

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM OCONEE COUNTY
Court of Common Pleas

OCT 29 2014

S.C. Supreme Court

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.

SCOTT AND TAMMY LAWING'S RESPONDENT'S BRIEF

John S. Nichols
BLUESTEIN, NICHOLS,
THOMPSON, DELGADO, LLC
Post Office Box 7965
Columbia, SC 29202
(803) 779-7599

Larry C. Brandt
LARRY C. BRANDT, PA
Post Office Box 738
Walhalla, SC 29691
(864) 638-5406

Robert P. Foster
FOSTER & FOSTER, LLP
Post Office Box 2123
Greenville, SC 29602
(864) 242-6200

William P. Walker, Jr.
S. Kirkpatrick Morgan, Jr.
WALKER & MORGAN, LLC
Post Office Box 949
Lexington, SC 29072
(803) 359-6194

Attorneys for Petitioners/Respondents

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INTRODUCTION

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

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

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

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

COUNTER-STATEMENT OF THE CASE

On July 18, 2005, Keith Black and Channon Black (Blacks), and Curtis Martin and Tina Martin (Martins), commenced suit against several Defendants, Univar USA, Inc. (Univar), Trinity Manufacturing, Inc. (Trinity) and Matrix Outsourcing, LLC (Matrix), seeking damages resulting from a chemical fire that occurred at the Engelhard plant in Seneca, South Carolina, on June 1, 2004. On January 11, 2006, Plaintiffs Scott Lawing and Tammy Lawing (Lawings), filed similar Complaints against the same three Defendants for damages resulting from the same fire. All of the Complaints were served upon each Defendant in a timely manner, and the Defendants timely filed their Answers, denying liability as to all causes of action.

The cases were designated as complex and assigned to Judge J. C. Nicholson, Jr. Upon his own motion, Judge Nicholson consolidated the cases for discovery and trial and bifurcated the trial as to liability and damages. As discovery progressed, Plaintiffs and Defendants amended their pleadings with the consent of all other parties, and the cases proceeded to trial upon the Amended pleadings.

The initial Complaints pled causes of action for (1) Strict Liability; (2) Negligence and (3) Implied Warranty as to all three Defendants. The Amended Complaints added a cause of action based upon Breach of Express Warranty as to Univar. Univar's Second Amended Answer added the "Sophisticated User" defense and its Third Amended Answer formally denied the Plaintiffs' Breach of Express Warranty claim.

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

Defendants' Motion for Summary Judgment on the Strict Liability claims, holding that the Plaintiffs were not "users or consumers" within the meaning of those terms as used in Section 15-73-10 of the South Carolina Code.

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

The liability trial began on October 20, 2008 and ended on November 17, 2008, with jury verdicts in favor of all Plaintiffs against Univar on the claim for Breach of Express Warranty and in favor of Univar, Trinity and Matrix on the remaining causes of action. The Trial Judge then set the damages trial to begin December 1, 2008, before the same jury for the purpose of assessing damages against Univar.

On November 26, 2008, Univar appealed from the liability trial and the orders denying motions made following the liability trial. Plaintiffs moved to dismiss the appeal and on December 4, 2008, the Court of Appeals held that appeal in abeyance pending resolution of trial on damages.

On November 26, 2008, all parties filed post-trial motions: Petitioners Scott and Tammy Lawing filed post-trial motions against Trinity and Matrix. The Court denied the Motions by order filed on December 3, 2008. Univar thereafter filed and served a Notice of Appeal. The Lawings filed and served a Notice of Cross-Appeal on December 30, 2008 as to all Defendants – Trinity, Matrix and Univar. Black and the Martins also filed a Notice of Appeal on December 30, 2008, solely as to Univar. Following initial briefing,

all Plaintiffs resolved their claims with Univar. Thus, the Lawings became the primary appellants and Trinity and Matrix became the only respondents in this appeal.

The Court of Appeals heard oral arguments in the matter and on August 21, 2013, the Court issued its opinion affirming in part, reversing in part and remanding. *Lawing v. Trinity Mfg., Inc.*, 406 S.C. 13, 749 S.E.2d 126 (Ct. App. 2013). Both sides petitioned this Court for review and on August 21, 2014, this Court granted both petitions.

FACTS

On June 1, 2004, Lawing and Black were working for Engelhard Corp. at its plant in Oconee County. They were part of a hand-picked maintenance crew along with Martin, a contract employee through Fluor Daniel. The three men were cutting out and replacing condensate pipe during the plant's annual shutdown week, which began on that date. (R. p. 1499, D.Exh.#12; R.p.988, l.21-p.989, l.2; R. p. 1007, ll.8-13; p.1008, ll.10-12).

Before any work commenced, Lawing and Steve Knox, the crew's lead, saw several pallets of bags in the area where the work was to be done. They looked at the bags but did not see a yellow oxidizer warning 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 introduced to a combustible material and ignition, 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). Plaintiffs moved slowly down the condensate pipe for about two hours to a distance of approximately twenty-five (25) to thirty (30) feet from the starting point to a right turn in the pipe and the aisle way (R. p. 1498, P.Exh.#110; p. 1499, D.Exh.#12; p. 1504, D.Exh.#15). A piece of hot slag landed on one of the 36 or more bags of the sodium bromate that was stacked on one of the pallets in the same condition and configuration as they were when delivered to Engelhard (R.p.844, l.25-p.845, l.14; p.848, ll.6-11; p.857, l.13-p.858, l.4; p.869, ll.8-18).

There may have been as much as 10,000 lbs. of the sodium bromate involved in the fire (R. p. 1499, D.Exh.#12). When the slag landed onto or near one of the bags it caused the bag to begin burning and in a matter of seconds the sodium bromate oxidized the burning bag, thereby expanding the highly exothermic reaction to all of the other bags and creating a fire ball that engulfed the workers in the pipe rack (Black) and in a man-lift (Martin and Lawing) (R.p.991, l.22-p.992, l.25; p.1004, ll.2-14; p.1032, ll.1-12). Each worker suffered severe burns and other injuries that totally disabled them and rendered them in need of substantial medical care (physical and psychological) for life. (R.p.969, l.3-p.970, l.11; p.1005, ll.2-18; p.1033, l.18-1034, l.4).

At the time of the fire, Black and Martin had no knowledge of the specific uses and dangers associated with sodium bromate, but Lawing had assisted the operator of the processor on the night shift load the sodium bromate into the reactors and generally knew its purpose (R.p.994, ll.13-19; p.1006, ll.10-17; p.1018, ll. 4-22). The workers received

Hazcom and Hazmat training that taught each of them to recognize warning symbols on packages of all the chemicals that would be present in the Engelhard factory, including sodium bromate (R.p. 985, ll.3-12; p. 1003, ll.2-4, 20-22; p. 1018, ll.7-15; p.1132, l.10-21).

The sodium bromate was in a combustible bag that acted as the fuel source for the fire. It was in the same condition at the time of the accident as it was when it arrived at the Engelhard dock, which was layer upon layer of bags of sodium bromate stacked upon wooden pallets (R.p.785, l.25-p.787, l.24; p.844, l.25-p.845, l.14; p.848, ll.6-11). The Plaintiffs themselves were unaware of the extent of the dangerous reaction, as was Jimmy Norris, an Engelhard chemical engineer, who had no idea that such an eruption as the one that occurred on June 1, 2004 would have been possible (R.p.866, l.17-p.867, l.20).

Engelhard purchased the sodium bromate involved in the fire from Univar pursuant to a "blanket" purchase order dated December 9, 2003 and issued to Univar on January 6, 2004, covering the anticipated needs of Engelhard for sodium bromate for the calendar year 2004. (R. p. 1541, D.Exh.#100; p.754, l.23-p.755, l.11; p.760, l.4-p.761, l.6). The purchase order in question expressly stated:

Acceptance of this Order constitutes an express warranty by the Vendor that . . . all goods to be provided hereunder shall be merchantable, fit for the purpose intended and of first quality, involve no unreasonable risk of injury or damage when used as intended, conform to all specifications and samples and be free from all defects in design, materials and workmanship.

(R. p. 1541, D.Exh.#100). Additionally, the purchase order stated:

Vendor warrants that it is and will be in compliance with all applicable provisions of federal, state and local laws and the rules,

regulations and standards promulgated thereunder, including without limitation the following, as amended from time to time: (a) Occupational Safety and Health Act of 1970.

(R. p. 1541, D.Exh.#100). Also present on the purchase order was a clause that stated:

Each package must be marked to comply with the Occupational Safety and Health Association (OSHA) (29 C.F.R. §1910.1200) requirements for packaging and labeling and the Department of Transportation Code of Federal Regulations (CFR) 49 requirements.

(R. p. 1541, D.Exh.#100; p.755, ll.16-24; p.762, ll. 7-21; p.911, l.25-p.912, l.10). This clause was included in the purchase order because Engelhard completely depended on Univar to properly label and package the sodium bromate in accordance with OSHA and DOT regulations, with the purpose of warning Engelhard's employees (R.p.763, l.7-p.764, l.7; p.765, ll.3-11;p.766, ll.14-25; p.913, l.12-p.914, l.2;p.1101, ll.11-24).

The purchase order also provided:

This purchase order is subject to the provisions on the face hereof and the instructions, terms and conditions on the reverse side. Please review them carefully. They will constitute our contract unless we agree in writing to changes or additions.

(R. p. 1541, D.Exh.#100).

On January 15, 2004, the shipment of sodium bromate that Engelhard had ordered from Univar left China with a final destination of the Engelhard receiving dock (R. p. 1496, P.Ex.#100). The shipment reached the port of Charleston on February 6, 2004 and remained there until February 13, when it was shipped by Trinity over-land by Old Dominion Freight Line, Inc., directly to the Engelhard facility in Seneca, South Carolina (R. p. 1475, P.Ex.#16; R. p. 1569, D.Exh.#114; R. p.971, ll.17-19).

Engelhard received an invoice for this shipment that was dated February 16, 2004

(R. p. 1476, P.Exh.#17). The sodium bromate was purchased by Engelhard from Univar, USA, Inc. who, in turn, ordered it from Trinity Manufacturing, Inc. Trinity, in turn, utilized its sister company, Matrix Outsourcing, LLC, to import the sodium bromate from China to the port of Charleston. There, it was delivered by agreement between Trinity and Univar directly to Engelhard, with Trinity paying the over-land freight bill from the port of Charleston to Englehard (R. p. 1475, P.Exh.#16; R.p.881, ll.11-24; p.971, ll.17-19; p.975, ll.20-24; p.976, ll.1-22).

None of the Defendants conducted a safety hazard analysis of the bags of sodium bromate or inspected any of the connex boxes that contained the sodium bromate at any time (R.p.889, ll.15-17; p.972, ll.2-5; p.977, ll. 4-10; p.982, l.22-p.983, l.10; p.1162, ll.1-8). Paul Bailey, the Engelhard employee in charge of receiving shipments at the loading dock of Engelhard, testified that prior to the fire, shipments of sodium bromate had been received from Univar containing pallets with no oxidizer hazard labels showing (R.p.847, ll.1-5; p.855, ll.3-16).

Approximately 8 months after the fire, drums of sodium bromate supplied by Univar were, in fact, discovered in the Engelhard plant without the yellow labels on them (R.p.851, ll.9-13). On the day of the fire and prior to beginning their work, Lawing and Steve Knox, the work crew's lead, looked at the pallets of sodium bromate and did not see any warning labels of any kind on the pallets or bags and, more particularly, did not see any yellow oxidizer labels required by OSHA (R. p. 1441, P.Exh.#12) and DOT (R. p. 1488, P.Exh.#95), which they had been trained to recognize (R.p.820, ll.14-22; p.1025, l.1-p.1026, l.2). Numerous employees of Engelhard in management level positions,

including the Safety Manager, had passed by the pallets of sodium bromate prior to the fire and none of them recalled seeing the yellow oxidizer label required by OSHA and DOT on the pallets or bags. (R.p.1027, l.6-p.1028, l.9; p.1226, l.22-p.1227, l.8; p.1228, ll.10-13; p.1231, l.25-p.1232, l.3).

On October 2 and 3, 2008, the trial court heard pre-trial motions and granted all of the Defendants' Motions for Summary Judgment on the Plaintiffs' Strict Liability Claim pursuant to Section 15-73-10. The court ruled that the Plaintiffs were not "users" or "consumers" of the sodium bromate within the meaning of the Products Liability Act. Defendants' Motion for Summary Judgment on Plaintiffs' Common Law Negligence and Implied Warranty of Merchantability Claims based on the sophisticated user defense was denied, however, as the court ruled that there were questions of fact that needed to be developed before the court could finally rule upon that issue. (Pre-Trial Motions (8/3/2008): R.p.624, ll.4-18). At the end of the trial but before the jury instruction Plaintiffs moved to reinstate their Strict Liability cause of action but the court denied the motion. (R.p.1252, ll.13-15). The court advised that it would "incorporate all your arguments on the summary judgment motion and at the directed verdict stage at the end of the Plaintiffs' cases into the arguments now." (R.p.1253, ll.6-9).

Petitioners and their co-plaintiffs appealed the trial court's grant of Summary Judgment upon their Strict Liability Claims, its denial of their Motion for Directed Verdict upon the sophisticated user defense at the close of all evidence, and those issues raised in Plaintiffs' Post-Liability Trial Motion for New Trial upon the negligence and implied warranty of merchantability claims against all three (3) Defendants.

The Court of Appeals reversed on the Strict Liability claims, but affirmed the Court's decision to give the sophisticated user charge. Petitioners separately challenged the Court of Appeals' ruling on the "sophisticated user" charge in their Petition for Writ of Certiorari. This brief concerns Defendants' cross-petition for writ of certiorari seeking review of the Court of Appeals' reversal of summary judgment for them on the Plaintiffs' strict liability claims.

ARGUMENTS

The trial court granted summary judgment for Defendants on Plaintiffs' strict liability claims, adopting the Defendants' position on the definition of "user" for purposes of the South Carolina Products Liability Act and holding Plaintiffs were not "users" under that Act. (R. p.624, lines 15-18). The Court of Appeals appropriately reversed that ruling.

Summary judgment is appropriate where there is no genuine issue of material fact; and it is clear that the moving party is entitled to judgment as a matter of law. Rule 56(e), SCRPC; *Bank of New York v. Sumter County*, 387 S.C. 147, 691 S.E.2d 473 (2010). On review of an order granting summary judgment, the appellate court applies the same standard as that used by trial court. *Edwards v. Lexington County Sheriff's Dep't*, 386 S.C. 285, 688 S.E.2d 125 (2010).

The issue of interpretation of a statute is a question of law for the court. *Catawba Indian Tribe of SC v. State*, 372 S.C. 519, 642 S.E.2d 751 (2007). In a case raising a novel question of law regarding the interpretation of a statute, the appellate court is free to decide the question with no particular deference to the lower court. *In re Campbell*, 379 S.C. 593, 666 S.E.2d 908 (2008). *See also Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 658 S.E.2d 80 (2008) (the Supreme Court reviews questions of law *de novo*).

PLAINTIFFS WERE "USERS" OR "CONSUMERS" FOR PURPOSES OF S.C. CODE ANN. § 15-73-10

Section 15-73-10, entitled "Liability of seller for defective product," adopted Restatement (Second) of Torts § 402A and provides, in pertinent part:

(1) One who sells any product in a defective condition unreasonably dangerous *to the user or consumer* or to his property is subject to liability for physical harm caused to the ultimate user or consumer, or to his property, if

(a) The seller is engaged in the business of selling such a product, and

(b) It is expected to and does reach *the user or consumer* without substantial change in the condition in which it is sold.

S.C. Code Ann. § 15-73-10 (2005)(emphasis added). This section imposes strict liability upon the manufacturer and seller for an injury to any “user or consumer” caused by its product if the product is expected to and does reach the user or consumer without substantial change. *Id. See also Fleming v. Borden, Inc.*, 316 S.C. 452, 450 S.E.2d 589 (1994) (Section 15-73-10 imposes strict liability for an injury to “any user caused by its product unless the product has been materially altered before it reaches the injured user and such alteration could not have been expected by the manufacturer or seller).

The Act does not expressly define “user or consumer.” The trial court ruled that the Plaintiffs were not “users or consumers” of the product or the warnings required by state and federal law so that the Defendants were not liable to them under the Act. The Court of Appeals correctly found this ruling was contrary to established authority under Section 402A.

First, under a strict, literal construction of the Act, the Plaintiffs were “users” of the inadequately labeled sodium bromate. As employees of the industrial purchaser of the chemicals, the Plaintiffs were the very users and consumers for whom the warnings on the volatile and explosive hazardous workplace product were, and should have been, intended. The Defendants provided the sodium bromate to Plaintiffs’ employer for

eventual use in manufacturing processes run in the employer's plant. Defendants provided the sodium bromate in significant quantities and on pallets that were intended to be stored and moved about in the plant until needed for later use in the employer's chemical process. The warnings required to be placed on the bags were intended and necessary to alert the employees of the buyer/employer that the bags contained highly combustible and volatile material so that any and all employees who might be responsible for storing, handling and moving the pallets of bags would recognize what they were and the danger they represented and treat the pallets of bags accordingly.

The OSHA standard applicable in this case was enacted to protect employees from the dangers of hazardous chemicals. When suppliers, subject to the OSHA standard, fail to meet their burdens under that standard, the employees are not adequately protected and serious harm may befall them. OSHA promulgated the Hazard Communication Standard (HCS) (see 29 C.F.R. § 1910.1200(f)(3)) "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(a)(1) (emphasis added). "Suppliers" must be included in this Regulation to ensure that information actually flows from the manufacturer to the user and that the labeling system effectively serves as an immediate warning and as a reminder of the more detailed information provided in other forms. *Id.* at 53301.

The trial court effectively held that these warnings were meaningless and directed at no one. The individuals who encountered the pallets in transit would be "mere bystanders" who did not enjoy any benefit of the product so that the warnings were not

meant for them. The buyer's management never actually encountered the pallets and did not work around them; the warnings could not have been meant for them, except as they would have been passed on to the workers who actually did work around the pallets. Under a literal construction of § 15-73-10, however, these Plaintiffs were precisely the "users" and "consumers" for whom the warnings were intended.

The comments to Rule 402A further support the view that the Act applies to employees such as Mssrs. Lawing, Martin and Black. The Act expressly adopts those comments as the expression of legislative intent in enacting the Act. See S.C. Code Ann. § 15-73-30 (2007) ("Comments to § 402A of the Restatement of Torts, Second, are incorporated herein by reference thereto as the legislative intent of this chapter.")

Comment *l* provides:

l. User or consumer. In order for the rule stated in this Section to apply, it is not necessary that the ultimate user or consumer have acquired the product directly from the seller, although the rule applies equally if he does so. He may have acquired it through one or more intermediate dealers. It is not even necessary that the consumer have purchased the product at all. He may be a member of the family of the final purchaser, or his employee, or a guest at his table, or a mere donee from the purchaser. The liability stated is one in tort, and does not require any contractual relation, or privity of contract, between the plaintiff and the defendant.

* * *

"User" includes those who are passively enjoying the benefit of the product, as in the case of passengers in automobiles or airplanes, as well as those who are utilizing it for the purpose of doing work upon it, as in the case of an employee of the ultimate buyer who is making repairs upon the automobile which he has purchased.

Restatement (Second) of Torts § 402A, cmt. *l*. Under this comment, the terms "user or consumer" includes the final purchaser's employee, and even those "passively enjoying

the benefit of the product.” Industrial workers, such as the Plaintiffs, owe their very employment to – and thus passively enjoy the benefit of – each industrial product the employer purchases and uses in pursuit of its manufacturing processes. Each employee is a constituent part of the employer’s collective enterprise and are the core users of the warnings required to be placed on the product.

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

The Court stated:

[C]omment *j* discusses the requirement that a seller provide directions and warnings on the container of a product. The comment contemplates that the seller will warn people of the product’s dangerous qualities so that certain people who see the warning will not use the product. Comment *j* provides an example:

Where ... the product contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product, the seller is required to give warning against it....

§ 402A cmt. *j*. Thus, the comment contemplates that a person will “use” the warning to determine whether it is safe for the person to use or consume the product, or in a situation like the one we face in this case, whether he should move the product to another location before doing work that may be dangerous in the vicinity of the product.

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

The Court of Appeals finally turned properly to comment *o*, which caveats comment *l*, and explains that the ALI expressed no opinion on whether Section 402A should be applied to “persons other than users or consumers.” Comment *o* provides:

Thus far the courts, in applying the rule stated in this Section, have not gone beyond allowing recovery to users and consumers, as those terms

are defined in Comment *l*. Casual bystanders, and others who may come in contact with the product, as in the case of employees of the retailer, or a passer-by injured by an exploding bottle, or a pedestrian hit by an automobile, have been denied recovery. There may be no essential reason why such plaintiffs should not be brought within the scope of the protection afforded, other than that they do not have the same reasons for expecting such protection as the consumer who buys a marketed product; but the social pressure which has been largely responsible for the development of the rule stated has been a consumers' pressure, and there is not the same demand for the protection of casual strangers.

Restatement (Second) of Torts § 402A cmt. *o*. Importantly, comment *o* does not indicate that even casual bystanders or casual strangers are not within the protections of Section 402A, but rather explains that during the early 1960s (when Section 402A was developed) there was no judicial support for strict liability in tort to cover "casual" victims of what was perceived at the time to be liability grounded in warranty claims.

However, as the Court of Appeals held, even under comment *o*, Plaintiff Lawing would be within the definition of "user or consumer" for purposes of Section 402A. Welders working within close proximity to highly flammable and explosive material their employer purchased for use in the corporate enterprise are hardly "casual," "strangers," or "bystanders" with respect to the hidden risks embedded within the hazardous workplace substance. These workers are the core class of potential victims for whose benefit products liability law in general, and Section 402A in particular, imposes the duty on sellers of such dangerous products to provide full, fair and adequate warnings of the hazards lurking within that product.

Comment *o* notes that the retailer's employees who "casually" come in contact with the product have been denied coverage. Such is a far cry from industrial welders at

an industrial plant whose work necessarily exposes them to the hidden risks of hazardous industrial products that have insufficient warning labels. Those employees are the very persons who must be warned about the dangers of the product so that they will treat the product with appropriate caution. They are the very “users or consumers” of the product label described in comment *l*. The Court of Appeals correctly held “[t]hese examples illustrate that the Institute intended that the people to be excluded from the definition of ‘user’ and ‘consumer’ are much farther removed from the product than Lawing and his co-workers were from the sodium bromate.” *Id.* at 34, 749 S.E.2d at 137.

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

* * * In *Patch*, a young man pitching in a baseball game died when he was struck by a batted ball. 257 P.3d at 386. His parents sued the manufacturer of the bat, asserting a failure-to-warn claim under Montana’s strict liability statute. *Id.* They claimed the bat was defective and unreasonably dangerous because the manufacturer did not warn that balls hit by the bat could travel with such high velocity that other players, particularly pitchers, could be hit by the ball before normal human reaction time would allow them to put up a hand or glove. *Id.* The jury found for the plaintiffs. *Id.* On appeal, the manufacturer argued it should have been granted summary judgment because the pitcher was not a user or consumer of the bat. 257 P.3d at 387. It argued that the person who bought the bat and those who swung it to hit the ball were the only users or consumers under Montana’s strict liability statute, and therefore the plaintiffs could not recover. *Id.*

The court disagreed. Noting that Montana’s strict liability statute is a codification of section 402A, the court found the manufacturer’s “narrow interpretation of the terms user and consumer is contrary to the definition of the terms as contained in” section 402A. *Id.* The court reviewed comment *l* and found the drafters of section 402A “broadly defined” user and consumer. *Id.* In light of the comment, and “the realities of the game

of baseball,” the court held that “[t]he risk of harm accompanying the bat’s use extends beyond the player who holds the bat in his or her hands.... [A]ll of the players, including [the pitcher], were users or consumers placed at risk by the increased exit speed caused by” the bat. 257 P.3d at 388. Therefore, the supreme court concluded the trial court did not err in denying the manufacturer’s summary judgment motion. *Id.*

Like the bat manufacturer in *Patch*, Trinity and Matrix define “user” and “consumer” too narrowly by considering only whether Lawing was doing something with the sodium bromate at the time of the accident. They argue Lawing was not a user or consumer of the sodium bromate because the chemical itself was not involved in the pipe removal operation. However, in light of the comments discussed above illustrating the legislative intent of section 15–73–10, and the realities of modern industrial practice, we hold Lawing was a user of the sodium bromate. Warnings and other safety information on packaging are part of the product. *See* § 402A cmt. *h* (“No reason is apparent for distinguishing between the product itself and the container in which it is supplied; and the two are purchased by the user or consumer as an integrated whole.... The container cannot logically be separated from the contents when the two are sold as a unit”). Manufacturers and suppliers of chemicals and other products not only foresee, but intend, that workers like Lawing will use the information on the packaging even if they are not actually using the chemical within the packaging. *See* [David G. Owen, *Products Liability Law* 621 (2d ed.2008)] (“The purpose of warnings ... is to provide information to people about hazards and safety information they do not know about so they may avoid the product altogether or avoid the danger by careful use.”).

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

Trinity and Matrix make two other arguments regarding Lawing’s status as a user under section 15–73–10. First, they argue [*Bray v. Marathon Corp.*, 356 S.C. 111, 588 S.E.2d 93 (2003)] supports their narrow interpretation of the term user. In *Bray*, the supreme court held the plaintiff was a user because she was physically operating the trash compactor’s controls at the time of her co-worker’s death. 356 S.C. at 115, 116–17, 588 S.E.2d at 94, 95–96. We see nothing in *Bray* that contradicts our interpretation of section 15-73-10. Trinity and Matrix also argue that even if Lawing was a user of the sodium bromate, he cannot recover because his use was not an intended use. *See Claytor v. Gen. Motors Corp.*, 277 S.C. 259, 264, 286 S.E.2d 129, 132 (1982) (“A product may, by reason of its nature and use, be unreasonably dangerous unless proper

instructions and warnings are supplied for its intended use.” (emphasis added)). This argument has the same flaw as their argument that Lawing was not a user—it focuses exclusively on the sodium bromate itself, rather than the product as a whole, including the packaging and particularly the warning. Trinity and Matrix cannot seriously suggest they did not intend for Lawing to examine the bags for information warning him it would be unsafe to leave them in the work area. Lawing testified he looked at the pallets and the bags for any labels, and he saw nothing indicating he should not work near them. In that respect, Lawing used the product exactly as Trinity and Matrix intended.

Accordingly, Lawing was a user of the product. By granting summary judgment on the ground that he was not a user, the trial court erred.

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

This Court’s precedents support the decision of the Court of Appeals. In *Marchant v. Lorain Div. of Koehring*, 272 S.C. 243, 251 S.E.2d 189 (1979), two workers were riding in a bucket suspended from a cable on a crane. The crane’s operator extended the boom beyond the length of the cable, causing the crane to “double block,” the cable to snap, and the bucket to crash to the ground. The Court allowed warning and design defect claims under the Act to proceed against the crane’s manufacturer, relying upon *Pike v. Hough Co.*, 467 P.2d 229 (Cal. 1970). The *Marchant* Court described the workers in the bucket as “users,” although the workers only passively related to the crane that was operated by someone else, stating:

Moreover, there was no showing that the appellant, Marchant, was cognizant of the crane’s tendency to two block when he boarded the bucket. Therefore, a jury issue was created as to whether Lorain was liable in strict liability for its failure to warn *a user such as Marchant* of the possible hazard.

272 S.C. at 248, 251 S.E.2d at 191 (emphasis added). In fact, the defect in the crane

placed the workers in the bucket at greater risk than the crane's operator, just as the inadequate warnings in this case placed the welders at greater risk than the workers who placed the pallets beneath those workers or the employees who utilized the product in the production process. *Marchant* supports application of Section 402A to the injured Plaintiffs in this case and the finding they were users of the product for purposes of the required warnings.

In *Bray*, this Court found the employee in that case who suffered emotional injury from watching a coworker being crushed by a defectively designed and manufactured machine was covered by Section 402A. The Court held the bystander analysis under *Kinard v. Augusta Sash & Door Co.*, 286 S.C. 579, 336 S.E.2d 465 (1985) does not apply to a strict liability cause of action, stating:

We find the Court of Appeals properly concluded that the bystander analysis of *Kinard* does not apply to a strict liability cause of action. A user of a defective product is not a mere bystander but a primary and direct victim of the product defect. *Accord Kately v. Wilkinson*, 148 Cal.App.3d 576, 195 Cal.Rptr. 902 (1983) (plaintiff, who was owner and driver of boat that killed daughter's friend, allowed to proceed on products liability claim as user of product); *Gnirk v. Ford Motor Co.*, 572 F. Supp. 1201 (D.S.D.1983) (manufacturer owed independent legal duty to plaintiff due to status as user of car involved in accident, rather than as bystander). Because § 15-73-10 limits liability to the user or consumer, there is no need for a limitation on foreseeable victims to avoid disproportionate liability as was found necessary in the bystander setting. It is not unreasonable to conclude the user of a defective product might suffer physical harm from emotional damage if the use of the product results in death or serious injury to a third person, irrespective of the relationship between the user and third person.

Bray, 356 S.C. at 117, 588 S.E.2d at 95-96. The Court noted that "If the Act is to be amended so as to provide for the requirement of a close relationship in the context of a

strict liability cause of action, this must be accomplished by the legislature, not the court.”

Bray, 356 S.C. at 117 n. 6, 588 S.E.2d at 96 n. 6.

Bray does not preclude recovery for the workers in this case. In fact, *Bray* supports the argument that Plaintiffs, who were primary and direct victims of the defective warnings, were more than “mere bystanders” for purposes of the Act.

Cases from other jurisdictions are also instructive on this issue. For instance, in *Martin v. Survivair Respirators, Inc.*, 298 S.W.3d 23 (Mo. Ct. App. 2009), Derek Martin, a firefighter, died trying to rescue a fellow firefighter (Morrison) who was lost inside a burning building and Martin’s family sued the manufacturers of the firefighters’ equipment, Survivair Respirators, Inc. (“Survivair”) because of alleged malfunctioning of equipment that contributed to Martin’s death. The equipment, call a PASS alarm, was designed to activate and emit a loud screeching sound anytime the wearers were motionless for a period of twenty seconds or more. The fellow firefighter’s PASS alarm failed, causing Martin to lose him and to ultimately die of smoke inhalation while trying to locate and rescue the fellow firefighter. The Missouri Court of Appeals noted Missouri had adopted Section 402A:

Here, the PASS device has an intended purpose: to sound an alarm when a firefighter has been motionless for a period of twenty seconds. This is to alert the others in the Rescue Squad that one of their men is down. It is these others who need the alarm in order to find the man who is down. This is exactly what the PASS device was designed to do. Once the alarm sounds, the firefighter wearing the device takes no part in its use, rather it is the others who use the device to find him. Martin, as one of the other firefighters seeking to locate Morrison, relied on Morrison’s PASS alarm to sound in order to find him. Thus, Martin was the “ultimate user” of Morrison’s PASS alarm.

298 S.W.3d at 32.

In this case, the Plaintiffs who were in the vicinity of the dangerous materials were the “ultimate users” of the warnings that should have been properly placed and visible on the bags of sodium bromate. Those warnings were required to alert those who encountered the pallets that the bags contained material that would explode if exposed to flame, including red-hot slag byproduct from welding.

In *Wirth v. Clark Equipment Co.*, 457 F.2d 1262 (9th Cir. 1972), the plaintiff was a longshoreman whose duties required him to work as a part of a crew attending a thirty-ton motor driven wheeled vehicle, known as a van carrier. Clark Equipment Company had manufactured the van carrier and had sold it to Matson Navigation Co., in whose service it was being operated at the time of the accident. Much of the cargo transported by Matson’s ships was packed in large wooden vans (or containers or boxes) whose dimensions were approximately 24' x 8' x 8', and whose loaded weight was many tons. The carrier concerned was designed and manufactured for the purpose of straddling such a van, lifting it from a flat bed trailer, or from the pavement, or from the top of another van, and transporting it to another location in the waterfront area. Such work required that the carrier be a large and heavy machine. The carrier was 26 feet long, 13 feet wide, and 18 1/2 feet high. The carrier could travel at speeds up to 20 miles per hour. The operator sat in a cab at the rear of the top of the vehicle, near the motor.

A representative of the defendant testified that this location of the cab was considered to be the best place to facilitate the ability of the operator to drive the carrier and handle the containers. However, because of the location of the cab, the forward view

of the driver was seriously limited to the extent that he could not see the ground for a distance of 51' 9" in front of his right front wheel. There was testimony to the effect that similar carriers "kept running into things," and that light poles and fire hydrants located in their areas of operation had to be protected by buffers of concrete or steel.

The carrier did not contain wheel guards, or "cow catchers," nor did it contain mirrors or closed circuit TV cameras and monitors for the purpose of enhancing the operator's forward vision, and the testimony was conflicting as to the practicability of such safety installations on this machine. The noise of the engine could be heard all over the yard, a fact that provided a constant reminder of the carrier's presence, but not necessarily of its approach. The testimony indicated that Matson had affixed a bell to the carrier that was actuated when the vehicle was in motion, but this bell could not be heard if the motor was turning faster than idling.

The plaintiff's function was that of a "block man," whose duty was to disengage or engage the fasteners that held a van securely on a trailer, in order to facilitate the carrier in lifting the van from the trailer or in depositing it thereon. Thus, the plaintiff's work required him regularly to be in close proximity to the carrier.

On the day of the accident, the crew had completed its assignments for the day, and the driver was in process of moving the carrier to the parking area. His route took him the length of a 30-foot wide aisle that was formed by the locations of two rows of vans. As the driver turned to enter this corridor, he could see the length of it and did not observe the plaintiff; after he had proceeded the entire length of the corridor and had parked the carrier, he learned that his right front wheel had run over the plaintiff,

inflicting severe injuries that included the loss of a leg. The evidence indicated that at the time the carrier proceeded down the corridor, the plaintiff was leaning against one of the vans that formed the corridor and was having a smoke.

The plaintiff sought recovery on the basis of negligence in the design and manufacture of the carrier, and strict liability by reason of the manufacture and sale of a carrier that was in an unreasonably dangerous and defective condition. At the conclusion of the trial, the judge submitted to the jury the issue of negligence (and a verdict for the defendant resulted), but he withdrew from the jury the matter of strict liability, ruling that, as a matter of law, the plaintiff could not recover on that basis.

The Ninth Circuit, applying Oregon law, reversed, stating:

The plaintiff in this case was not a “casual stranger.” He was an employee of the purchaser of the machine; his duties as block man were an integral part of the functioning of the machine; he was obliged to work in close proximity to the machine; and the safety deficiencies that the trial court found to exist in the carrier created a particular hazard to a person in the plaintiff’s position. A trier of fact could readily have found that the plaintiff was a “user” of the machine and that he was no more a bystander than was the driver.

Wirth v. Clark Equipment Co., 457 F.2d at 1265.

Like the plaintiff in *Wirth*, the Plaintiffs in this case were not “casual bystanders” or “casual strangers” to the product and the warnings that should have been placed in compliance with state and federal law. The defect in the product (lack of an adequate warning) jeopardized these Plaintiffs precisely because of their close proximity to the pallets and their use of welding and cutting machinery that could ignite the sodium bromate. It makes no sense to hold that these Plaintiffs are not “users or consumers” of

the warnings required for the product for purposes of South Carolina's Products Liability Act. *See also Anderson v. Smith*, 514 N.W.2d 54 (Wisc. Ct. App.1993) (the "user" of the product includes any person who the manufacturer would reasonably foresee coming into contact with its hazardous product; if the product presents a risk to a third person foreseeably endangered by the expected use of the product, additional warnings to remind the immediate user of the latent danger to others may be required). As comment *l* explains, "[i]t is not even necessary that the consumer have purchased the product at all. He may be a member of the family of the final purchaser, *or his employee*, or a guest at his table, or a mere donee from the purchaser." (emphasis supplied).

The Pennsylvania Cases

Defendants contend that "case law is arguably legion as it pertains to the limitation of recovery to injured persons who are not demonstrated to be the 'intended' users of a product in question." (Brief p. 22). Defendants cite to seven cases (all arising out of Pennsylvania) they contend are persuasive decisions that the Court of Appeals overlooked in its decision. (Brief p. 22). Because of more recent Pennsylvania case law, however, these decisions are of questionable assistance in deciding this issue.

The difficulty with using the Pennsylvania cases can be summed up by discussing the first case Defendants reference, *Van Buskirk v. West Bend Co.*, 100 F.Supp.2d 281 (E.D. Penn. 1999). *Van Buskirk* is now viewed as against the grain of other district courts attempting to predict Pennsylvania's products liability law.

In *Berrier v. Simplicity Mfg., Inc.*, a child (Ashley) was injured when her grandfather (Mr. Shoff) backed over her foot while the grandfather was using a riding

mower that lacked “back-over” protection. The manufacturer argued, among other things, that the child was not the “intended user” of the mower under Pennsylvania law so that the manufacturer was entitled to summary judgment. *Berrier v. Simplicity Corp.*, 413 F.Supp.2d 431 (E.D. Penn. 2005) (“*Berrier I*”).

The district court first noted that while Pennsylvania followed the Restatement (Second) of Torts § 402A, which defines “user” and “consumer” “in broad terms,” the ALI’s adoption of the Restatement (Third) of Torts: Products Liability, §§ 1 and 2, eliminates the requirement that a plaintiff be a “user” or “consumer” and “suggests an intent to permit recovery under a strict liability theory to all persons affected by a defective product.” 413 F.Supp.2d at 439 and n. 2. The district court then noted that Pennsylvania’s “intended use” jurisprudence “evolved, through judicial interpretation, into the rule that a product need only be made safe for its ‘intended user.’” 413 F.Supp.2d at 439-440. The district court cited to several of the same cases the Defendants discuss in this portion of their brief to this Court, including *Azzarello v. Black Bros. Co., Inc.*, 391 A.2d 1020 (Pa. 1978), *Mackowick v. Westinghouse Electric Corp.*, 575 A.2d 100 (Pa. 1990), *Riley v. Warren Mfg., Inc.*, 688 A.2d 221 (Pa. Super. 1997), *Phillips v. Cricket Lighters*, 841 A.2d 1000 (Pa. 2003) and *Van Buskirk*. The district court in *Berrier I* held:

Application of the intended user or consumer doctrine to the instant set of facts yields the conclusion that Ashley may not recover under a strict liability theory. Ashley did not purchase the mower from Simplicity. Nor was Ashley operating the tractor at the time she sustained injuries. In fact, Ashley was not even a passive beneficiary of the mower’s benefits, as she neither lived nor had an ownership interest in the Shoff’s property. Furthermore, the on-product and in-manual warnings makes it clear that children are not to operate the mower, and, in fact, that the mower should not be operated in the presence of children. (See Pictures, at

No. 16; Operator's Manual, at 3–4). Finally, plaintiff has not suggested, let alone made an evidentiary showing, such as through expert testimony, that the mower was dangerous for its intended user, an adult operator. Consequently, because Ashley was an innocent bystander, rather than an intended user or consumer, and because plaintiffs have introduced no evidence to suggest that the mower was unsafe for its intended user, plaintiffs may not recover against Simplicity under Pennsylvania law for injuries Ashley sustained as a result of the alleged defect in the mower. Simplicity's motion for summary judgment on Count I of plaintiffs' complaint is therefore granted.

Berrier I, 413 F.Supp.2d at 442-443.

On appeal, the Third Circuit Court of Appeals asked the Pennsylvania Supreme Court to certify the following question: “Whether, under Pennsylvania law a plaintiff minor child may pursue a strict liability claim for injuries caused by a riding lawnmower, where that child is neither an intended user nor consumer of the mower.” *Berrier v. Simplicity Mfg., Inc.*, No. 05-3621 (3rd Cir. 2008) (2008 WL 538912). The Pennsylvania Supreme Court, however, declined to do so. *Berrier v. Simplicity Mfg., Inc.*, 959 A.2d 900 (Pa. 2008) (“*Berrier II*”).

The Third Circuit then undertook to predict what the Pennsylvania Supreme Court would do. The Court began by noting “[t]he Pennsylvania Supreme Court has never expressly determined if one who is merely a bystander and not a user of a product can bring a products liability claim against a manufacturer to recover for injuries that occur while an intended user is using the manufacturer's product.” 563 F.3d 38, 40 (3rd Cir. 2009), *cert. denied* 558 U.S. 1011 (2009) (“*Berrier III*”). The Court predicted the Pennsylvania high court would adopt the Restatement (Third) of Torts, §§ 1 and 2, “and thereby afford bystanders a cause of action in strict liability under the circumstances

here.” *Berrier III*, 563 F.3d at 40.

The *Berrier III* Court then discussed thoroughly the history of the development of products liability law in Pennsylvania, also referring to many of the same cases Defendants reference in their brief to this Court, including *Van Buskirk*, *Lewis v. Coffing Hoist Div.*, *Duff–Norton Co., Inc.*, 528 A.2d 590 (Pa. 1987), *Mackowick v. Westinghouse Electric Corp.*, and *Phillips v. Cricket Lighters*.¹ Important for this case, however, is the following discussion by the Third Circuit:

The unintended user doctrine is not implicated by Berrier’s claim. Accordingly, there is little logic and much sophistry in reflexively applying cases discussing intended uses and users to determine liability for defective design under the circumstances here. See *Aetna Life & Cas. Co. v. Barthelemy*, 33 F.3d 189, 193 (3d Cir.1994) (“Where stops the reason, there stops the rule.”).

District courts in Pennsylvania have no doubt recognized that lack of logic and abundance of sophistry because they have allowed bystanders to recover in strict products liability under Section 402A under Pennsylvania law just as Justice Saylor explained in *Phillips*.^[FN29] Even though those cases were decided before *Phillips* and [*Pennsylvania Dept. of General Services v. U.S. Mineral Products Co.*, 898 A.2d 590 (Pa. 2006)], we do not believe that the result in those cases is altered by the Court’s subsequent decisions because, as Justice Newman explained in *Mineral Products*, *Phillips* is a narrow holding that only addresses “unintended users,” and *Mineral Products* did not involve bystanders at all.

[FN29]. See, e.g., *Fedorchick v. Massey–Ferguson, Inc.*, 438 F.Supp. 60, 62–63 (E.D. Pa.1977), aff’d, 577 F.2d 725 (3d Cir.1978) (Table) (“[Section] 402A provides coverage for a person who suffers harm proximately caused by a

¹ The federal appellate court did not mention two other cases Defendants cite, *Riley v. Warren Mfg., Inc.*, 688 A.2d 221 (Pa. Super. 1997) and *Griggs v. BIC Corp.*, 981 F.2d 1429 (3rd Cir. 1992). This is likely because the appellate court had mentioned *Riley* in its previous request for certification that the Pennsylvania Supreme Court denied, and *Griggs* was abrogated on other grounds in *Surace v. Caterpillar, Inc.*, 111 F.3d 1039 (3rd Cir. 1997).

defective and unreasonably dangerous product, regardless of whether that person used or consumed the product.”); *see also Stratos v. Super Sagless Corp.*, 1994 WL 709375 at *5 (E.D. Pa. December 21, 1994) (permitting administrator of seventeen month old daughter’s estate to bring strict liability claim against manufacturer of allegedly defective bed even though the decedent was “non-user of the product who wandered into the product’s danger zone”); *Herman v. Welland Chemical, Ltd.*, 580 F.Supp. 823, 829 (M.D. Pa.1984) (volunteer fireman struck by car while directing traffic following chemical spill on highway permitted to bring Section 402A claim). *But see Van Buskirk v. West Bend Co.*, 100 F.Supp.2d 281, 285 (E.D. Pa.1999) (guardians of child burned by an allegedly defective fryer denied recovery on a strict liability theory, in part, because the child was “not an intended user” of the fryer).

563 F.3d at 57-58 (underline added). Thus, the Third Circuit in *Berrier III* viewed *Van Buskirk* as an outlier among cases in which the federal district courts have tried to predict Pennsylvania’s approach to the concept of “user” for product liability purposes. Furthermore, *Van Buskirk* relied upon *Griggs*, but *Griggs* is of questionable efficacy now that it has been overruled.

The remaining Pennsylvania cases Defendants cite suffer the same difficulty. *Riley* arose in 1997, over 10 years before *Berrier III*. And the Third Circuit in *Berrier III* explained the danger of relying upon the other cases Defendants cite: *Phillips*, *Azzarello*, and *Mackowick*. As the *Berry III* Court explained:

Phillips was decided by six Justices. We view the relevant portion of the opinion as a two-justice majority because then Chief Justice Cappy authored the decision, but only Justice Newman expressly joined the portion of the opinion which held that the strict liability claim must fail because the lighter was not unsafe when used by adults, and that concepts of negligence have no place in strict products liability cases. *Phillips*, 841 A.2d at 1023. Justice Saylor filed a concurring opinion joined by Justices Castille and Eakin. *Id.* at 1012 (Saylor, J., concurring). Justice Newman

filed a concurring and dissenting opinion which expressed her support of Chief Justice Cappy's opinion, as well as her disagreement that the negligence causes of action should be permitted to go forward. *Id.* at 1023 (Newman, J., concurring and dissenting). Justice Nigro concurred in the result, but did not write separately or join either concurrence. *See id.* at 1012. Justice Zappala did not participate in the decision. *Id.* at 1011.

Although Justice Newman is no longer on the Pennsylvania Supreme Court, Justice Baer remains. The fact that he joined Justice Newman's opinion means that four of the current seven Justices have voiced support for adopting the Third Restatement.

Berrier III, 563 F.3d at 57 n. 28. *See also Bugosh v. I.U. North America, Inc.*, 971 A.2d 1228 (Pa. 2009) (dismissing appeal as improvidently granted; lengthy dissent by Saylor, J, discussing *Berrier* and the difficulties with *Azzarello*, *Phillips*, and *Lewis*, and advocating the Restatement (Third) approach).

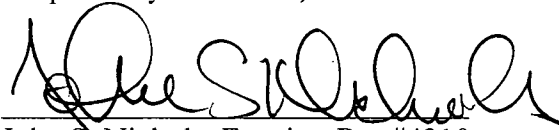
At bottom, then, this Court gains nothing from the discussion of the Pennsylvania decisions that Defendants claim demonstrate that "arguably legion" cases limit recovery to "intended" users of the defective product. Pennsylvania's Supreme Court declined the invitation to clarify the conflicts among the district courts in that state in *Berrier* and *Bugosh*, and the Third Circuit has therefore put the issue to bed (for now) by adopting the approach espoused by the Restatement (Third) of Torts: Products Liability, § 1. That approach makes a manufacturer or distributor liable to anyone who is harmed by the product without inquiring into whether the person is a user or consumer, intended or not.

This Court should reject Defendants' argument (based entirely upon questionable case law from federal district courts in one state, Pennsylvania) that Mr. Lawing was not an "intended user or consumer" for purposes of strict product liability.

CONCLUSION

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

Respectfully submitted,



John S. Nichols, Esquire, Bar #4210
BLUESTEIN, NICHOLS, THOMPSON &
DELGADO

Post Office Box 7965
Columbia, SC 29202
(803) 779-7599

Larry C. Brandt, Esquire
LARRY C. BRANDT, PA
Post Office Box 738
Walhalla, SC 29691
(864) 638-5406

Robert P. Foster , Esquire
FOSTER & FOSTER, LLP
Post Office Box 2123
Greenville, SC 29602
(864) 242-6200

William P. Walker, Jr., Esquire
S. Kirkpatrick Morgan, Jr.
WALKER & MORGAN, LLC
Post Office Box 949
Lexington, SC 29072
(803) 359-6194

October 28, 2014

Attorneys for Petitioners/Respondents

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

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

RECEIVED

OCT 29 2014

S.C. Supreme Court

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 Respondents* by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:

Ellis M. Johnston, II, Esquire
Joshua Howard, Esquire
HAYNSWORTH SINKLER BOYD, PA
Post Office Box 2048
Greenville, South Carolina 29602

Christian Stegmaier, Esquire
Amy L. Neuschafer, Esquire
COLLINS & LACY, PC
Post Office Box 12487
Columbia, South Carolina 29211

Gray T. Culbreath, Esquire
GALLIVAN, WHITE & BOYD, PA
P.O. Box 7368
Columbia, South Carolina 29202

October 29, 2014
Columbia, South Carolina



Erin Bridges
BLUESTEIN, NICHOLS, THOMPSON
& DELGADO, LLC



BLUESTEIN · NICHOLS · THOMPSON · DELGADO LLC
ATTORNEYS AT LAW

October 29, 2014

RECEIVED

OCT 29 2014

VIA HAND DELIVERY

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

S.C. Supreme Court

Re: *Lawing v. Trinity Manufacturing, Inc.*
Case Tracking No.: 2013-002464

Dear Mr. Shearouse:

Please find enclosed for filing the original and fifteen (15) copies of the Lawing's Brief of Respondents in reference to the above matter. I have also enclosed a proof of service of the Brief of Respondents on counsel for the Respondents/Petitioners. Please return the additional filed copy to me via our courier.

Thank you for your attention to this matter. If you need any additional information, please do not hesitate to contact me.

Sincerely,

Erin Bridges

Paralegal to John S. Nichols
BLUESTEIN, NICHOLS, THOMPSON &
DELGADO, LLC

/emb

Enclosures

cc: Robert P. Foster, Esquire
William P. Walker, Jr., Esquire

S. Kirkpatrick Morgan, Jr., Esquire

Larry C. Brandt, Esquire

Ellis M. Johnston, II, Esquire

Joshua Howard, Esquire

Gray T. Culbreath, Esquire

Christian Stegmaier, Esquire

Amy L. Neuschafer, Esquire