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MAR 27 2014  
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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..... 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

**RESPONDENTS' RETURN TO  
PETITIONERS' CROSS PETITION FOR WRIT OF CERTIORARI**

In their Petition for Writ of Certiorari, dated January 22, 2014, Appellants Scott F. Lawing and Tammy R. Lawing ("Petitioners") articulate three questions for review they assert form the basis for the grant of certiorari in the instant case. Respondents address these points as follows in their opposition to Petitioners' pursuit of this writ:

Regarding a counter-statement of the case, as permitted by Rule 242(f), SCACR, Respondents crave reference to the statement of the case found in their cross petition for writ of certiorari.

Regarding Petitioners' arguments found in their cross petition for writ of certiorari at Section A(1) & (2) (p. 1):

1. The Court of Appeals appropriately disposed of the issue of whether the Sophisticated User Doctrine is the law of South Carolina. In its opinion, the Court explicitly stated that in affirming the decision to charge the jury on the doctrine in previous case involving the doctrine, Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 551, 462 S.E.2d 321, 332 (Ct. App. 1995), the Court of Appeals "recognized that the sophisticated user doctrine is part of the products liability law of South Carolina." Lawing v. Trinity Mfg. Inc., Op. No. 5166 (Ct. App. filed August 21, 2013).

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).

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).

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 devices and was “well aware that conductive materials like conductive hoses should not be used in the buckets of aerial devices.” 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 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 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. The Court of Appeals was correct in its disposition of this issue.

Regarding Petitioners’ arguments found at B(1), (2), and (3) (p. 1-2):

2. Petitioners’ argument that §388 of the Restatement (Second) of Torts requires application of a six-factor balancing test and, if conducted, this balancing test would render the

Sophisticated User Doctrine unavailable to Respondents as a matter of law is without merit. As an initial matter, this six-factor test has never been adopted by a South Carolina court. Even assuming this test is the applicable law of South Carolina, its content was adequately considered by the Court. The six factors are simply circumstances that may be considered in determining if the supplier acted reasonably in relying upon the purchaser/employer to warn its employees of the product's dangers. The Court of Appeals discussed the requirement of reasonable reliance under the circumstances at length in Section III.B.1 of its opinion. Finally, because the record is replete with evidence from which the jury could conclude Respondents acted reasonably under the circumstances in relying on Engelhard to warn its employees, it was not error to charge the Sophisticated User Doctrine to the jury. The Court of Appeals directly addressed this issue and discussed the pertinent testimony supporting the charge in detail in Section III.C of its opinion.

3. The Court of Appeals did not err when it disagreed with the Petitioners' contention that the sophisticated user defense is inapplicable to this case because the warnings provided to the intermediate user were inadequate. In holding the evidence supported the trial court's decision to charge the jury on the Sophisticated User Doctrine, the Court of Appeals implicitly rejected Petitioners' argument that the warnings given to the intermediate user (Engelhard) were inadequate. The Court discussed at length the evidence presented at trial from which a jury could infer Respondents "acted reasonably in providing warnings on the bags and in the MSDS, relying on Engelhard to provide its employees any additional warnings about the dangers of sodium bromate." Accordingly, the adequacy of the warnings given to Engelhard was a question for the jury.

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

4. Petitioners' contend "the Defendants" contractually assumed an obligation to warn Engelhard's employees apart from any warning given to sophisticated intermediaries. This argument is not preserved for appellate review as to Respondents. In their brief to the Court of Appeals, Petitioners very clearly and specifically directed this argument only to Univar, USA, Inc. See, e.g., App. Br. p. 24 ("Did Univar's Contract and Express Warranties With Engelhard Preclude the Defense From Being Applied to Plaintiffs' Negligence and Implied Warranty of Merchantability Claims Against Univar?"), p. 25 ("Univar assumed a duty owed to the employees of Engelhard"), p. 29 ("[i]n summary, as to Univar, the sophisticated user charge should not have been given at all"). This argument is inapplicable to Respondents and, because Univar is no longer involved in this appeal, the Court correctly declined to address it.

Regarding Petitioners' arguments found at C(1) & (2) (p. 2):

5. The Court of Appeals correctly addressed Petitioners' argument that federal preemption applies where state common law defenses conflict with federal law. The Court of Appeals' analysis regarding preemption was not confined to state statutory law. In fact, the origin of the state law claimed to be preempted is irrelevant to the Court's analysis. The Court of Appeals considered the sophisticated user doctrine in conjunction with the

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

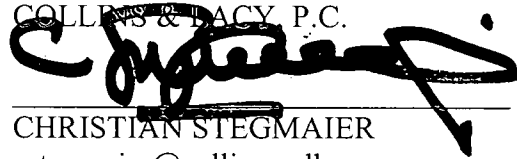
6. Likewise, the Court of Appeals adequately addressed Petitioners’ argument that state law incorporating federal regulations precludes application of the Sophisticated User Doctrine. The Court of Appeals specifically noted Petitioners contended the federal regulations on which their preemption was premised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

For the reasons set forth above, Respondents respectfully request the Court deny Petitioners’ cross Petition for Writ of Certiorari.

**[SIGNATURE PAGE FOLLOWS]**

Respectfully submitted,  
COLLINS & LACY, P.C.

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**RESPONDENTS' RETURN TO  
PETITIONERS' CROSS PETITION  
FOR WRIT OF CERTIORARI**

Columbia, South Carolina  
March 24, 2014

THE STATE OF SOUTH CAROLINA  
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**PROOF OF SERVICE**

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Counsel for Respondents Trinity Manufacturing, Inc. and Matrix Outsourcing, LLC certifies it has served the Respondents Return to Petitioners' Cross Petition for Writ of Certiorari on all parties by depositing a copy of it in the United States Mail, postage prepaid, on March 24, 2014, addressed to the following attorneys of record:

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**[SIGNATURE PAGE TO FOLLOW]**

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