety or health issue is in effect, a state cannot promulgate an occupational safety or health standard relating to that issue, unless it first submits the state plan to OSHA for approval.”). See also Puffer’s Hardware Inc. v. Donovan, 742 F.2d 12, 16 (1st Cir.1984); National Solid Wastes Management Ass’n v. Killian, 918 F.2d 671, 677-78 (7th Cir. 1990).

Section 3 in turn defines an occupational safety and health “standard” as one which “requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.” 29 U.S.C. § 652(8) (1982); see also People v. Chicago Magnet Wire Corp., 126 Ill.2d 356, 128 Ill.Dec. 517, 520, 534 N.E.2d 962, 965 (§ 18 precludes “a State’s development and enforcement of ‘occupational health and safety standards.’”) (discussing OSHA preemption of State criminal laws) (citations omitted), cert. denied, 493 U.S. 809, 110 S.Ct. 52, 107 L.Ed.2d 21 (1989). Thus, it is not surprising that substantial authority exists for the view

that section 18 preempts the unapproved establishment of state standards and regulatory schemes in competition with OSHA, see, e.g., Environmental Encapsulating Corp. v. City of New York, 855 F.2d 48, 55 (2d Cir. 1988); New Jersey State Chamber of Commerce v. Hughey, 774 F.2d 587, 592-93 (3d Cir.1985), appeal after remand, 868 F.2d 621 (3d Cir.), cert. denied, 492 U.S. 920, 109 S. Ct. 3246, 106 L. Ed. 2d 593 (1989), but that there is no authority for the view that OSHA preempts provisions of state law of the sort relied on by Pedraza.

Id. at 50-52 (footnotes omitted).

Importantly, the Pedraza Court recognized OSHA does not operate to preempt state tort law:

We are aware of no case which holds that OSHA preempts state tort law. Rather, most courts have been concerned with how OSHA affects tort actions, not with whether it preempts state tort law. Thus, every court faced with the issue has held that OSHA creates no private right of action. See, e.g., Pratico v. Portland Terminal Co., 783 F.2d 255, 266 (1st Cir.1985) ("The legislative history of § 653(b)(4) shows that the intent of the provision was merely to ensure that OSHA was not read to create a private right of action for injured workers which would allow them to bypass the otherwise exclusive remedy of workers' compensation."). We have embraced the majority view that the regulations promulgated under OSHA prescribe standards of care relevant in common law negligence actions. Id. at 263-65; see also Albrecht v. Baltimore & Ohio R.R. Co., 808 F.2d 329, 332 (4th Cir. 1987); but see Minichello v. U.S. Industries, Inc., 756 F.2d 26, 29 (6th Cir. 1985) ("To use OSHA regulations to establish whether a product is unreasonably dangerous is ... improper.") (product liability action brought by employer against product supplier).

While we discern in OSHA's language, structure and context a clear congressional signal that section 18 preempts unapproved

assertions of state jurisdiction in the development and enforcement of standards relating to occupational health and safety issues in competition with federal standards, we find no warrant whatever for an interpretation which would preempt enforcement in the workplace of private rights and remedies traditionally afforded by state laws of general application. Connecticut's accustomed maintenance of judicial fora for the enforcement of private rights in the workplace, under State laws of general application, seems to us a function far less prophylactic than reactive; less normative than compensatory; and less an arrogation of regulatory jurisdiction over an "occupational safety or health issue" than a neutral forum for the orderly adjustment of private disputes between, among others, the users and suppliers of toxic substances.

We are persuaded that Congress, by its enactment of the "savings clause," further evinced its intention to spare these provisions of State law from preemption.

Nothing in this Act shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

29 U.S.C. § 653(b)(4) (1982) (emphasis added). There is a solid consensus that section 4(b)(4) operates to save state tort rules from preemption. See, e.g., National Solid Wastes Management Ass'n, 918 F.2d at 680 n.9 (collecting cases). See also Atlas Roofing Co. v. Occupational Safety Comm'n, 430 U.S. 442, 445, 97 S.Ct. 1261, 1264, 51 L.Ed.2d 464 (1976) (noting that OSHA establishes a new statutory duty on the part of employers and creates new remedies; and stating: "Each remedy exists whether or not an employee is actually injured or killed as a result of the

[unsafe or unhealthful] condition, and existing state statutory and common-law remedies for actual injury and death remain unaffected.” (dictum)); Chicago Magnet Wire Corp., 128 Ill.Dec. at 523, 534 N.E.2d at 968 (“Congress expressly stated that OSHA was not intended to preempt two bases of liability that, like criminal law, operate to regulate workplace conduct and implicitly set safety standards-State worker’s compensation and tort law.”) (criminal laws). See generally, Note, The Extent of OSHA Preemption of State Hazard Reporting Requirements, 88 Colum.L.Rev. 630, 641 (1988) (§ 4(b)(4) reveals “Congress’ explicit recognition of the continued validity of state worker compensation and tort remedies....”); Note, Getting away with Murder: Federal OSHA Preemption of State Criminal Prosecutions for Industrial Accidents, 101 Harv.L.Rev. 535, 543 (1987) (“Indeed, section 4(b)(4) saves from preemption two forms of liability that, like criminal law, regulate workplace conduct and set implicit standards-state workers’ compensation and tort law.”).

....

Thus, we are unpersuaded that the provisions of Connecticut law undergirding Pedraza’s claims against Shell are eclipsed by OSHA.

Id. at 52-54 (footnotes omitted).

In footnote 6, the court directly addressed the argument raised by the defendant that the savings clause found within 29 U.S.C. § 653(b)(4) was reserved to save only for workers’ compensation claims from preemption.

As explicated below, the court established that both workers' compensation claims and claims sounding in tort were excised from preemption:

We are unpersuaded by Shell's eiusdem generis argument, which would render § 4(b)(4) inapposite to the provisions of Connecticut law on which Pedraza relies. Shell argues that only those state laws which are in the nature of workers' compensation laws come within the scope of the savings clause. Its argument implicitly assumes that though traditional private rights and remedies between employer and employee arising under state law are expressly saved from preemption by § 4(b)(4), those private rights and remedies which have a much less direct connection with the workplace were meant, for some unarticulated reason, to be preempted. We are unable either to ascribe a plausible reason for such a result or to discern such a congressional intent. **Having seen no reason to preempt existing state law rights and remedies between employer and employee-the principal participants in the workplace, and the only parties whose relationship is regulated by OSHA, McKinnon v. Skil Corp., 638 F.2d 270, 275 (1st Cir.1981) (OSHA's "terms apply only to employers") (citations omitted)-Congress almost certainly did not intend to preempt, *sub silentio*, the right of an employee to bring an action for damages against a third-party supplier of products used in the workplace. See *infra* note 7. We would be very reluctant to infer preemptive intent absent some indication that the state law could have a significant adverse regulatory impact on OSHA's mission in the workplace. Section 4(b)(4) plainly expresses Congress' intention to preserve workers' compensation laws and the rights and duties of employers and employees under state laws relating to injuries, disease or death arising in the course of employment. Nevertheless, notwithstanding that Connecticut statutory law preserves Pedraza's right to sue Shell in these circumstances, see Conn.Gen.Stat. Ann. § 31-293(a), under Shell's view Pedraza's right to seek private redress for workplace injury or disease allegedly caused by the employer's ECH supplier would be**

preempted. Shell cannot insist simultaneously that § 4(b)(4)'s reference to workers' compensation laws modifies the scope of the savings clause and does so more restrictively than the workers' compensation law itself.

Id. at 54 n.6 (emphasis added).

Footnote 8 continues the analysis that Congress did not intend to preempt state law with its enactment of OSHA:

What little legislative history we have discovered leaves even less doubt that § 4(b)(4) evinces a congressional intent to preserve state tort law from preemption. In a letter to the Chairman of the House Subcommittee on Labor, the Solicitor of Labor explained that OSHA "would in no way affect the present status of the law with regard to workmen's compensation legislation or private tort actions." Pratico, 783 F.2d at 266 (quoting Occupational Health and Safety Act of 1969: Hearings on H.R. 843, H.R. 3809, H.R. 4294, and H.R. 13373 before Select Subcomm. on Education and Labor, 91st Cong., 1st Sess., Pt. 2, at 1592-93 (letter of L.H. Silberman, Solicitor of Labor) (emphasis added)).

Id. at 54 n.8.

Respondents assert that since Congress did not intend to preempt the prosecution of tort-based claims against third party suppliers such as Respondents Trinity and Matrix and Univar, the common law defenses to these claims that available to these suppliers survive as well. The Sophisticated User Doctrine was a cognizable defense to Respondents'

negligence and implied warranty claims. OSHA did not preempt its application in the instant case.

C. Sophisticated User Doctrine Remains Operative Even Where Preemption Argument Proves Viable

In Lescs v. Dow Chemical Company, 976 F.Supp. 393 (W.D.Va. 1997), the Western District of Virginia disposed of a homeowner's breach of implied warranty of merchantability claims against a chemical manufacturer. An issue that arose was whether the homeowner's claims were preempted by federal law via the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136 et seq.

As to the implied warranty of merchantability claim, the court determined the plaintiff failed to demonstrate the chemical product in question was defective in assembly or manufacture, unreasonably dangerous in design, or unaccompanied by adequate warnings concerning the hazardous properties. Additionally, the court articulated the following concerning the Sophisticated User Doctrine:

Furthermore, even if the court did not grant Defendants' motion for summary judgment for the reasons set forth in this section, the court would nonetheless grant the motion based on Virginia's sophisticated user doctrine. "When a skilled purchaser ... knows or reasonably should be expected to know of the dangerous propensities or characteristics of a

product, no implied warranty of merchantability arises.” Goodbar v. Whitehead Bros., 591 F.Supp. 552, 567 (W.D.Va. 1984). In this case, Dursban is an insecticide, which is inherently poisonous to insects, and, in inappropriate doses, to humans. Dow sold Dursban to the Hughes Defendants, who were in the business of extermination. Hughes certainly had knowledge of the dangerous propensities or characteristics of Dursban, as described by the label attached to the Dursban. Since Hughes was a sophisticated user of Dursban, Dow would prevail on this claim regardless of whether or not the claim was dismissed based on preemption and a lack of substantive evidence as set forth in this section. Id.

Id. at 399 n.3 (emphasis added).

III. The Circuit Court Properly Granted Summary Judgment to Respondents Trinity and Matrix on Appellants’ Strict Liability Claims

Prior to trial, Respondents Trinity and Matrix and Univar moved for summary judgment, seeking dismissal of Appellants’ strict liability cause of action.

Following a review of the parties’ briefing and oral argument, the Circuit Court granted the motion.

On appeal, Appellants seek reversal, maintaining the Circuit Court’s decision to grant summary judgment on Appellants’ strict liability cause of action was in error. Specifically, Appellants aver the injured workers in the case at bar were “users” and/or “consumers” of the sodium bromate. Thus, they asseverate they should have been entitled to pursue their strict liability

claims at trial pursuant to S.C. Code Ann. 15-73-10 and Restatement (Second) of Torts § 402A.

Respectfully, notwithstanding their arguments, Appellants are in error. The trial court properly granted summary judgment on the strict liability count. As evinced within the authorities, most notably Bray v. Marathon Corporation, 356 S.C. 111, 588 S.E.2d 93 (2003), Appellants were not “users” or “consumers” of the sodium bromate. Moreover, there is no current mechanism in place in our case law that permits their recovery under a bystander theory. Based on the precedent established 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).

Respondents Trinity and Maxtrix bottom and premise their assertion that summary judgment was warranted and properly granted upon the following assertions.

A. The Law of Strict Liability in South Carolina

South Carolina Jurisprudence outlines the law of strict liability in exhaustive detail:

Under the South Carolina Defective Products Act (DPA), one who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his or her property is subject to liability for physical harm caused to the ultimate user or consumer, or to his or her property, if the following apply:

- the seller is engaged in the business of selling such a product
- it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold

This rule applies although the seller has exercised all possible care in the preparation and sale of his or her product, and the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Recovery under the strict products liability law does not rest upon any rights or duties framed by some transaction, as is the case in a suit for breach of warranty. However, although one of the purposes of strict products liability is to restrict the degree to which manufacturers may define their own legal responsibility by means of the commercial law of warranties, strict products liability has not completely displaced warranty theory. Thus, the strict products liability law renders irrelevant the concept of duty in the traditional setting of tort liability, for recovery may be had even though a seller has exercised all possible care in the

preparation and sale of his or her product. Accordingly, neither conduct nor obligation underlie recovery in strict products liability, but, rather, a combination of a defective product with the instance of a causally related injury. Thus, whether a manufacturer sells products "off the rack" or according to specifications has no bearing on whether the policies of strict products liability attach to the product. Relative bargaining power is likewise irrelevant, with the possible exception of situations in which the seller is able to impose an adhesion contract.

Thus, to recover under a strict liability theory, a plaintiff must establish:

- the defendant's product was in a defective condition unreasonably dangerous for its intended use
- the defect existed when the product left the defendant's control
- the defect was a proximate cause of the injury sustained

In other words, the plaintiff must show that the product, as designed, was unreasonably dangerous in its failure to conform to ordinary users' expectations. The focus is on the condition of the product without regard to any action of the seller or manufacturer. It is the nature of the risk that caused the injury, rather than the nature of the party, which is finally determinative of the application of the policy of strict products liability. While a plaintiff is relieved from proving fault by a manufacturer, the manufacturer is not held as an insurer against all losses caused by a product, but rather is to be held responsible only for damages attributable to some failure of the product to perform with reasonable safety in its normal environment. Thus, manufacturers are not treated as insurers of the risk that their products will prove ineffective, as opposed to unsafe.

30 S.C. Jur. Products Liability § 18 (footnotes omitted) (emphasis added).

B. Application of the Law of Strict Liability in South Carolina Limited Solely to Intended “Users” or “Consumers”

As evinced above, our appellate courts have held that in South Carolina, strict liability claims are legally cognizable only where the alleged injury is to a “user” and/or “consumer.” Liability does not extend to “casual bystanders” or any other non “user” or “consumer” such as Appellants. Based on this oft-repeated proposition, Respondents Trinity and Matrix, along with Univar, was entitled to summary judgment.

As noted above, 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*.¹⁵

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*.¹⁶ The comment expressly states that “casual

¹⁵ Comment *l* of Restatement (Second) of Torts § 402A states:

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.

¹⁶ Comment *o* of Restatement (Second) of Torts § 402A states:

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.”).

Bray v. Marathon Corporation, 356 S.C. 111, 588 S.E.2d 93 (2003), is a Supreme Court decision involving the strict liability and negligence claims

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

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.

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, this Court cannot extend the right to recovery via strict liability to any person other than a direct “user” and/or “consumer.”

C. Citation from Other Jurisdictions Limiting Recovery in Strict Liability Claims to Only Those Persons Demonstrated to be the Intended “Users” or “Consumers”

In addition to the limitation on bystander recovery noted above, the case law is extensive 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.

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 1, 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.

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)).

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

Applying § 15-73-10 and the common law and Restatement-based principles enunciated above to the facts of the case sub judice, Appellants were not “users” or “consumers” of sodium bromate. Moreover, Appellants were not using the sodium bromate for its intended use. Thus, they were not entitled to recovery at trial under a strict liability theory.

Appellants were not “users” of the sodium because they were not “enjoying the benefit of the product.” Restatement (Second) of Torts § 402A cmt. 1. Appellants were not using sodium bromate in their work. Instead, the

only connection they had with the product was that they were in the product's vicinity.

Appellants were not "consumers" of the sodium because they were not using the product as it was intended to be used. Id. The record is clear the Appellants' welding did not involve the consumption or use of sodium bromate.

Though 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

In their appeal to this Court, Appellants seek reversal of the jury verdict, which found Respondents Trinity and Matrix not liable for their alleged injuries resulting from the June 1, 2004, explosion at Engelhard.

Appellants sought this relief upon, inter alia, the assertions that:

- The Circuit Court erred by charging the Sophisticated User Doctrine because it is not the law in South Carolina;
- The Circuit Court erred by charging the Sophisticated User Doctrine as a defense to Appellants' negligence and implied warranty of merchantability claims; and
- The Circuit Court erred by charging the Sophisticated User Doctrine as a defense because application of this doctrine is preempted by OSHA.

Contrary to Appellants arguments, review of the law and the evidence propounded in the trial of this case demonstrate:

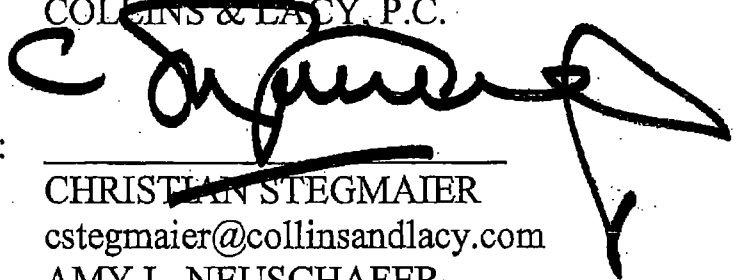
- The Sophisticated User Doctrine is recognized a defense in South Carolina product liability cases;
- Sufficient evidence existed for the jury to determine the Sophisticated User Doctrine precluded recovery by Appellants from Respondents Trinity and Matrix; and
- The Sophisticated User Doctrine as a defense is not preempted by OSHA.

Additionally, as explicated above, summary judgment on Appellants' strict liability cause of action was proper because Appellants were not the direct and intended "users" and/or "consumers" of the sodium bromate, nor were they using this product for its intended purpose at the time of their accident. Our jurisprudence does not allow for recovery on a strict liability theory of recovery in instances where the plaintiff is someone other than a "user" or "consumer" of the product in question.

For the reasons outlined within this brief, Respondents Trinity and Matrix respectfully request this Court affirm the judgment of the Circuit Court as it pertains to the pre-trial grant of summary judgment on the strict liability count and the jury's verdicts in the negligence and implied warranty of merchantability claims.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,
COLLINS & LACY, P.C.



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