THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

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

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.

PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rules 224 and 226, SCACR, Petitioners Scott F. Lawing and Tammy R. Lawing petitions this Court to issue a Writ of Certiorari to the Court of Appeals to review the Court's rulings in *Lawing v. Trinity Mfg., Inc.*, 406 S.C. 13, 749 S.E.2d 126 (Ct. App. 2013). Petitioners assert this matter involves novel questions of law, and that the Court of Appeals' decision is in conflict with prior decisions of this Court. Rule 226 (b)(1), (3), SCACR. The grounds for this Petition are discussed below.

RULE 226 (d)(1), SCACR, CERTIFICATION

Counsel for Petitioners certifies that a Petition for Rehearing was made to the Court of Appeals on September 5, 2013 and denied by the Court of Appeals on October 22, 2103.

I. QUESTIONS PRESENTED FOR REVIEW

A. Did the Court of Appeals err in affirming the trial court's decision to charge the jury as to the "sophisticated user" defense in this case?

1. The Court of Appeals erred in rejecting Petitioners' argument that the sophisticated user doctrine is not the law of South Carolina and holding 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)."

2. The Court overlooked Petitioners' 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.

B. Did the Court of Appeals err in applying the sophisticated user doctrine in this case?

1. The Court overlooked or misapprehended Petitioners' 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 set forth in *Goodbar v. Whitehead Bros.*, 391 F.Supp. 552, 557 (W.D. Va.1984), and that upon an application of the 6-factor test to this 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.

2. The Court overlooked or misapprehended Petitioners' 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 afforded no defense at all in this case.

3. The Court overlooked or misapprehended Petitioners' 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.

C. Did the Court of Appeals err in rejecting Petitioners' argument that the sophisticated user doctrine is impliedly preempted in this case?

1. The Court of Appeals overlooked Appellants' argument that federal preemption also applies where state common law defenses that conflict with the federal law.

2. The Court of Appeals overlooked Appellants' argument that state law which incorporates federal regulations also prevents application of the sophisticated user defense.

II. CONCISE 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 chemical fire that occurred at the Engelhard plant in

Seneca, South Carolina, on June 1, 2004. 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 of 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 pleadings.

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 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 trial 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 used in S.C. Code Ann., §15-73-10 (2007); however, the trial court 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, the contract between Engelhard was formed by the language as set forth in Engelhard's purchase order. 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 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. Plaintiffs moved to dismiss the appeal and on December 4, 2008, the Court of Appeals held that appeal in abeyance pending resolution of trial on damages.

On November 26, 2008, all parties filed post-trial motions; Petitioners 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 on December 30, 2008 as to all Defendants, Trinity, Matrix and Univar. Black and the Martins also filed a Notice of Appeal 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.

The Court of Appeals heard oral arguments in the matter and on August 21, 2013, the Court issued its opinion affirming in part, reversing in part and remanding.

III. FACTS

On June 1, 2004, Petitioner Scott Lawing and a co-worker, Keith Black, were working for Engelhard Corporation at its plant in Oconee County, South Carolina. They were part of a hand-picked maintenance crew along with Curtis Martin, a contract employee through Fluor Daniel. The three of them were 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).

Before any work commenced Petitioner 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 commencing work, Tim Wald issued a hot work permit stating that the area had been cleared of all dangers (R.p.986, l.18-p.987, l.6).

Unknown to them, the pallets contained sodium bromate, which is an oxidizer that Engelhard uses in the refinement of precious metals. When introduced to a combustible material and ignition, sodium bromate will cause the fire to erupt in an extremely violent and dangerous fashion (R.p.785, l.25-p.788, l.1).

The team was 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). Plaintiffs moved slowly down the condensate pipe for about two hours to 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 a piece of hot slag from the cutting operation 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).

There may have been as much as 10,000 lbs. of the sodium bromate 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 workers 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 workers suffered severe burns and other injuries that 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). At the time of the accident, the workers 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).

The Sodium Bromate

The sodium bromate was in a combustible bag that acted as the fuel source for the fire. It 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).

Engelhard purchased the sodium bromate involved in the fire 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, l.7-p.764, l.7; p.765, ll.3-11;p.766, ll.14-25; p.913, l.12-p.914, l.2;p.1101, ll.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, when 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, ll.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 Univar, USA, Inc. who, in turn, ordered it from Respondent Trinity Manufacturing, Inc. Trinity, in turn, utilized its sister company, Respondent Matrix Outsourcing, LLC, to import the sodium bromate from China to the port of Charleston. There, 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, ll.11-24; p.971, ll.17-19; p.975, ll.20-24; p.976, ll.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).

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, Petitioner 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). 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 none 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).

The Proceedings Below

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." The Court also charged 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, l.24-p.1257, l.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, l.9-p.1261, l.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, ll.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, ll.6-9) Previously, Plaintiffs had argued that the sophisticated user defense was not applicable to any of their claims against any of the three 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 the defense was not available on any of the claims against Univar 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).

Just prior to 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). The question 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).

Petitioner and his co-plaintiffs appealed 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.

The Court of Appeals reversed on the Strict Liability claims but affirmed the Court's decision to charge the sophisticated user doctrine. This Petition follows.

IV. ARGUMENTS

A. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S DECISION TO CHARGE THE JURY AS TO THE "SOPHISTICATED USER" DEFENSE IN THIS CASE

The Court of Appeals first rejected Petitioners' argument that the sophisticated user doctrine is not the law of South Carolina and holding 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)." 406 S.C. at ___, 749 S.E.2d at 131. The sophisticated user doctrine has not, however, been definitely adopted in this state.

In *Bragg*, the Court of Appeals stated 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. *Bragg*, 319 S.C. at

550, 462 S.E.2d at 332. The Court referenced Restatement (Second) of Torts § 388 as being adopted by numerous jurisdictions, but did not specify whether South Carolina recognizes § 388 as the law of South Carolina.

Further, although the *Bragg* court stated 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. In fact, *Bragg* has been criticized by both this Court and the Court of Appeals. *See Branham v. Ford Motor Co.*, 390 S.C. 203, 701 S.E.2d 5 (2010) (cautioning against a broad reading of *Bragg* in regards to whether strict liability and negligence are not mutually exclusive theories of recovery); *Allen v. Long Mfg. NC, Inc.*, 332 S.C. 422, 505 S.E.2d 354 (Ct. App. 1998) (noting the *Bragg* court held no duty to warn existed for the product, which was deemed safe as designed; hence, any discussion regarding the adequacy of the warnings in *Bragg* was dictum). As the *Allen* court noted, because the *Bragg* Court had held the product was not defective such that a warning was needed, any discussion about whether the manufacturer discharged its duty by warning a sophisticated user was dictum.

Therefore, the Court of Appeals erred in holding this issue had been put to bed by its holding in *Bragg*. This Court should grant this Petition and address whether the sophisticated user doctrine as set forth in Restatement (Second) of Torts § 388 is the law in South Carolina.

B. THE COURT OF APPEALS ERRED IN APPLYING THE SOPHISTICATED USER DOCTRINE IN THIS CASE

The Court of Appeals overlooked or misapprehended Petitioners' 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 set forth in *Goodbar v. Whitehead Bros.*, 391 F.Supp. 552, 557 (W.D. Va.1984), and that upon an application of the 6-factor test to this 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.

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.

Courts apply a balancing test of six (6) factors when determining whether or not the requirement of reasonable care has been satisfied under § 388(c). *Goodbar v. Whitehead Bros.*, 391 F.Supp. 552, 557 (W.D. Va.1984). The factors 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.; *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). Balancing these considerations is necessary because no single set of rules could possibly be advanced that would automatically cover all individual situations. *Goodbar*, 391 F.Supp. at 557.

Applying this test to the facts of this case, the sophisticated user defense, even if recognized as the law of South Carolina, is unavailable to the Defendants and the Trial Court erred charging the doctrine 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.

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.

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.

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.

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

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

The evidence supporting each of these factors is set forth in Petitioners brief before the Court of Appeals at pages 32 through 47.

Based upon the above balancing of the factors analysis and a reasonable cost/benefit analysis, each and every one of the factors 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.

The Court of Appeals also overlooked or misapprehended Petitioners' 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 afforded no defense at all in this case. In South Carolina, 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. In those states where the sophisticated user defense is recognized the doctrine 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 v.BASF Corp.*, 45 F.3d 431 (Table), 1994 WL 721632 (6th Cir. 1994).

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 sophisticated user charge 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.

Lastly, the Court of Appeals overlooked or misapprehended Petitioners' 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. Defendants 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)).

An affirmative legal duty may be created by contract. *Barker v. Sauls*, 289 S.C. 121, 345 S.E.2d 244 (1986). "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).

In *Barker v. Sauls*, 289 S.C. 121, 345 S.E.2d 244 (1986), this 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. The Court observed that "[a] tortfeasor may be subjected to tort liability for injury to a third party arising out of the tortfeasor's contractual relationship with another, despite the absence of privity between the tortfeasor and the third party." *Compare Theeke v. BASF Corporation*, 45 F.3d 431 (Table), 1994 WL 721632 (6th Cir. 1994) (Court held 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).

This Court should grant this Petition, permit briefing, hear arguments, reverse the Court of Appeals and remand this matter to the circuit court for a new trial, with instructions not to charge the sophisticated user doctrine in this case.

C. THE COURT OF APPEALS ERRED IN REJECTING PETITIONERS' ARGUMENT THAT THE SOPHISTICATED USER DOCTRINE IS IMPLIEDLY PREEMPTED IN THIS CASE

The Court of Appeals overlooked Appellants' argument that federal preemption also applies where state common law defenses conflict with the federal law. The Court of Appeals also overlooked Appellants' argument that state law which incorporates federal regulations also prevents application of the sophisticated user defense. This Court should grant this Petition and reverse the Court of Appeals' rulings on these issues.

Petitioners objected to the sophisticated user defense being charged to the jury because 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. Petitioners contended (1) the doctrine is prohibited by the conflicts preemption doctrine arising under the Supremacy Clause of the United States Constitution (U.S. Const. art. VI); and (2) the doctrine cannot override or relieve one of duties and/or requirements legislatively imposed by valid state statutes and regulations. The Court of Appeals rejected these arguments, holding that the doctrine did not stand as an obstacle to fulfillment of the safety objectives embodied in the federal regulations.

The common law defense of sophisticated user is 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 Court of Appeals also erroneously rejected Petitioners' argument that the sophisticated user defense is inapplicable to the facts of this case because the defense would effectively contradict and abrogate the application of the State requirements legislatively imposed upon the Defendants through the State's adoption of the federal standards.

The law of South Carolina provides 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 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. *Id.* (violation of state and federal air pollution regulations supports action for negligence); Accord *Seals v. Winburn*, 314 S.C. 416, 445 S.E.2d 94 (Ct. App. 1994); *Raven v. Greenville County*, 315 S.C. 447, 343 S.E.2d 296 (Ct. App. 1993); *Coleman v. Shaw*, 281 S.C. 107, 314 S.E.2d 154 (Ct. App. 1984).

In this case the Court erred in instructing 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. 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 as 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."

The application of the sophisticated user defense in this case relieved 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,

established that the operation of the defense nullified and destroyed the requirements of the state regulation that are identical to the federal regulation.

The OSHA regulations, both state and federal, require that everyone in the chain of distribution, from the chemical manufacturer to the importers of the chemical to the distributers 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.

The trial court correctly 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). The court 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, the court 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, the trial court thereafter charged the jury

that if it found that the sophisticated user defense applied, it must find that the Defendants 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.

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 Court of Appeals should have reversed the verdicts in favor of Matrix, Trinity and Univar on the negligence and implied warranty claims.

V. CONCLUSION

Petitioner requests that this Court grant this Petition and issue a Writ of Certiorari to review the Court of Appeals' decision in this case, order briefing of the issues involved, permit oral argument, and reverse the Court of Appeals's decision affirming the trial court's decision to instruct the jury on the sophisticated user defense.

Respectfully submitted,

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January 22, 2014

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

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

Scott F. Lawing and Tammy R. Lawing, ... Petitioners/Respondents,

v.

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

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

PROOF OF SERVICE

The undersigned hereby certifies on the date indicated below, she served counsel for the Respondents with a copy of the *Petition for Writ of Certiorari and Joint Appendix* by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:

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