THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

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

Op. No. 5166 (S.C. Ct. App. filed Aug. 21, 2013)

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.

PETITIONERS/RESPONDENTS' RETURN TO RESPONDENTS/PETITIONERS' CROSS-PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Pursuant to Rule 242(f), SCACR, Petitioners-Respondents Scott F. Lawing and Tammy R. Lawing file the following Return to the Cross-Petition for Writ of Certiorari filed by defendants Trinity Manufacturing, Inc. and Matrix Outsourcing, LLC ("Defendants") seeking review of a portion of the Court of Appeals' decision in this case. Defendants contend the Court of Appeals improperly expanded "the aegis of S.C. Code Ann. [§] 15-73-10 and Restatement (Second) of Torts § 402A by including Petitioner Scott Lawing as a 'user' for purposes of the strict liability analysis." (Cross-Petition, p. 16). Defendants claim the Court of Appeals "created too expansive of a definition of 'user' and/or 'consumer' in its opinion." (Cross-Petition, p. 16). The Court of Appeals, however, properly analyzed this issue and correctly applied South Carolina law. Accordingly, this Court should not be persuaded by Defendants' arguments, and should deny their Cross-Petition for Writ of Certiorari.

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

Did the Court of Appeals Erroneously Reverse the Grant of Summary Judgment to Cross-Petitioners Trinity and Matrix on Petitioners/Respondents' Cause of Action for Strict Liability?

1. Did the Court of Appeals Correctly hold Petitioner Scott Lawing was a "user" and/or "consumer" of the subject product?
2. Did the Court of Appeals improperly "expand the aegis of" South Carolina products liability law in its decision on this point?

COUNTER-STATEMENT OF THE CASE

On July 18, 2005, Keith Black and Channon Black (Blacks), and Curtis Martin and Tina Martin (Martins), commenced suit against several Defendants: Univar USA, Inc. (Univar), Trinity Manufacturing, Inc. (Trinity) and Matrix Outsourcing, LLC (Matrix), seeking damages 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 Defendants for damages resulting from the same fire. All of the Complaints were served upon each Defendant in a timely manner, and the Defendants timely filed their Answers, denying liability as to all causes of action.

The cases were designated as complex and assigned to Judge J. C. Nicholson, Jr. Upon his own motion, Judge Nicholson consolidated the cases for discovery and trial and bifurcated the trial as to liability and damages. As discovery progressed, 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 causes of action for (1) Strict Liability; (2) Negligence and (3) Implied Warranty as to all three (3) Defendants. The Amended Complaints added a cause of action based upon Breach of Express Warranty as to Univar. Univar's Second Amended Answer added the Sophisticated User defense and its Third Amended Answer formally denied the Plaintiffs' Breach of Express Warranty claim.

On October 2 and 3, 2008, the trial court heard dispositive motions filed by the Defendants and issued its Order upon the record as to each motion. 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).

Prior to trial Plaintiffs Black and the Martins settled with Trinity and Matrix; however, the Lawings were unable to resolve their claims against Trinity and Matrix. Because the cases had been consolidated the trial was conducted as if all three Plaintiffs were proceeding against all three Defendants upon all remaining claims.

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.

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. *Lawing v. Trinity Mfg., Inc.*, 406 S.C. 13, 749 S.E.2d 126 (Ct. App. 2013).

FACTS

On June 1, 2004, Lawing and Black were working for Engelhard Corp. at its plant in Oconee County. They were part of a hand-picked maintenance crew along with Martin, a contract employee through Fluor Daniel. The three men 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, Lawing and Steve Knox, the crew's lead, saw several pallets of bags in the area where the work was to be done. They 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 aisle way (R. p. 1498, P.Exh.#110; p. 1499, D.Exh.#12; p. 1504, D.Exh.#15). A piece of hot slag 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 exothermic 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). Each worker suffered severe burns and other injuries that totally disabled them and rendered them in need of substantial medical care (physical and psychological) for life. (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 fire, 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). 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 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, 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).

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 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). At the end of the trial but before the jury instruction Plaintiffs moved to reinstate their Strict Liability cause of action but the Court denied the motion. (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).

Petitioners and their 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 charge. Petitioners separately challenged

the Court of Appeals' ruling on the "sophisticated user" charge in their Petition for Writ of Certiorari. In this cross-petition, Defendants seek review of the reversal of summary judgment on the strict liability claims.

ARGUMENTS

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). The Court of Appeals appropriately reversed that ruling.

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). 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).

The issue of interpretation of a statute is a question of law for the court. *Catawba Indian Tribe of SC v. State*, 372 S.C. 519, 642 S.E.2d 751 (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. *In re Campbell*, 379 S.C. 593, 666 S.E.2d 908 (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" OR "CONSUMERS" FOR PURPOSES OF S.C. CODE ANN. § 15-73-10

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 (2005)(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. The Court of Appeals correctly found this ruling was 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.

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 actually flows from the manufacturer to the user and that the labeling system effectively serves 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 encountered 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.

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 *l* provides:

> *l.* **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 core users of the warnings required to be placed on the product.

The Court of Appeals also properly noted that comment *j* supports its decision. The Court stated:

> [C]omment *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.

Lawing, 406 S.C. at 34, 749 S.E.2d at 137.

The Court finally turned properly to comment *o*, which caveats comment *l*, 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 no 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, as the Court of Appeals held, even under comment *o*, Plaintiff Lawing 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 core class of 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 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 *l*. The Court of Appeals correctly held "[t]hese 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." *Id.* at 34, 749 S.E.2d at 137.

The Court of Appeals noted there is little case law on the definition of "user or consumer" for purposes of Section 402A. The Court appropriately relied upon *Patch v. Hillerich & Bradsby Co.*, 361 Mont. 241, 257 P.3d 383 (2011) to inform the Court:

> * * * In *Patch*, a young man pitching in a baseball game died when he was struck by a batted ball. 257 P.3d at 386. His parents sued the manufacturer of the bat, asserting a failure-to-warn claim under Montana's strict liability statute. *Id.* They claimed the bat was defective and unreasonably dangerous because the manufacturer did not warn that balls hit by the bat could travel with such high velocity that other players, particularly pitchers, could be hit by the ball before normal human reaction time would allow them to put up a hand or glove. *Id.* The jury found for the plaintiffs. *Id.* On appeal, the manufacturer argued it should have been granted summary judgment because the pitcher was not a user or consumer of the bat. 257 P.3d at 387. It argued that the person who bought the bat and those who swung it to hit the ball were the only users or consumers under Montana's strict liability statute, and therefore the plaintiffs could not recover. *Id.*
>
> The court disagreed. Noting that Montana's strict liability statute is a codification of section 402A, the court found the manufacturer's "narrow interpretation of the terms user and consumer is contrary to the definition of the terms as contained in" section 402A. *Id.* The court reviewed comment *l* and found the drafters of section 402A "broadly defined" user and consumer. *Id.* In light of the comment, and "the realities of the game of baseball," the court held that "[t]he risk of harm accompanying the bat's use extends beyond the player who holds the bat in his or her hands....

> [A]ll of the players, including [the pitcher], were users or consumers placed at risk by the increased exit speed caused by" the bat. 257 P.3d at 388. Therefore, the supreme court concluded the trial court did not err in denying the manufacturer's summary judgment motion. *Id.*
>
> Like the bat manufacturer in *Patch*, Trinity and Matrix define "user" and "consumer" too narrowly by considering only whether Lawing was doing something with the sodium bromate at the time of the accident. They argue Lawing was not a user or consumer of the sodium bromate because the chemical itself was not involved in the pipe removal operation. However, in light of the comments discussed above illustrating the legislative intent of section 15–73–10, and the realities of modern industrial practice, we hold Lawing was a user of the sodium bromate. Warnings and other safety information on packaging are part of the product. *See* § 402A cmt. *h* ("No reason is apparent for distinguishing between the product itself and the container in which it is supplied; and the two are purchased by the user or consumer as an integrated whole.... The container cannot logically be separated from the contents when the two are sold as a unit ...."). Manufacturers and suppliers of chemicals and other products not only foresee, but intend, that workers like Lawing will use the information on the packaging even if they are not actually using the chemical within the packaging. *See* [David G. Owen, *Products Liability Law* 621 (2d ed.2008)] ("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.").

Lawing, 406 S.C. at 36, 749 at 138. The Court added:

> Trinity and Matrix make two other arguments regarding Lawing's status as a user under section 15–73–10. First, they argue [*Bray v. Marathon Corp.*, 356 S.C. 111, 588 S.E.2d 93 (2003)] 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.

Lawing, 406 S.C. at 36-37, 749 S.E.2d at 138.

Decisions from this Court support the decision of the Court of Appeals. 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*, this 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 this case, 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 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 Co., 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 was 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 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*, 514 N.W.2d 54 (Wisc. 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 *l* 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).

Defendants contend that "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." (Cross-Petition, p. 22). Defendants cite parenthetically to six cases (four cases from Pennsylvania, a Third Circuit case also arising from Pennsylvania, and an unpublished District Court case out of Texas) they contend are persuasive decisions the Court of Appeals overlooked in its decision. (Cross-Petition, p. 22). These decisions, however, have either been criticized by subsequent authority, are meaningfully distinct, or do not stand for the propositions for which Defendants cite them.

The Court of Appeals correctly applied Section 15-73-10 against the backdrop of the relevant comments to Section 402(A) and applicable case law. The Court properly concluded that Lawing was a "user or consumer" for purposes of strict liability under Section 402A with regard to the product and the warnings that were required to be on the product. The Court's analysis is sound and should be left undisturbed.

CONCLUSION

For the reasons stated this Court should deny Defendants' Cross-Petition for a Writ of Certiorari.

Respectfully submitted,

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March 24, 2014

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

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

Op. No. 5166 (S.C. Ct. App. filed Aug. 21, 2013)

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/Petitioners with a copy of the *Return to Respondents/Petitioners' Cross-Petition for Writ of Certiorari* by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:

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