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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

Op. No. 5166
Appellate Case 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 Which Trinity Manufacturing, Inc. and Matrix
Outsourcing, LLC are . . . . . Respondents/Petitioners.

THE LAWINGS' BRIEF OF PETITIONERS

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INTRODUCTION

On August 21, 2014, this Court issued Writs 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). This is a products liability case that involves novel questions of law regarding the trial court's decision to instruct the jury on the "sophisticated user" defense. This Court should reverse the Court of Appeals and remand to the circuit court for a new trial on the Lawings' claims against Trinity Manufacturing and Matrix Outsourcing.

QUESTIONS PRESENTED

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?

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

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

STATEMENT OF THE CASE

On July 18, 2005, Keith Black and Channon Black (the Blacks) and Curtis Martin and Tina Martin (the Martins) commenced their cases against the Defendants, Univar USA, Inc. (Univar), Trinity Manufacturing, Inc. (Trinity) and Matrix Outsourcing, LLC (Matrix), 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, Scott Lawing and Tammy Lawing (the Lawings) filed similar Complaints against the same three Defendants for Mr. Lawing's personal injuries and Mrs. Lawing's loss of consortium damages resulting from the same fire. Each of the Defendants timely filed their Answers in which they denied liability as to all causes of action. Matrix pled the "sophisticated user" defense.

The initial Complaints stated three causes of action as to all three Defendants: (1) Strict Liability; (2) Negligence and (3) Breach of Implied Warranty. The Amended Complaints added a fourth cause of action based upon Breach of Express Warranty as to Univar. 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 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 bifurcated the trial as to liability and damages.

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 Section 15-73-10 of the South Carolina Code; however, the trial court denied Defendants' Motions for Summary Judgment based upon the "sophisticated user" defense, holding there were questions of fact for the jury to determine as to the application of that defense.

The trial court also denied Univar's Summary Judgment Motion as to the Plaintiffs' Breach of Express Warranty claims. The court held that as a matter of law the contract between Engelhard and Univar 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 regulations under OSHA and the Department of Transportation (DOT).

Prior to the start of the liability trial, Plaintiffs Keith 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, and notwithstanding that Black and the Martins had settled with Trinity and Matrix, the trial was conducted as if all of the Plaintiffs were proceeding against all three Defendants upon all remaining claims pled.

The liability trial began on October 20, 2008 and ended on November 17, 2008, with a jury verdict in favor of all Plaintiffs against Univar on the claim for Breach of Express Warranty. This was the only claim the jury decided in the Lawings' favor – the jury found for Univar, Trinity and Matrix on the remaining causes of action. The trial court 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 denied the motion to dismiss but held that appeal in abeyance pending resolution of trial on damages. The Court remanded the matter to the circuit court for the damages trial.

The damages phase began on December 1, 2008. On December 12, 2008, the jury returned verdicts for all of the plaintiffs against Univar, awarding Mr. Lawing $1,900,000 for his damages and Mrs. Lawing $100,000 for loss of consortium. The Lawings filed post-trial motions as to Trinity and Matrix. The trial court denied the motions by order filed on March 31, 2009. 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 and served Notices of Appeal, solely as to Univar.

Following initial briefing, all of the Plaintiffs resolved all of 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 of Appeals 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. *Lawing v. Trinity Mfg., Inc.*, 406 S.C. 13, 749 S.E.2d 126 (Ct. App. 2013). Both sides filed cross-motions for writ of certiorari, and on August 21, 2014, this Court granted both Petitions.

FACTS

On June 1, 2004, 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 Mr. Lawing and Steve Knox, the crew's lead, saw several pallets of bags in the area where the work was to be done and looked at the bags but did *not* see a yellow oxidizer label that was required to be on the bags by DOT and OSHA regulations (R.p.820, ll.14-22; p.1025, l.1-p.1026, l.2). Prior to 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 any of them, the pallets contained sodium bromate, which is an oxidizer that Engelhard uses in the refinement of precious metals. When ignited, sodium bromate will cause a 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). They 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). 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). When the slag landed onto or near one of the bags it caused the bag to begin burning.

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 ball of fire 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). There may have been as much as 10,000 pounds of the sodium bromate involved in the fire (R. p. 1499, D.Exh.#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). It is as if the men walked through a blowtorch.

At the time of the fire, Mr. Black and Mr. Martin had no knowledge of the specific uses and dangers associated with sodium bromate, but Mr. Lawing had assisted the operator of the processor on the night shift in loading the sodium bromate into the reactors and he generally knew this substance's 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 workers themselves were unaware of the extent of the dangerous reaction. This included 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 that was dated December 9, 2003 and issued to Univar on January 6, 2004. This covered 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 also 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 at the Engelhard receiving dock (R. p. 1496, P.Ex.#100). The shipment reached the port of Charleston, South Carolina, on February 6, 2004 and remained there until February 13, when it was shipped by Trinity by truck 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). Engelhard purchased the sodium bromate from Univar, who, in turn, ordered it from Trinity. Trinity utilized its sister company, Matrix, 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 overland freight bill from Charleston to Englehard's facility (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 Engelhard's loading dock, testified that prior to the fire, Engelhard had received shipments of sodium bromate from Univar containing pallets with no oxidizer hazard labels showing (R.p.847, ll.1-5; p.855, ll.3-16).

About eight months after the fire, sodium bromate drums supplied by Univar were 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, Mr. Lawing and Mr. Knox looked at the pallets of sodium bromate and did not see any warning labels of any kind on the pallets and/or bags. More particularly, they did not see any yellow oxidizer labels required by OSHA (R. p. 1441, P.Exh.#12) and DOT (R. p. 1488, P.Exh.#95). This was a label that the men had been trained to recognize. (R.p.820, ll.14-22; p.1025, l.1-p.1026, l.2). Numerous management-level Engelhard employees, including the Safety Manager, had passed by the pallets of sodium bromate before the fire and none 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 Section 15-73-10 of the South Carolina Code. The court ruled that Mr. Lawing, Mr. Black and Mr. Martin were not "users" or "consumers" of the sodium bromate within the meaning of the Products Liability Act. The court denied Defendants' Motion for Summary Judgment on Plaintiffs' Common Law Negligence and Implied Warranty of Merchantability Claims based on the "sophisticated user" defense, finding 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 Matrix, Trinity and Univar by federal law. More specifically, Plaintiffs argued 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. The court 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 negate or contradict the federally mandated duty to label and warn that is contained in OSHA regulations and in other federal regulations (R.p.1260, l.9-p.1261, l.16).

Prior to this charge being given, however, Plaintiffs moved to reinstate their Strict Liability cause of action but the court denied that 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) 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 precluded the defense when weighed in accordance with the relevant six (6) qualifying factors.

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; Summary Judgment 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 court instructed them "yes." (R. p. 1651, Ct. Exh.#23). The question clearly indicated that the jury was confused by the court'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 the court could fully resolve that matter, however, the jury reached its verdict and there was no further attempt by the court to clarify or to ensure that the jury understood the charge or the six (6) factor balancing test. (R.p.1263, l.4-p.1264, l.24; p.1266, l.17-p.1269, l.9;p.1268, ll.16-20).

All Plaintiffs appealed the trial court's grant of summary judgment upon their strict liability claims, the court's 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 Defendants.

The Court of Appeals reversed as to the Strict Liability claims but affirmed the trial court's decision to charge the "sophisticated user" defense.

This review follows.

ARGUMENTS

I. 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 rejected the Lawings' argument that the "sophisticated user" defense is not the law of South Carolina and held 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 23, 749 S.E.2d at 131. This holding was wrong. The "sophisticated user" defense has not been definitively adopted in this state.

In *Bragg*, the Court of Appeals stated that the question of whether a defendant is entitled to the "sophisticated user" defense, which would obviate any duty on the part of a product's distributor to warn subsequent purchasers and users, relies on whether the defendant has acted reasonably in assuming that an intermediary party like a business would recognize the danger in the product and take precautions to protect its employees. *Bragg*, 319 S.C. at 550, 462 S.E.2d at 332. The *Bragg* court referenced Restatement (Second) of Torts § 388 as being adopted by numerous jurisdictions, but it did not specify whether South Carolina recognizes § 388 as the law of this state.

Further, although the *Bragg* court stated that the trial court had "properly charged" the defense as set forth in Section 388 of the Restatement (Second) of Torts (*i.e.*, that the charge as given properly reflected the defense), the *Bragg* Court did *not* address whether the defense was in fact the law of South Carolina; rather, the Court held that as charged, the defense was accurately portrayed. *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 that 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 *Bragg* held that the product was not defective and that a warning was needed, *any* discussion about whether the manufacturer discharged its duty by warning a "sophisticated user" was not relevant and not a holding. The Court of Appeals erred in holding that this issue had been put to bed by its decision in *Bragg*.

This Court has not spoken to the issue of whether the "sophisticated user" defense is the law in South Carolina. Although the Court has mentioned Section 388 in a dissent, it was not in the context of whether the defense is a viable one. *See Claytor v. General Motors Corp.*, 277 S.C. 259, 286 S.E.2d 129 (1982) (Lewis, CJ, dissenting). The Court should therefore address whether the defense as set forth in Restatement (Second) of Torts § 388 is the law in South Carolina.

As the next section of this brief explains, this defense would not apply in the present case, regardless of whether the defense is available in South Carolina generally.

II. THE COURT OF APPEALS ERRED IN APPLYING THE "SOPHISTICATED USER" DEFENSE IN THIS CASE

The Court of Appeals rejected the Lawings' argument that even if the defense is part of the law of South Carolina, Section 388 of the Restatement (Second) of Torts still requires the application of a balancing test of six (6) factors as set forth in *Goodbar v. Whitehead Bros.*, 391 F.Supp. 552, 557 (W.D. Va.1984). The Court also declined to address the Lawings' contention 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 erred 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 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.*, 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 defense to the jury:

1. The sodium bromate involved in the June 1, 2004 incident was imported and sold by the Defendants in an extremely dangerous condition. This was not a mildly hazardous product. It was sensitive to heat and had the potential to cause a disaster.

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. It was stored as it was shipped and it was where it was supposed to be.

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. Acting reasonably required

them to do something, but they did nothing.

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 as follows.

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

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

Earlier shipments of sodium bromate to Engelhard had been packaged in drums, but the sodium bromate shipment that is the subject of this litigation was packaged in a polyethylene inner bag and a polypropylene outer bag, both organic materials. (P.Exh.#1 (filed separately with the Court); R.p.782, ll.10-15; p.886, ll.4-13). The MSDS for sodium bromate actually warns to keep sodium bromate away from organic materials at all times. (R.p.798, l.22-p.799, l.16). The bags of sodium bromate were stacked, at least thirty-six (36) at a time onto a wooden pallet, covered in a polyethylene shrink-wrap and

double-stacked, meaning one pallet of sodium bromate bags was stacked on top of another. (R.p.782, ll.8-9; p.844, l.25-p.845, l.5; p.858, l.24-p.859, l.9). The pallets were received into Engelhard's loading dock and placed directly into the plant in the exact form in which they were sold. (R.p.844, l.25-p.845, l.14; p.848, ll.6-11).

At trial, Dr. Richard Henderson was offered as an expert witness to address the reaction of sodium bromate and its packaging when exposed to ignition sources. (R.p.775, l.22-p.776, l.3). He performed an ignition test, using the same make-up of packaged sodium bromate that was shown to be in the Engelhard plant a day or two after the June 1, 2004 fire, and he videotaped the test, which was offered into evidence by the Plaintiffs. (P.Exh.27 (filed separately with the Court); R.p.777, l.25-p.778, l.3; p.785, ll.16-21; p.792, ll.7-9). Dr. Henderson testified that the test intended to demonstrate that when you introduce sodium bromate to burning fuel, the fire "takes off kind of like a chain reaction" and "goes up exponentially" kind of like a bomb. (R.p.785, l.25-p.787, l.24; p.792, l.10-p.793, l.16; p.794, ll.2-7). He attempted to calculate the actual amount of energy released at the fire and his best estimates were 3,200,000 Kilojoules. (R.p.795, ll.17-24). In an attempt to illustrate how violent a reaction of this magnitude would be, Dr. Henderson stated, "I didn't do a test that big, but that would be a gigantic fireball." (R.p.796, ll.17-18). Steve Knox, a crew leader at Engelhard at the time of the fire, viewed Dr. Henderson's bag test while testifying. (R.p.823, l.22-24). When asked if the eruption on the video represents the incident that occurred on the morning of June 1, 2004, he replied, "On a very small scale . . . It sounded like a jet taking off." (R.p.826, ll.10-18).

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

Angela Granados, Vice President of Defendant Matrix, had been alerted by the Chinese manufacturer of the sodium bromate in an email that the packaging of the sodium bromate in bags actually created a hazardous cargo issue. (R.p.877, ll.14-22; p.884, l.23-p.885, l.6). She confirmed that she was fully aware that as an oxidizer, sodium bromate was a hazardous chemical that can seriously harm people. (R.p.878, l.25-p.879, l.11). On the other hand, Engelhard employees, including the Plaintiffs in this case, were completely unaware of the extent of the danger that the sodium bromate presented in the plant on June 1, 2004. (R.p.866, l.17-p.867, l.20; p.985, ll.3-7; p.1006, ll.10-12; p.787, l.25-p.788, l.12). The Defendants knew the risks; the Plaintiffs did not.

The dangerous condition of the sodium bromate that Defendants sold in this case is of an indisputably high level. This factor in the "sophisticated user" balance analysis weighs heavily against the Defendants, and their claim they have no duty to warn – none – subsequent purchasers and their employees of the serious dangers associated with sodium bromate in the form in which it was sold.

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

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

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

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

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

pallets of sodium bromate, looked at them, and saw only black writing and numbers. (R.p.820, l.11; p.821,ll.7-10; p.823,ll.4-10).

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

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

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

Paul Bailey, who worked in receiving at the time of the June 1, 2004 incident, testified at trial that he would receive shipments of sodium bromate prior to June 1, 2004 that contained pallets that did not show any kind of hazard labels on them at all. (R.p.847, ll.1-5). He testified that this would occur on two or three pallets per truck that was received. (R.p.848, ll.18-24). Paul Bailey also stated that the yellow oxidizer labels, when visible, were "faded", and one would "have to be up on the pallet and look at it very

close" to see it. (R.p.849, ll.7-18). He confirmed that there were pallets that came through that had oxidizer labels that were only visible from the top of the pallet, and never on the side of the pallet. (R.p.855, ll.3-16).

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

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

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

The nature of the relationship between the Defendants and Engelhard made the Defendants' reliance upon Engelhard to properly label the sodium bromate unreasonable. The Defendants were completely uninformed as to Engelhard's level of reliability as a conduit of necessary information. No Defendant ever investigated Engelhard's safety practices or level of sophistication, and no Defendant made any inquiries into Engelhard's activities or uses of sodium bromate. The Defendants never inspected any shipments that entered the United States from China. Their approach was totally "hands off."

The Defendants are unable to avail themselves of the "sophisticated user" defense without showing they took some affirmative steps to determine whether its purchaser, Engelhard, was reliable as a conduit of necessary information. *Willis v. Raymark*

Industries, Inc., 905 F.2 793, 797 (4th Cir. 1990). They never did anything of this sort. They also did not show that they took affirmative steps to ensure that their product was marked with appropriate warnings in the Engelhard plant.

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

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

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

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

of the contract.

David Williams, the purchasing manager at Engelhard in 2004, dealt with Univar on behalf of Engelhard. (R.p.759, ll.6-13). He testified that the relevant provision in the contract was an essential and material term of the contract, the purpose of which was to ensure that any shipments from suppliers, such as Univar, complied with federal regulations. (R.p.762, l.9-p.763, l.11). He stated that Engelhard depended on Univar to put OSHA and DOT compliant labels on the sodium bromate, and that the cost of labeling was included in the contract price. (R.p.763, ll.12-20). David Williams further stated that the purpose of having the labels on the bags was, among other things, to warn the employees of Engelhard as to its hazardous identity. (R.p.763, l.21-p.764, l.7).

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

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

The Defendants in this case are unable to claim they acted reasonably by solely

relying upon Engelhard to ensure proper labeling on products which they (and not Engelhard) sold. Engelhard had effectively contracted this duty away to Univar, who passed responsibility to Matrix and Trinity, who then passed this duty overseas to the Chinese manufacturers, and none of the Defendants ever inspected the results of these delegations of contractual duty. (R.p.893,ll.4-11; p.1162,ll.1-8; p.1173,ll.1-3). The Defendants claim that they could reasonably rely on Engelhard to mark the sodium bromate in compliance with OSHA when Univar expressly contracted and warranted that it would do this for Engelhard for a price. This factor in the "sophisticated user" analysis should weigh so heavily in the Plaintiffs' favor that the Defendants' conduct in this regard could never be mistaken as reasonable. This, standing alone, should preclude the defense.

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

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

risks in this case kept compounding such that the magnitude of the risk was totally unacceptable.

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

The OSHA standard was enacted to protect employees from the dangers of hazardous chemicals. When suppliers who are subject to the OSHA standard fail to meet their burdens, the employees are not adequately protected and serious harm may befall them. OSHA promulgated the Hazard Communication Standard (HCS) "to ensure that the hazards of all chemicals produced or imported are evaluated, and that information concerning their hazards is transmitted to employers and employees." 29 C.F.R. § 1910.1200(f)(3); *see also Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 92 (1992) (noting that OSHA authorizes the Secretary of Labor to promulgate federal occupational safety and health standards).

The Defendants (Univar, Trinity, and Matrix) are all subject to the OSHA HCS standard and have a duty to warn employees of subsequent purchasers of the hazards of sodium bromate, especially of hazards created in the form in which that sodium bromate is sold. "Suppliers" must be included in this regulation to ensure that information flows

from the manufacturer to the user and that the labeling system is to serve as an immediate warning and as a reminder of the more detailed information provided in other forms. The Federal Register states:

> Employers who simply use chemicals, rather than producing or importing them, *are permitted to rely on the information received from their suppliers*. 29 CFR 1910.1200(d)(1). This downstream flow of information recognizes that the chemical manufacturers and importers have access to information about the chemicals they sell that is not available to those who only use them. It also reduces duplication of effort by focusing the hazard determination process at the source, rather than having everyone who uses a chemical trying to complete such a process.

77 Fed. Reg. 17707 (Mar. 26, 2012)(emphasis added). The document provides further:

> *(f) Labels and other forms of warning.* The HCS is designed to provide information through three different media: labels or other forms of immediate warning; safety data sheets; and training. Labels are attached to the container of chemicals, and thus provide the information that employees have the most ready access to in the workplace. Given that they are attached to containers, they are by necessity somewhat limited in the amount of information they can present. The labels provide a snapshot or brief summary of the more detailed information provided to employees in training programs, or available to them on safety data sheets. They are not intended to be a complete or detailed source of information on the chemical.

Id. at 17724.

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

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

(R.p.1017, ll.20-24). Scott Lawing agreed that in his hazard communication training he was taught to look for the DOT oxidizer label to immediately alert him to the dangers of

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

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

The Restatement supports this view. The Comments to Section 388 are particularly instructive. Comment (*a*) provides:

a. The words "those whom the supplier should expect to use the chattel"

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

(Emphasis added). Comment (*a*) demonstrates that those within the field of foreseeable use enjoy the protections afforded by the required warnings and are covered by the section.

Furthermore, comment (*g*) provides:

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

Comment (*h*) provides further:

> *h.* There are many articles which are so defective as to be incapable of safe use for any of the purposes for which they are normally fit or for use in the manner in which such articles are normally capable of safe use, but which

> are safe for limited uses or if used with particular precautions. If the appearance of such a chattel does not disclose its defective condition, *the supplier is under a duty to exercise reasonable care to disclose its condition, in so far as it is known to him, to those who are to use it, or to inform them that it is fit only for these limited uses, or if used with the particular precautions.*

(Emphasis added). Finally, comment (k) adds:

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

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

This factor in the "sophisticated user" analysis should overwhelmingly weigh in favor of the Plaintiffs in this case. The sodium bromate was inadequately labeled from the that it was sold. The risk of injury was so great that those charged with properly labeling the product and warning of its dangers should *never* be excused for their failure to do so.

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

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

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

Dr. Jerry Purswell testified that to stitch a label onto the side of a bag would be very simple and that since the bags are stacked sideways, "you would want to have something that shows up along the edge." (R.p.954, l.4-p.955, l.5). John Munson testified that prior to June 1, 2004 and since that time, Univar had sold Engelhard chemical products with white "Univar USA, Inc." stickers on the outside of the shrink-wrapped pallets. (R. p. 1479, P.Exh.#19; R.p.901, ll.1-17). There is no reason why Univar could not have labeled the shrink-wrapped pallets with a warning label just as easily as they labeled it with their corporate logo and other markings.

It is not only feasible for the Defendants to adequately label sodium bromate sold by them, it is required. The Defendants were required by OSHA's HCA to provide adequate and effective warnings, and Univar expressly warranted that they would provide products compliant with OSHA and DOT regulations. The burden on the Defendants is nominal. They need only to comply with federal regulations to fulfill contracts that they willfully enter. This factor, along with all the other factors, weighs heavily against the Defendants and demonstrates that the magnitude of the risks involved in this case, along with the minimal cost to the Defendant corporations, demanded that the Defendants provide an effective and prominently visible label for the benefit of the Plaintiffs.

Based upon the above "balancing of the factors" analysis and a reasonable cost/benefit analysis, each factor 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. 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 rejected the Lawings' argument that the warning given to the intermediate user in this case was inadequate so that even if the "sophisticated user" defense is the law of this State, it afforded no defense at all in this case.

In South Carolina, manufacturers, suppliers, and distributors 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. Even in states where the "sophisticated user" defense is recognized, the defense 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, the jury 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 ignored the Lawings' argument that, if the defense 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*, 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. 289 S.C. 121, 345 S.E.2d 244 (1986). The Court observed that "[a] tort-feasor may be subjected to tort liability for injury to a third party arising out of the tort-feasor's contractual relationship with another, despite the absence of privity between the tort-feasor and the third party." *Id.* at 122, 345 S.E.2d at 244. *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 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" defense in this case.

III. THE COURT OF APPEALS ERRED IN REJECTING THE LAWINGS' ARGUMENT THAT THE "SOPHISTICATED USER" DEFENSE IS IMPLIEDLY PREEMPTED IN THIS CASE

The Court of Appeals rejected the Lawings' argument that federal preemption also applies where state common law defenses conflict with federal law. The Court of Appeals also rejected the Lawings' argument that state law which incorporates federal regulations also prevents application of the "sophisticated user" defense. This Court should reverse the Court of Appeals' rulings on these issues.

The Lawings objected to the "sophisticated user" defense being charged to the jury because the defense was in conflict with federal OSHA regulations to such an extent

that its application completely abrogated the federal regulatory scheme and the duty to label and warn imposed thereby. The Lawings contended (1) the defense 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 defense cannot override or relieve someone of duties and/or requirements that are legislatively imposed by valid state statutes and regulations. The Court of Appeals rejected these arguments, holding that the defense did not stand as an obstacle to fulfillment of the safety objectives embodied in the federal regulations. This conclusion is incorrect.

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 Conflicts Preemption is 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 the Lawings' 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.

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 trial 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 upon 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 are the law of South Carolina by the state's incorporation by reference and are intended to benefit employees in the workplace. The Defendants' argument is that the duty and mandate for adequate labeling is extinguished if the employer is a "sophisticated user." This is plainly incompatible with the intent of the regulations and their 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, must 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 the OSHA regulations applied to Matrix, Trinity and Univar as a matter of law and that those federal regulations *did* impose a duty on the Defendants to warn of possible dangers and to 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 should have 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, 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.

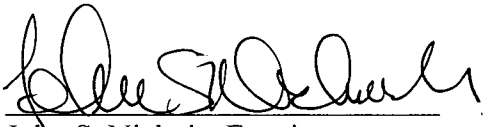
The duty warranted by Univar, which the jury found it to have breached, was the same duty that all three of the Defendants, Matrix, Trinity and Univar, owed to the Plaintiffs pursuant to the DOT and OSHA regulations. The jury's verdict against Univar on the express warranty claims is, therefore, a finding that all three of the Defendants Matrix, Trinity and Univar breached the federally-mandated duties imposed on 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 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 they completely contradicted the federally mandated duty to warn and to label the sodium bromate as prescribed. This was error and cannot be allowed to stand.

The Court of Appeals should have reversed the verdicts in favor of Matrix, Trinity and Univar on the negligence and implied warranty claims. This Court should reverse the Court of Appeals' decision and should remand the matter to the trial court for proceedings consistent with this Court's mandate.

CONCLUSION

The Court should reverse the Court of Appeals's decision. The trial court should not have instructed the jury on the "sophisticated user" defense. The Court should remand the matter for a new trial consistent with this Court's decision.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the 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 *Lawing's Brief of Petitioners* by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:

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