

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

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S.C. Supreme Court

Op. No. 5166 (S.C. Ct. App. Filed August 12, 2013)
Case Tracking No. 2013-002464

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/PETITIONERS' REPLY TO
PETITIONER/RESPONDENTS' RETURN TO
PETITION FOR WRIT OF CERTIORARI**

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TABLE OF CONTENTS

LAW/ANALYSIS.....1

 I. The General Assembly Has Not Defined “User” or “Manufacturer”
 to Include a Non-User Despite the Opportunity to Do So1

 II. The Court of Appeals Failed to Recognize or Acknowledge the
 Analogousness of “Employees of the Retailer” in Comment o
 with the Circumstances Involving Scott Lawing in the Instant Case5

CONCLUSION.....7

LAW/ANALYSIS

I. The General Assembly Has Not Defined “User” or “Manufacturer” to Include a Non-User Despite the Opportunity to Do So

Respondents/Petitioners Trinity Manufacturing, Inc. and Matrix Outsourcing, LLC maintain Petitioners/Respondents Scott F. Lawing and Tammy R. Lawing and the Court of Appeals have made wide jumps and assumptions about the intent of the General Assembly concerning the aegis of “user” or “consumer” in the Restatement (Second) of Torts § 402A/S.C. Code Ann. § 15-73-10 analysis. Respectfully, Respondents/Petitioners aver both the Court of Appeals and Petitioners/Respondents have gone too far in their respective arguments/holdings.

In the instant dispute, at issue is whether Scott Lawing was a “user” or “consumer” of the subject sodium bromide at the time of his accident while performing maintenance duties (which did not include direct use of the sodium bromide) at Englehard. The terms “user” and “consumer” are undefined in both Restatement (Second) of Torts § 402A and S.C. Code Ann. § 15-73-10.

In its decision, the Court of Appeals—employing case law from other jurisdictions, namely Patch v. Hillerich & Bradsby Co., 257 P.3d 383 (Mont. 2011)—determined Lawing fell within the parameters of “user” for purposes of prosecution of his strict liability against Respondents/Petitioners. Patch was a case brought to the attention of the Court at oral argument by Petitioners/Respondents. Respondents/Petitioners maintain the Court of Appeals reliance on Patch to dispose of the strict liability summary judgment issue was erroneous and should be revisited by this tribunal.

As rightly noted in the Court of Appeals’ opinion in Bray v. Marathon Corporation, 347 S.C. 189, 553 S.C. 477 (Ct. App. 2001),¹ any help from case law regarding strict liability emanating from outside our state is arguably often of little assistance because South Carolina is one of only a few jurisdictions in which strict liability was adopted by statute rather than judicially. Id. at 201, 553 S.E.2d at 483 (citing Barnwell v. Barber-Colman Co., 301 S.C. 534, 537–538, 393 S.E.2d 162, 163–164 (1989)). Accordingly, what drives our appellate court’s analysis of novel issues involving strict liability in South Carolina—including what constitutes a “user” or “consumer”—is what the General Assembly has actually said (**or not said**) on the subject. Simply stated, despite ample opportunity to do so, the General Assembly has not expanded the definition of “user” or “consumer” to include non-users of products like Scott Lawing in the case sub judice.

Additionally, as has been asserted by Respondents/Petitioners repeatedly in briefing at every level of this dispute, this Court’s disposition in Bray v. Marathon Corporation, 356 S.C. 111, 588 S.E.2d 93 (2003), is a guide star for the establishment of parameters on “user” or “consumer.”

At issue on appeal in Bray was, inter alia, whether the claimant was a “user” for purposes of prosecuting her claims sounding in strict liability. The Bray Court found the determination of whether an individual is a “user” or “consumer” is not based on a foreseeability standard, but is instead premised upon the finding of whether the individual’s injury was a result of the individual’s **direct** use or consumption of the allegedly dangerous product. Id. at 117, 588 S.E.2d at 95. The Court determined in Bray the claimant was a “user” because she was actually

¹ Reversed in part on other grounds, 356 S.C. 111, 588 S.E.2d 93 (2003).

operating the controls of the defective trash compactor (i.e., directly or actively using the product) at the time her co-worker was killed while in it.²

Additionally, the Bray Court held that it lacked authority to modify § 15-73-10 and its effect where the General Assembly had already spoken by passing the statute. Id. at 117 n.6, 588 S.E.2d at 96 n.6. Specifically, the Bray Court stated the following concerning the constraints of its purview to fashion a remedy for persons alleging bystander claims under a strict liability theory via § 15-73-10:

[W]e are without authority to graft the Kinard [v. Augusta Sash & Door Co., 286 S.C. 579, 336 S.E.2d 465 (1985)] bystander analysis on § 15-73-10. Where the legislature has, by statute, acted upon a subject, the judiciary is limited to interpretation and construction of that statute. Barnwell v. Barber-Colman Co., 301 S.C. 534, 393 S.E.2d 162 (1989) (finding punitive damages are not recoverable under Defective Products Act); Schall v. Sturm, Ruger Co., Inc., 278 S.C. 646, 300 S.E.2d 735 (1983) (absent clear legislative direction, strict liability cause of action under § 15-73-10 does not exist in South Carolina where product entered stream of commerce prior to enactment of statute and is alleged to have caused injury thereafter). **If the Act is to be amended so as to provide for the requirement of a close relationship in the context of a strict liability cause of action, this must be accomplished by the legislature, not the court.**

Id. at 117 n.6, 588 S.E.2d 93, 96 n.6 (2003) (emphasis added).

This constraint articulated by this tribunal in Bray runs contrary to Petitioners/Respondents' pursuit of expanding the already clearly delineated aegis of the

² Specifically, this Court held:

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

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

definition of “user” or “consumer” to include a non-user or someone whose contact with the subject product was, at most, incidental.³

Bray was decided in 2003. It cannot be disputed the General Assembly pays close attention to the decisions of our appellate entities. Time and again, we see legislation patterned to reflect appellate decisions to either codify holdings or to enact law that this Court stated the General Assembly possessed the sole providence to do. For Respondents/Petitioners, what is telling in this case is that the General Assembly took no action to expand the definition of “user” or “consumer” from that the Bray Court arguably articulated as being the law, which Respondents/Petitioners maintain is this: To be considered a “user” or “consumer” for purposes

³ Bray was preceded by another strict liability decision of this Court, Marchant v. Lorain Division of Koehring, 272 S.C. 243, 251 S.E.2d 189 (1979). In Marchant, suit was brought against crane manufacturer after a crane “double blocked,” which caused the bucket in which plaintiff was riding crashed to ground. The Circuit Court granted manufacturer's motion for summary judgment as to all three theories of liability: negligence, breach of warranty, and strict liability. Plaintiff appealed. The Supreme Court, reversed holding, *inter alia*, there was no showing the plaintiff was cognizant via a manufacturer’s warning of the crane's tendency to “double block” when he boarded bucket, and thus a jury issue was created as to whether manufacturer was liable in strict liability for its failure to warn a user such as plaintiff of such possible hazard. In conjunction with this holding, the Court noted:

(A) product, although faultlessly made, may nevertheless be deemed “defective” under the rule (in Restatement Second of Torts, section 402A) and subject the supplier thereof to strict liability if it is unreasonably dangerous to **place the product in the hands of a user** without a suitable warning and the product is supplied and no warning given.

Id. at 247-48, 251 S.E.2d at 192 (quoting Pike v. Hough, 497 P.2d 229 (Calif. 1970)).

Applying Marchant, for a strict liability claim to be cognizable in South Carolina, the plaintiff must be a “user” with the subject product actually being in his or her hands (*i.e.*, actively using the product).

Contrary to Petitioners/Respondents’ assertions found within their reference to Marchant in their return to Respondents/Petitioners’ cross petition for writ of certiorari, the plaintiff in Marchant was not “passive,” but was actually using the subject product—he was riding in the bucket (*i.e.*, the product had actually be placed in his hands as a user). Id. at 18-19. In the case sub judice, Lawing was not using or consuming the sodium bromide at the time of his accident.

of Restatement (Second) of Torts 402A/S.C. Code Ann. § 15-73-10, the person seeking recovery must actually have been using or consuming the subject product (i.e., “directly” or actively using or consuming the product) at the time of alleged injury. In the instant case, Scott Lawing was neither directly using nor consuming the subject sodium oxide at the time of the accident, nor was the sodium bromide a component of his job activities. Accordingly, applying Bray, Scott Lawing cannot recover under a theory of strict liability in the case at bar.

II. The Court of Appeals Failed to Recognize or Acknowledge the Analogousness of “Employees of the Retailer” in Comment with the Circumstances Involving Scott Lawing in the Instant Case

In its opinion, the Court of Appeals stated:

[W]e believe the legislature intended that the term “user” include persons who could foreseeably come into contact with the dangerous nature of a product. Thus, a person who examines a product for warnings and other safety information is one whom the seller intends will use that information to avoid the dangers associated with the product, and thus is a person who foreseeably could come into contact with its dangerous nature. Such persons enjoy the benefit of the warning by learning how to use the product safely, or by learning that they should avoid the product altogether. They are not “casual bystanders,” but instead use the product by reading the warning to learn what, if anything, they can safely do with it.

Lawing v. Trinity Mfg., Inc., 406 S.C. 13, 34-35, 749 S.E.2d 126, 137 (Ct. App. 2013)

Despite the Court of Appeals’ apparent certainty on the subject of the General Assembly’s purported intent concerning the definition of “user,” there is nothing extant emanating from the General Assembly to actually evince or otherwise demonstrate this intent.

Moreover, noticeably absent from the Court of Appeals’ decision was the entirety of the quote from Comment o of Restatement 402A concerning the distinction between user and non-user. Id. at 34, 749 S.E.2d at 137 (“Finally, comment o helps define ‘user’ and ‘consumer’ by illustrating what those terms do not mean. When the American Law Institute adopted section 402A, it stated it expressed no opinion as to whether the rule should apply ‘to persons other than

users or consumers.’ § 402A caveat. Explaining that caveat, comment o describes a ‘non-user’ as a ‘[c]asual bystander’ and others whose contact with the product is incidental, such as ‘a passer-by injured by an exploding bottle, or a pedestrian hit by an automobile.’ § 402A cmt. o. These examples illustrate that the Institute intended that the people to be excluded from the definition of ‘user’ and ‘consumer’ are much farther removed from the product than Lawing and his co-workers were from the sodium bromate”). Specifically, Comment o states, in pertinent part: “Thus far the courts, in applying the rule stated in this Section, have not gone beyond allowing recovery to users and consumers, as those terms are defined in Comment 1. Casual bystanders, **and others who may come into contact with the product, as in the case of employees of the retailer,** or a passer-by injured by an exploding bottle, or a pedestrian hit by an automobile, **have been denied recovery.**” *Id.* (emphasis added). In the instant case, as a maintenance worker working nearby who was not using or consuming the subject sodium bromide, Scott Lawing was in a position analogous to the “employees of the retailer” example found in Comment o—someone whose contact with the subject product was at most incidental. The Court of Appeals’ opinion omitted the “employees of the retailer” language in its quote/analysis of this comment. Respondents/Petitioners maintain this omission was significant inasmuch as Lawing, like the “employees of the retailer” example were in the same position—persons whose contact with the subject product was not direct, but instead non-direct or incidental. Had that example been included in its analysis, Respondents/Petitioners aver the Court of Appeals would have been constrained from using Comment o as a basis for expanding the definition of “user” or “consumer” to non-users like Scott Lawing.

CONCLUSION

Petitioner Scott Lawing was not a “user” or “consumer” of the subject sodium bromate under either Restatement (Second) of Torts § 402A or S.C. Code Ann. § 15-73-10. Accordingly, Respondents/Petitioners Trinity and Matrix respectfully request this Court grant the instant cross petition for writ of certiorari in order to enable them to pursue reversal of the Court of Appeals’ opinion regarding the Circuit Court’s grant of summary judgment to them on the strict liability count.

Respectfully submitted,
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PROOF OF SERVICE

Counsel for Respondents/Petitioners Trinity Manufacturing, Inc. and Matrix Outsourcing, LLC certifies it has served Respondents/Petitioners' Reply to Petitioners/Respondents' Return to Petition for Writ of Certiorari on all parties by depositing a copy of it in the United States Mail, postage prepaid, on April 17, 2014, addressed to the following attorneys of record:

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[SIGNATURE PAGE TO FOLLOW]

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