

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

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S.C. Supreme Court

Op. No. 5166
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 Whom Trinity Manufacturing, Inc. and
Matrix Outsourcing, LLC,
are.....

Respondents/Petitioners.

**RESPONDENTS/PETITIONERS'
BRIEF OF RESPONDENTS**

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COUNTER STATEMENT OF QUESTIONS
PRESENTED FOR REVIEW

- I. Did the Court of Appeals Correctly Affirm the Circuit Court's Decision to Charge the Sophisticated User Doctrine in the Instant Case?

- II. Did the Court of Appeals Correctly Hold the Sophisticated User Doctrine Was Not Preempted in the Instant Case?

COUNTER STATEMENT OF THE CASE

On January 11, 2006, Petitioner/Respondent Scott F. Lawing and his wife, Tammy R. Lawing, commenced an action against Respondents/Petitioners Trinity Manufacturing, Inc. and Matrix Outsourcing, LLC, alleging the causes of action sounding in strict liability, negligence, and breach of implied warranty arising out a June 1, 2004, workplace accident at the Englehard plant in Seneca, South Carolina. (R. pp. 1758-1765.). A co-defendant, Univar USA, Inc., was also named in the suit.

All the defendants timely answered the aforementioned complaints, denying their material allegations and asserting numerous affirmative defenses. (R. pp. 1720-1757; R. pp. 1766-1785.)

All plaintiffs amended their complaint in September of 2008 to assert, for the first time, a cause of action against Univar for breach of express warranty. (R. pp. 1810-1841.) Univar timely answered these amended pleadings responding to and denying the material allegations of this claim and also asserting affirmative defenses. (R. pp. 1842-1870.)

Following extended discovery and prior to trial, the defendants (including Respondents/Petitioners) made a number of dispositive motions, including motions for summary judgment on the plaintiffs' claims for, inter

alia, strict liability. (R. pp. 49-139; R. pp. 42-48; R. pp. 2060-2104; R. pp. 2105-2246; R. pp. 2247-2248; R. pp. 2048-2059.) The trial court addressed these motions and other matters during a two-day pre-trial hearing, granting the motion for summary judgment on the strict liability claim. (R. pp. 391-726.)

The cases were consolidated and the trial thereon was bifurcated into a liability phase (on the remaining counts) and a damages phase, with the liability phase beginning before the circuit judge and a jury on October 20, 2008. (R. p. 2309, lines 1-21; R. pp. 1654.)

Five causes of action were submitted to the jury. Three against all defendants: negligence as to packaging, negligence as to warning labels, and breach of implied warranty of merchantability. Two causes of action were against Univar only: breach of express warranty as to packaging and breach of express warranty as to warning labels. The jury returned a verdict in favor of the Lawings (and the other plaintiffs) on one cause of action, breach of express warranty as to warning labels against Univar. The jury found against the Lawings (and the other plaintiffs) on all other causes of action, thereby absolving Respondents/Petitioners of liability. (R. pp. 1413-1420; R. p. 1269, line 16 – p. 1271, line 3.)

Following the damages phase of trial began on December 1, 2008, the jury rendered a verdict against Univar in favor of the Lawings. (R. pp. 2498-2500; R. pp. 1668-1670.)

The trial court heard post-trial motions, denying Univar's motion for JNOV. (R. pp. 1355-1412.) The Lawings pursued post trial motions against Respondents/Petitioners, which were denied.

A consolidated appeal timely followed. (R. pp. 1871-2047; R. pp. 1695-1703.) During the pendency of the appeal, Univar settled with the plaintiffs. Only Petitioners/Respondents' appeal of the grant of summary judgment to Respondents/Petitioners, along with the appeal of the jury verdict in favor of Respondents/Petitioners proceeded to disposition.

Following extensive briefing and oral argument, the Court of Appeals affirmed the trial court's decision to charge the Sophisticated User Doctrine to the jury on the counts pertaining to negligence and breach of implied warranty of merchantability, but reversed the trial court-level decision to grant summary judgment to Respondents/Petitioners on the strict liability count, finding the Circuit Court employed too restrictive of the term "user." Consequently, the Court of Appeals remanded the matter for new trial on Petitioners/Respondents' strict liability claim.

Both parties thereafter filed cross petitions for writ of certiorari, which were both granted by this Court.

This review follows.

FACTS

Engelhard was a world leader in refining precious metals and a sophisticated user of many chemicals, including the chemical sodium bromate.¹ (R. p. 2423, lines 18-22; R. p. 2434, lines 22-25; R. p. 2444, line 25 – p. 2445, line 19; R. p. 2446, line 12 – p. 2451, line 1; R. p. 2452, lines 6-23.) Sodium bromate is a strong oxidizing agent or “oxidizer.” (R. p. 2343, lines 24-25; R. p. 2354, lines 22-23; R. pp. 1532 - 1536.) When heated to a certain temperature, it gives off oxygen and thereby contributes to the combustion of other material. (R. p. 2357, line 23 – p. 2358, line 22; R. p. 785, line 23 – p. 788, line 1; R. p. 2418, lines 5-18.)

Engelhard regularly used sodium bromate in its refining process. (R. p. 2452, lines 6 – p. 2453, line 3.) At the time of the June 1, 2004, accident out of which Petitioners/Respondents Scott F. Lawing and Tammy R. Lawing’s claims arise, Engelhard was purchasing approximately **120 metric tons of sodium bromate per year** from Univar. (R. p. 2417, lines 12-18).

¹ Before Englehard was purchased in 2006, Engelhard operated a 400,000 square-foot facility in Oconee County, where it produced a precious metal catalyst for use in the automobile industry and reclaimed previous metals from recycled materials. BASF Corporation now operates the facility.

Engelhard began purchasing sodium bromate from Univar² in 2002, having previously obtained the product from another supplier. (R. p. 760, line 24 – p. 761, line 3; R. p. 2416, lines 1-9; R. p. 2417, lines 12-18; R. p. 2425, line 3 – p. 2427, line 19; R. p. 2430, line 19; R. p. 1564; R. p. 1565; R. p. 1566; R. pp. 1567-1568.) Univar sourced the sodium bromate it supplied Engelhard through Respondents/Petitioners Trinity and Matrix. Engelhard ordered the product from Univar; Univar then ordered it from Trinity; Trinity then ordered it from its subsidiary, Matrix. Matrix obtained the product from a Chinese manufacturer, whereupon it was shipped to the United States and delivered directly to Engelhard by a common freight carrier, never having physically passed through the “workplace” of any of the distributors. (R. pp. 1472 – 1474; R. p. 1475; R. p. 1564; R. p. 2314, lines 19-25; R. p. 2318, line 25 – p. 2319, line 12; R. p. 2324, line 22 – p. 2325, line 1; R. p. 2414, line 23 – p. 2415, line 17; R. p. 880, line 15 – p. 881, line 24; R. p. 2419, line 23 – p. 2420, line 17; R. p. 2421, line 16 – p. 2424, line 6; R. p. 1160, line 17 – p. 1161, line 16.)

² As noted in the Counter Statement of the Case, Univar was a defendant in this matter, which settled the plaintiffs’ claims in this case against it following verdict and appeal to the Court of Appeals.

The shipment of sodium bromate involved in the June 1, 2004, accident was delivered to Engelhard on February 16, 2004, **whereupon, it was inspected, verified, and accepted by Engelhard without complaint.** (R. pp. 1519 - 1523; R. pp. 1524 - 1531; R. p. 2315, line 6 – p. 2317, line 13; R. p. 2318, line 25 – p. 2319, line 12; R. p. 2326, line 22 – p. 2328, line 10; R. p. 2329, line 11 – p. 2332, line 20; R. p. 2333, line 8 – p. 2337, line 12; R. p. 2338, line 7 – p. 2343, line 1; R. p. 2352, line 8 – p. 2353, line 14; R. p. 2429, lines 19-22.)

When it arrived at Engelhard, the sodium bromate involved in the accident was in a metal shipping container, sometimes referred to as a “connex box.” (R. p. 2321, lines 6-23; R. p. 855, line 17 – p. 856, line 8.) The sodium bromate was in DOT and United Nations approved, individual, 25 kilogram, plastic woven bags, every one of which displayed the internationally recognized yellow diamond oxidizer warning label on one side and written information on the reverse side. R. p. 2431, lines 13-21; R. p. 2432, lines 10-14; R. p. 2436, lines 17-20; R. p. 1257, lines 12-13; R. pp.

539-1540; R. pp. 1557-1563.)³ This written information included the words “sodium bromate” and other information that could be used to look up the material safety data sheet (“MSDS”) for sodium bromate.

Univar provided the MSDS for sodium bromate to Engelhard, and it was accessible to Lawing and his co-workers – and the other workers in the Engelhard Seneca facility – via terminals located throughout the plant. (R. p. 2439, line 21 – p. 2441, line 12.)

The bags were stacked on 20 individual wooden pallets, with 36 bags of sodium bromate per pallet. Each of the pallets was wrapped in clear plastic, i.e., shrink wrapped. (R. p. 1422; R. p. 843, line 25 – p. 849, line 2; R. p. 2406, line 12 – p. 2413, line 11.)

As required by Engelhard’s procedures, once inspected and verified, the sodium bromate that it accepted on February 16, 2004, was inventoried and logged into Engelhard’s internal computer system. The shipment, a total of 720 bags, was taken to the D-1 area of Engelhard’s warehouse – i.e., the specific area of its warehouse where oxidizers are stored – where it would stay until it was specifically requested to be brought from storage for use in

³ To be clear, the yellow diamond oxidizer warning label was the label utilized by Engelhard within its workplace. (R. p. 2437, lines 12-18; R. p. 995, lines 7-23.)

production. (R. p. 2343, line 24 – p. 2351, line 3; R. p. 2402, line 3 – p. 2403, line 25; R. p. 2404, line 12 – p. 2405, line 23; R. pp. 1485 - 1486.)

On May 20, 2004, four pallets from the February 16, 2004, shipment of sodium bromate were transported by forklift from the D-1 area of Engelhard's warehouse to the refinery for use in Engelhard's production operations. (R. p. 2343, line 24 – p. 2351, line 3.) The week of May 30, 2004, was a "complete shutdown week" at Engelhard, during which production was stopped for scheduled maintenance projects at the facility. (R. p. 2361, line 20 – p. 2362, line 18.) **During a shutdown week, production materials, such as sodium bromate, were not to be left in the refinery.** (R. p. 2356, lines 1-17; R. pp. 1519 - 1523.)

One of the maintenance projects to take place during the shutdown week was the removal of a section of a condensate return pipe in the refinery hallway. (R. p. 2359, line 22 – p. 2361, line 8.) This project was scheduled and planned in advance of the shutdown week by Engelhard management. (R. p. 2366, line 19 – p. 2368, line 8; R. p. 2397, lines 16-24.) Respondents/Petitioners Trinity and Matrix had no involvement whatsoever with the project. (R. p. 1035, line 20 – p. 1036, line 1.)

The condensate return pipe was made of carbon steel and was suspended some 15 to 20 feet above the floor along with numerous other pipes in what is referred to as a “pipe rack.” (R. p. 817, line 22 – p. 818, line 25; R. p. 2363, line 24 – p. 2365, line 5.) Engelhard knew that removal of the section of pipe would require the use of an oxyacetylene cutting torch. (R. p. 2398, lines 5-12.) Using the torch, an approximately 60 to 100-foot section of pipe was to be cut and removed in a number of smaller pieces. (R. p. 2363, lines 20-23.) **Use of the torch to cut the pipe was certain to produce and scatter hot molten slag.** (R. p. 2398, lines 5-12.)

The maintenance project work crew involved in the actual removal of the condensate pipe consisted of four men: Keith Black, Curtis Martin, Steve Knox, and Lawing. Knox was Engelhard’s maintenance “lead,” i.e., the leader of the work crew. He selected Black, Martin, and Lawing to work with him on the project and had supervisory authority over them. Another man, Mark Powell, served a “fire watch” for the project. He did not take part in the actual removal of the pipe, but was required by Engelhard’s hot work procedure, as well as OSHA’s welding code, to have a fire extinguisher immediately available for use. (R. p. 814, line 4 – p. 815, line 21; R. p. 817, line 22 – p. 818, line 4; R. p. 2369, line 2 – p. 2371, line 20; R. p. 1514.)

Use of the oxyacetylene torch to remove the pipe constituted a type of work known by Engelhard to be hazardous.⁴ Specifically, it was known as “hot work” and, before it was commenced, it required the issuance of a hazardous work permit authorizing hot work pursuant to Engelhard’s procedures. (R. p. 2371, line 25 – p. 2373, line 9; R. p. 1464.)

Prior to commencement of the pipe removal project on June 1, 2004, Knox obtained a hazardous work permit authorizing hot work. The permit was issued by Engelhard permit supervisor Tim Wald. (R. p. 2372, line 19 – p. 2373, line 13; R. p. 2400, line 19 – p. 2401, line 17.)

Engelhard has express written procedures to be followed for issuance of a hazardous work permit authorizing hot work. Among other things, these procedures provided that:

The Permit **shall contain all data/information known or suspected** in reference to the work to be performed and the system on which it will be performed. In all cases, **a conservative approach will be used** when determining P[ersonal] P[rotective] E[quipment] requirements and other relevant safety features. All individuals involved in the work shall review, approve, and sign the Permit. If any questions or doubts are encountered, personnel

⁴ That this work is well known to be hazardous is reflected in OSHA lengthy regulation specifically addressing “[o]xygen-fuel gas welding and cutting,” 29 C.F.R. § 1910.253.

shall contact the Safety Manager for clarification and guidance.

(R. p. 1514); R. p. 2387, line 13 – p. 2388, line 25 (emphasis added).)

Engelhard's procedure further required that:

Immediately prior to the start of Hotwork, the Work Supervisor (or designee) **shall perform a thorough inspection of the immediate work area and all areas adjacent for the presence of combustible and/or flammable materials. All such materials will be removed to a safe location for the duration of the Hotwork.** All Hotwork performed on the Inside of a building must have atmospheric monitoring performed prior to the start of the work evolution.

(R. p. 1514; R. p. 2389, line 1 – p. 2391, line 5 (emphasis added).)⁵

Additionally, OSHA expressly requires that, “[i]f the object to be welded or cut cannot readily be moved, **all movable fire hazards in the vicinity shall be taken to a safe place.**” 29 C.F.R. § 1910.252(a)(i). OSHA investigated the accident the day after it happened.

As per Engelhard procedure, prior to issuance of the hazardous work permit authorizing hot work, the entirety of the hot work area was marked

⁵ Though not relevant here because the subject sodium bromate was readily movable via forklift, where combustible and/or flammable materials could not be removed from a hot work area, procedure required that they be covered with fire retardant blankets, which Engelhard kept on site. (R. p. 2396, lines 12-17; R. p. 2454, lines 15-22).

with red “danger” tape. (R. p. 2375, line 8 – p. 2376, line 19; R. p. 2383, line 21 – p. 2384, line 4; R. p. 1484.) Knox and Wald walked through the entire area within the red “danger” tape, i.e., the hot work area. Knox expressly testified that, although he did not at the time know what chemical they contained, he personally noticed the pallets of sodium bromate within the hot work area, i.e., where they were located at the time of the accident. Knox walked over to the pallets and viewed the bags thereon close enough to tell there was black writing on the sides of the bags that were facing up. He did not look at the bags close enough to read this writing. While he testified that he did not see a yellow diamond oxidizer warning label on the sides of the bags that were facing up, he admitted that he did not make any attempt to turn the bags over to look for the label. (R. p. 2375, line 8 – p. 2376, line 19; R. p. 2385, line 20 – p. 2386, line 2; R. p. 2387, line 13 – p. 2390, line 2; R. p. 832, line 17 – p. 833, line 16; R. p. 2394, line 3 – p. 2395, line 3; R. p. 1484.) **Knox acknowledged that, pursuant to Engelhard procedure, a supervisor was supposed to be contacted when unidentified materials were encountered and that, despite the fact that he did not know what material was on the pallets in the hot work area, he did not do so.** (R. p. 2392, line 18 – p. 2393, line 1; R. p. 2395, lines 4-24.)

After this inspection of the entirety of the hot work area – which, of course, gave Knox personal knowledge of the existence of the pallets (i.e., combustible and/or flammable material) within the hot work area – a hazardous work permit authorizing hot work was nonetheless issued. On this permit, it was wrongfully stated that the “Work Area [was] Clear of All Flammable Materials. (R. p. 2372, line 19 – p. 2374, line 14; R. p. 1464.) The record is clear that, in addition to being signed by the Engelhard permit supervisor, Wald, the hazardous work permit authorizing hot work was signed by Knox, who acknowledged that his signature represented his affirmation that he had reviewed and approved of the permit. (R. p. 2387, line 2 – p. 2388, line 9; R. p. 1514.) Nonetheless, Knox expressly conceded that the hot work area was not cleared of all flammable materials, in fact, acknowledging that simply leaving the then unidentified plastic bags and wooden pallets in the work area was a failure to clear the hot work area of flammable materials. (R. p. 2388, lines 10 – p. 2390, line 2.)⁶

⁶ There is also testimony that a number of other Engelhard supervisory or management personnel, including the plant safety manager, Dan Hogan, walked through or in the vicinity of the hot work area on the morning of June 1, 2004. None of these persons made sure that hot work procedures were followed by removing the subject sodium bromate. (R.. p. 2442, line 9 – p. 2443, line 10.)

With the hazardous work permit authorizing hot work having been improperly issued, the pipe removal project began on the morning of June 1, 2004. During the course of the project (i.e., before the accident) Knox, Black, and Lawing were in the pipe rack, with Knox and Black taking turns operating the oxyacetylene torch to cut the condensate pipe into approximately eight-foot sections and with Lawing assisting in lowering the removed sections down from the pipe rack to the floor. Martin was in a man lift situated nearby also assisting in lowering the removed sections of pipe. (R. p. 2377, line 22 – p. 2379, line 15.)

The accident occurred around lunchtime. The men were in the proximity of Area 12 in the refinery, an area known as the “bromate” leech. (R. p. 2399, lines 1-5; R. p. 2438, lines 16-21.) Knox had come down from the pipe rack. Black and Lawing remained harnessed in the pipe rack with Martin in a lift nearby. According to Knox, while the cutting operation was ongoing, there was a “flash on the pallet” which, within two to three seconds thereafter, became an inferno. After seeing the flash on the pallet, Knox (not Powell) attempted to retrieve the fire extinguisher (which Powell was supposed to have immediately available), but was unable to do so in time to

prevent the chemical reaction and fire that injured the men, including Lawing. (R. p. 2380, line 16 – p. 2381, line 15; R. p. 2382, lines 17-24.)

These injuries led these employees to seek and receive workers' compensation benefits and thereafter to pursue this third-party litigation.

LAW/ANALYSIS

I. The Court of Appeals Correctly Affirmed the Circuit Court's Decision to Charge the Sophisticated User Doctrine

A. The Law Relating to the Sophisticated User Doctrine and the Court of Appeals' Disposition of the Issue

The Court of Appeals appropriately disposed of Petitioners/Respondents' assertions regarding whether the Sophisticated User Doctrine is the law of South Carolina. Specifically, the Court stated:

First, Lawing argues the sophisticated user doctrine is not the law in South Carolina. This court refuted Lawing's argument years ago in Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995). In Bragg, the employee of a large electrical contractor died after he jumped from the bucket of an aerial bucket truck that was on fire, and his widow sued the manufacturer. 319 S.C. at 534–35, 462 S.E.2d at 323–24. The trial court charged the sophisticated user doctrine to the jury, which found for the manufacturer. 319 S.C. at 534, 549, 462 S.E.2d at 323, 331–32. [The Court of Appeals] affirmed the decision to charge the jury on the doctrine, and thus recognized that the sophisticated user doctrine is part of the products liability law of South Carolina. 319 S.C. at 551, 462 S.E.2d at 332.

[T]he sophisticated user doctrine is not some complex or novel concept in products liability law. It is simply the requirement that under the circumstances to which the doctrine applies, in determining whether a seller of a dangerous product acted with reasonable care in fulfilling its duty to warn, the jury must consider (1) what the purchaser already knew about the dangers associated with the product, and (2) whether under that circumstance, the seller can reasonably rely on the purchaser to

warn its employees and others who might come into contact with the product.

Lawing v. Trinity Mfg., Inc., 406 S.C. 13, 23, 749 S.E.2d 126, 131 (Ct. App. 2013).

The Sophisticated User Doctrine is not some novel or obscure law. This doctrine has been adopted by numerous jurisdictions. See, e.g., Willis v. Raymark Indus., Inc., 905 F.2d 793, 796 (4th Cir. 1990) (citing In re: Asbestos Litigation (Mergenthaler), 542 A.2d 1205 (Del. Super. Ct. 1986)) (ruling the sophisticated user defense may be permitted in cases involving an employer who is aware of the inherent dangers of a product which the employer purchases for use in its business; if the employer/purchaser has “equal knowledge” of the product’s dangers, then the manufacturer may be able to rely on the employer/purchaser to protect its own employees from harm).

Courts in South Carolina have followed suit and recognize and apply the Sophisticated User Doctrine in products liability claims in both the state court and federal court venues. E.g., Odom v. G.D. Searle Co., 979 F.2d 1001 (4th Cir. 1992) (appeal emanating from South Carolina); Brooks v. Medtronic, 750 F.2d 1227 (4th Cir. 1984) (appeal emanating from South

Carolina); Sizemore v. Georgia-Pacific Corp., 1996 WL 498410 (D.S.C. 1996); Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995).

According to the Bragg Court, the Sophisticated User Doctrine as a defense is “permitted in cases involving an employer who was aware of the inherent dangers of a product which the employer purchased for use in his business. Bragg, 319 S.C. at 549, 462 S.E.2d at 331. Pursuant to this defense, the employer’s “familiarity or extensive experience with the product” permits the product supplier to rely on the employer for warnings to its employees about the product’s dangers. Id.

Additionally, our appellate entities have emphasized that the Sophisticated User Doctrine also applies if the distributor “acted reasonably in assuming that the [purchaser] would recognize the danger and take precautions to protect its employees.” Bragg, 319 S.C. at 550, 462 S.E.2d at 332 (quoting O’Neal v. Celanese Corp., 10 F.3d 249 (4th Cir. 1993)).

Applying the Sophisticated User Doctrine as a defense, both South Carolina appellate courts and the Fourth Circuit have time and again determined that manufacturers and suppliers of a product have no duty to

warn a sophisticated user's employees of a product's hazards, including those involving personal injury.

As noted above, in Bragg, the Court of Appeals approved the application of the Sophisticated User Doctrine as a defense because the purchaser of the product was a large company, which "frequently used and was familiar with" the product and its dangers. Id. at 551, 462 S.E.2d at 332. The plaintiff, an employee of a large electrical contractor, died when the aerial bucket devices in which he was working on an electrical pole, caught on fire. The fire started because the plaintiff's conductive hose came into contact with an energized power line. The Bragg Court held that the defendant manufacturer of the aerial bucket device was entitled to assert the Sophisticated User Doctrine as a defense on plaintiff's failure to warn claim because the plaintiff's employer "frequently used" aerial devices and was "well aware that conductive materials like conductive hoses should not be used in the buckets of aerial devices." Id. at 551, 462 S.E.2d at 332.

In Beale v. Hardy, 769 F.2d 213 (4th Cir. 1985), the Fourth Circuit held that a supplier of silica sand had no duty to warn the plaintiffs of the hazards associated with the product because the plaintiff's employers – the purchaser of the silica sand – had "extensive knowledge" of the product's risks. Id. at

214-15 (applying Restatement (Second) of Torts § 338, which sets forth the principles upon which the sophisticated user doctrine is based).

In O’Neal v. Celanese Corporation, 10 F.3d 249 (4th Cir. 1993), the Fourth Circuit upheld a jury instruction based on the Sophisticated User Doctrine, holding the defendant “acted reasonably in assuming that the [plaintiff’s employer, a salvage company with extensive experience in removing lead-based paint] would recognize the danger [of] and take precautions to protect its employees” from lead-based paint. Id. at 252-53.

In Emory v. McDonnell Douglas Corporation, 148 F.3d 347, 352 (4th Cir. 1998), the Fourth Circuit emphasized that under the Sophisticated User Doctrine, “a supplier is not negligent when it relies on an intermediary [who is] ‘already well aware of the [product’s] danger’ to relay any necessary warning.” (internal citation omitted).

In Brooks v. Metronic, Inc., 750 F.2d 1227 (4th Cir. 1984), the Fourth Circuit applied South Carolina law to determine that a drug manufacturer has no duty to warn a drug consumer of the drug’s risks if the consumer’s doctor has received “adequate notice of [the drug’s] possible complications.” The court reasoned the drug manufacturer’s duty to warn was obviated because the doctor constituted a “‘learned intermediary’ between the manufacturer

and the consumer,” and the doctor was responsible for relaying the drug’s risks to the consumer. Id. at 1231; see also Odom v. G.D. Searle & Co., 979 F.2d 1001 (4th Cir. 1992) (applying South Carolina law that a drug manufacturer is not liable under a failure to warn theory if the plaintiff’s doctor knew of the drug’s risks).

Thus, Respondents/Petitioners assert there can be no question the Sophisticated User Doctrine is a recognized legal doctrine in South Carolina, which can be successfully employed by defendants in products liability claims. Moreover, Respondents/Petitioners maintain application of this doctrine as a defense is viable in South Carolina in response to whatever products liability-based theory of recovery employed by a plaintiff, whether the plaintiff’s claim sounds in negligence, breach of implied warranty, or strict liability.⁷ The Court of Appeals was correct in its disposition of this issue.

⁷ In its opinion, the Court of Appeals noted the same as it related to the application of the doctrine to the breach of implied warranty count that remained in the case for disposition by the jury:

Lawing’s contention that the trial court erred in charging the sophisticated user doctrine applies not only to his negligence cause of action for failure to warn, but also to his breach of implied warranty cause of action. The sophisticated user doctrine

**B. The Circuit Court Did Not Err By Not Charging
Goodbar v. Whitehead Brothers Six-Factor Balancing Test in
Conjunction with the Sophisticated User Doctrine**

Petitioners/Respondents' argument that §388 of the Restatement (Second) of Torts requires the explicit application/charging of a six-factor

originated in the context of a claim for negligent failure to warn, but it also applies to failure-to-warn causes of action based on breach of implied warranty. See Carrel v. Nat'l Cord & Braid Corp., 447 Mass. 431, 852 N.E.2d 100, 109 (2006) (holding the sophisticated user doctrine applies in claims of "negligent failure to warn and ... failure to warn under breach of warranty"). This is so because all products liability causes of action turn on the question of reasonableness. See Branham, 390 S.C. at 210, 701 S.E.2d at 8 (stating "all products liability actions, regardless of the stated theory, have common elements," including "that the injury occurred because the product was in a defective condition unreasonably dangerous to the user" (quoting Madden v. Cox, 284 S.C. 574, 579, 328 S.E.2d 108, 112 (Ct.App.1985))). The jury focuses on the conduct of the seller when analyzing the fault element of a negligence cause of action, but when analyzing the unreasonably dangerous element of any cause of action, the jury focuses on the product. See Bragg, 319 S.C. at 539, 462 S.E.2d at 326 (stating "under a negligence theory, ... unlike strict liability, the focus is on the conduct of the seller or manufacturer, and liability is determined according to fault"). However, to the same extent evidence of the purchaser's sophistication relates to whether the seller's conduct was reasonable, the evidence also relates to whether the product as sold under those circumstances was "unreasonably" dangerous.

Lawing v. Trinity Mfg., Inc., 406 S.C. 13, 26-27, 749 S.E.2d 126, 133 (Ct. App. 2013).

balancing test⁸ and, if conducted, this balancing test would render the Sophisticated User Doctrine unavailable to Respondents/Petitioners as a matter of law is without merit.

As an initial matter, in the almost 20 years since Bragg, this six-factor test propounded by Petitioners/Respondents has never been expressly adopted by a South Carolina court.⁹ Even assuming this test is the applicable law of South Carolina, its content was adequately considered by the trial court and the fact finder, the entity that would ultimately decide the reasonability of Respondents/Petitioners' conduct regarding warnings. The six factors are simply circumstances that may be considered in determining if the supplier acted reasonably in relying upon the purchaser/employer to warn its employees of the product's dangers. The Court of Appeals discussed the

⁸ Citing Goodbar v. Whitehead Bros., 391 F.Supp. 552, 557 (W.D.Va. 1984).

⁹ Based on Respondents/Petitioners' counsel's research, Bragg v. Hi-Ranger, Inc., 319 S.C. 351, 462 S.E.2d 321 (Ct. App. 1995) is the only reported South Carolina state court appellate decision that even cites Goodbar. Id. at 550, 462 S.E.2d at 331 ("We conclude the trial court properly charged the jury concerning the sophisticated user defense. The sophisticated user defense outlined in section 388 of the Restatement (Second) of Torts has been adopted by numerous jurisdictions.") (citing Willis v. Raymark Indus., Inc., 905 F.2d 793 (4th Cir. 1990) and Goodbar in support of this proposition). Bragg did not adopt the use of the six-factor balancing test advocated by Petitioners/Respondents.

requirement of reasonable reliance under the circumstances at length in Section III.B.1 of its opinion.¹⁰ The record is replete with evidence from which the jury could conclude Respondents/Petitioners acted (or did not act)

¹⁰ Specifically, the Court of Appeals stated:

The sophisticated user doctrine arose from the circumstances contemplated in comment n, where a seller warns the intermediate purchaser, and relies at least in part on that purchaser to warn the end user. See O’Neal v. Celanese Corp., 10 F.3d 249, 251 (4th Cir. 1993) (“The sophisticated user defense is implicated in the situation in which A supplies a [product] to B, B in turn allows C to be exposed to the [product], C is injured by [the] exposure ..., and C claims that A should be liable ... for ... failure to warn...”). Because the plaintiff in any negligence action must prove the defendant failed to exercise reasonable care, the question upon which the liability of a seller turns when it relies on an intermediate purchaser to warn the end user is the same as when the seller warns the end user directly—whether the seller acted reasonably. The American Law Institute explained this in comment n, stating, “In all such cases the question may arise as to whether the person supplying the [product] is exercising ... reasonable care, which he owes to those who are to use it, by informing the third person through whom the [product] is supplied...” § 388 cmt. n. Our own Professor Owen has also explained this: “Addressing a seller’s duty to warn when it sells a product to an intermediate supplier, comment n to § 388 provides that a seller may rely on the intermediary to provide warnings to the end-user **if that reliance is reasonable under the circumstances.**” Owen, supra, at 624 (emphasis added). In this statement, the professor has explained the sophisticated user doctrine with all the complexity it deserves.

Lawing, 406 S.C. at 25, 749 S.E.2d at 132 (emphasis in original).

reasonably under the circumstances in relying upon Engelhard to warn its employees; therefore, it was not error to charge the Sophisticated User Doctrine to the jury. The Court of Appeals directly addressed this issue and discussed the pertinent testimony supporting the charge in detail in Section III.C of its opinion.¹¹

¹¹ Section III.C of the Court of Appeals' analysis included the following:

The sophisticated user doctrine should be charged whenever there is evidence that supports a finding that the seller or supplier acted reasonably in relying on the purchaser to warn the end user of the dangers associated with the product. As we stated in Bragg, the question posed by the doctrine is “whether the supplier ... acted reasonably in assuming that the intermediary would recognize the danger and take precautions to protect its employees.” 319 S.C. at 550, 462 S.E.2d at 332.

In this case, there is evidence that Trinity and Matrix knew the nature of Engelhard's business, Engelhard's understanding of the dangers of sodium bromate, and the steps Engelhard took to protect employees from the dangers of hazardous materials. Trinity and Matrix knew the large quantities of sodium bromate they were procuring for Univar were ultimately being sold to, and would be used by, Engelhard. They also knew that before Engelhard started buying sodium bromate from Univar, Engelhard inspected and tested samples of the product. A July 2002 email from Tim Griffin of Trinity to Sherry Green of Matrix discusses progress those companies and Univar made towards becoming Engelhard's sodium bromate supplier. The email mentions that Engelhard reviewed their proposed specifications for the chemical, “eliminate[d] the optical density” specification, and approved the specifications after making that

change. The email also states that they delivered a sodium bromate sample to the Seneca facility, and that “they [Engelhard] are to run lab trials and advise results.” Explaining that email at trial, Angela Grenados, Matrix’s vice president, testified Engelhard required samples be delivered to the facility for testing. Trinity and Matrix sent Engelhard three samples.

Grenados also testified she knew Engelhard was a “large sophisticated manufacturer” that used sodium bromate. At trial, one of the plaintiffs’ lawyers asked Grenados whether Matrix ever visited the facility to see how Engelhard was storing sodium bromate. She testified Matrix did not do so because “[i]t’s my impression that Engelhard is a very sophisticated company and I’m sure their health and safety regulations are much beyond what my comprehension would be.” She never asked Engelhard about its storage and safety practices because “I felt like [Engelhard’s] reputation went beyond my asking.”

John Munson was the Univar salesman who interacted with Engelhard’s purchaser, David Williams. Munson testified Univar employed “safety and regulatory people” who were available to speak with Engelhard if it had any questions or concerns about the chemicals it bought from Univar. Univar did not visit the facility or ask Engelhard whether it had any questions about sodium bromate and safety. Munson testified that in his conversations with Williams, he learned “Engelhard has very qualified people and very strict regulations and they handle this themselves in house.” Munson also expected Engelhard would perform hazard analyses on the sodium bromate because it was “the most familiar with the operations of their plant and [was] best suited to do those kinds of evaluations.” Finally, Munson testified he knew Engelhard inspected shipments upon arrival, and if a shipment did not comply with OSHA’s labeling requirements, Engelhard would refuse it. Munson said, “if this material had ended up in Engelhard’s dock and there was anything wrong with it, I would have gotten a call from David

Williams immediately and [Williams would have] said, ‘we got a problem.’ We never got a call like that.”

Finally, Griffin testified Trinity and Matrix provided the MSDS for the sodium bromate. Before the shipment would arrive, one of the two companies faxed a copy of the MSDS to Univar. When the shipment arrived at the facility, Engelhard would get a hard copy of the MSDS that warned about the danger that sodium bromate can accelerate existing fires and that containers of it could explode. The MSDS also instructed users not to store sodium bromate next to combustible materials and to keep it from contacting organic matter.

Considered as a whole, this evidence supports the trial court’s decision to charge the jury on the sophisticated user doctrine. It shows Trinity and Matrix knew Engelhard used large quantities of sodium bromate and had tested samples of the product in its laboratory before deciding to buy it. It also shows that employees of Matrix, a wholly-owned subsidiary of Trinity, and Univar, the company to which Trinity directly sold the sodium bromate, believed Engelhard had a safety program that ensured employees were adequately informed of the dangers of the chemicals in the facility. Finally, it shows Trinity and Matrix knew about the MSDS and that Engelhard received it. **A jury could infer from this evidence that Trinity and Matrix acted reasonably in providing warnings on the bags and in the MSDS, relying on Engelhard to provide its employees any additional warnings about the dangers of sodium bromate. Although other evidence presented at trial could support a jury finding the sophisticated user doctrine did not apply, or that Trinity and Matrix did not act reasonably, those questions were ultimately for the jury.** The question we must answer is whether there is evidence in the record to support giving the charge. We hold there is.

Id. at 30-32, 749 S.E.2d at 135-36 (emphasis added).

The Court of Appeals did not err when it disagreed with the Petitioners/Respondents' contention that the sophisticated user defense is inapplicable to this case because the warnings provided to the intermediate user were inadequate.

In holding the evidence supported the trial court's decision to charge the jury on the Sophisticated User Doctrine, the Court of Appeals implicitly rejected Petitioners/Respondents' argument that the warnings given to the intermediate user (Engelhard) were inadequate. The Court discussed at length the evidence presented at trial from which a jury could infer Respondents/Petitioners "acted reasonably in providing warnings on the bags and in the MSDS, relying on Engelhard to provide its employees any additional warnings about the dangers of sodium bromate." Accordingly, the adequacy of the warnings given to Engelhard was a question for the jury.

C. Petitioners/Respondents' Various Arguments Regarding Sophisticated User Doctrine Charge Not Preserved for Appellate Review

Petitioners/Respondents aver the charge given on the Sophisticated User Doctrine was improper because it did not instruct the jury that to apply the defense, it must first find the warnings were adequate. As discussed in Section II.D of the Court of Appeals' opinion, this argument was not

preserved for appellate review because Petitioners/Respondents failed to appropriately object (i.e., with specificity) to the substantive correctness of the charge. Instead, after the jury charge, the circuit judge asked counsel if they had any objections. Petitioners/Respondents' trial attorney stated: "Other than the fact that we take exception [that] the sophisticated user charge has been given at all, because we don't think it applied." Thus, Lawing did not make an objection to the correctness of the language of the charge, only to whether the doctrine was applicable. This general, non-specific objection does not satisfy the standard our courts have enunciated for appellate review regarding sufficiency of jury charges. Respondents/Petitioners therefore assert the Court of Appeals was correct in its disposition of this argument on issue preservation grounds. See, e.g., Harris v. Univ. of S.C., 391 S.C. 518, 528, 706 S.E.2d 45, 50 (Ct. App. 2011) (holding argument regarding substance of jury charge unpreserved because it was not raised to and ruled upon by the trial court).

Additionally, Petitioners/Respondents contend "the Defendants" contractually assumed an obligation to warn Engelhard's employees apart from any warning given to sophisticated intermediaries. This argument is not preserved for appellate review as to Respondents. In their brief to the Court

of Appeals, Petitioners/Respondents very clearly and specifically directed this argument only to Univar, USA, Inc. See, e.g., App. Br. p. 24 (“Did Univar’s Contract and Express Warranties With Engelhard Preclude the Defense From Being Applied to Plaintiffs’ Negligence and Implied Warranty of Merchantability Claims Against Univar?”), p. 25 (“Univar assumed a duty owed to the employees of Engelhard”), p. 29 (“[i]n summary, as to Univar, the sophisticated user charge should not have been given at all”). This argument is inapplicable to Respondents/Petitioners and, because Univar is no longer involved in this appeal, the Court correctly declined to address it.

II. The Court of Appeals Correctly Held the Sophisticated User Doctrine Was Not Preempted in the Instant Case

The Court of Appeals correctly addressed and disposed of Petitioners/Respondents’ argument that federal preemption applies to preclude the Sophisticated User Doctrine in the case at bar. The Court of Appeals held the federal regulations on which Petitioners/Respondents’ preemption argument was premised was not discordant, but in fact harmonious with the reasonableness requirement on which the Sophisticated User Doctrine is based:

Lawing bases his preemption argument on 29 C.F.R. § 1910.1200(F)(1) (2003), which provides that a chemical

manufacturer, importer, or distributor must “ensure that each container of hazardous chemicals leaving the workplace is labeled, tagged or marked with the following information: (i) Identity of the hazardous chemical(s); (ii) Appropriate hazard warnings; and (iii) Name and address of the chemical manufacturer, importer, or other responsible party.” He also relies on 49 C.F.R. §§ 172.406 and 172.407 (2003), which include requirements for the design and placement of labels; and § 172.426, which provides the specific design for the oxidizer symbol. Lawing argues these regulations impose a duty on Trinity and Matrix to warn about the dangers of sodium bromate, and the sophisticated user doctrine conflicts with the regulations because it “has the effect of defeating the duty to warn that was clearly imposed as an integral part of the federal regulatory scheme.” Because of this conflict, he argues, the federal regulations preempt the state-law doctrine. See Priester, 401 S.C. at 43–44, 736 S.E.2d at 252.

Lawing’s argument fails, however, because it depends on an incorrect premise—that the sophisticated user doctrine, if applicable, means a supplier had no duty to warn. As we have explained, the sophisticated user doctrine does not operate to defeat any duty. It simply identifies circumstances the jury must consider when determining whether the supplier’s duty to warn was breached. The Fourth Circuit explained the error of Lawing’s argument in O’Neal:

Part of the problem that may lead some to look askance at [the sophisticated user doctrine] is in the language that some courts have used to describe it, in particular the notion that where the elements or prerequisites of it exist, the supplier is “absolved” of any duty to warn ultimate users. That notion is not only unnecessary to the [doctrine] but in fact is inconsistent with the rationale of comment n to Restatement § 388. There is a duty to warn of defects or propensities that make a product hazardous, and

that duty **does** extend ordinarily to those who may reasonably be expected to use or come into harmful contact with the product. It is **not** a duty, we think, from which the supplier can be entirely **absolved**. The question, rather, is, what conduct will suffice to discharge that duty?

10 F.3d at 251 (quoting Kennedy v. Mobay Corp., 84 Md.App. 397, 579 A.2d 1191, 1199 (1990), aff'd, 325 Md. 385, 601 A.2d 123 (1992)); see also Gray v. Badger Min. Corp., 676 N.W.2d 268, 278 (Minn. 2004) (quoting the above passage from Kennedy).

O'Neal, Gray, and Kennedy demonstrate that the sophisticated user doctrine does not address the legal question of whether the supplier had a duty to warn. It could not do so, because whether a duty exists is a question of law for the court. See Edwards v. Lexington Cnty. Sheriff's Dep't, 386 S.C. 285, 290, 688 S.E.2d 125, 128 (2010) (stating the existence of a duty "is a question of law for the court to determine"); Doe ex rel. Doe v. Batson, 345 S.C. 316, 323, 548 S.E.2d 854, 857 (2001) (stating "[t]he existence of a duty owed is a question of law for the courts"). As the Fourth Circuit pointed out in O'Neal, "[t]here is a duty to warn," 10 F.3d at 251, and thus, when courts have stated that under the sophisticated user doctrine there is no duty to warn, they have misspoken. See, e.g., Willis v. Raymark Indus., Inc., 905 F.2d 793, 796 (4th Cir. 1990) (stating that when the doctrine applies, a supplier "is absolved" of its duty to warn) (effectively overruled by O'Neal, 10 F.3d at 251). Rather, the sophisticated user doctrine addresses the factual question of whether it was reasonable for the supplier of a product to rely on the purchaser to warn the end user of the dangers associated with that product. In other words, the doctrine addresses breach of duty, not the existence of duty.

Therefore, the sophisticated user doctrine does not stand as an obstacle to fulfillment of the safety objectives embodied in the

federal regulations. On the contrary, what the regulations require coincides with the reasonableness requirement on which the sophisticated user doctrine is based. Here, the bags featured the words “SODIUM BROMATE” printed in black letters on one side and the oxidizer symbol printed on the other. Matrix provided an MSDS that warned of fire and explosion hazards. Whether this was enough for Trinity and Matrix to comply with the OSHA regulations—specifically the key requirement of “[a]ppropriate hazard warnings” under 29 C.F.R. § 1910.1200(F)(1)(ii)—is precisely the same question the jury must answer under the sophisticated user doctrine—what was reasonable under the circumstances. See In re Welding Fume Prods. Liab. Litig., 364 F.Supp.2d 669, 696 (N.D. Ohio 2005) (stating § 1910.1200 “does not prescribe in any way the language a chemical manufacturer or other employer must use to warn about health hazards;” it requires only that some warning be provided and that the warning be adequate). Because the federal regulations require warnings that are “appropriate” under the circumstances, and the sophisticated user doctrine requires only that certain circumstances be considered in determining what is reasonable (or appropriate), there is no conflict between the two, and the sophisticated user doctrine is not preempted.

Lawing v. Trinity Mfg., Inc., 406 S.C. 13, 27-29, 749 S.E.2d 126, 133-34 (Ct. App. 2013) (emphasis in original).

Respondents/Petitioners maintain the Court of Appeals was correct in its conclusions concerning the compatibility between the federal regulations cited by Petitioners/Respondents and the reasonableness requirement on which the Sophisticated User Doctrine and disposition of this issue.

Therefore, Respondents/Petitioners assert the Court of Appeals' determination should be affirmed by this tribunal.

CONCLUSION

In the case sub judice, the Court of Appeals correctly held the Sophisticated User Doctrine is the law of South Carolina and is not preempted by any federal statute or regulation. The jury in the instant case deliberated with this doctrine in mind and applied it to the facts of the case, which demonstrated Englehard was clearly a sophisticated buyer of the subject bromide and that numerous persons at Englehard had undeniably violated well-defined safety protocols. The jury ultimately (and correctly) determined Respondents/Petitioners Trinity Manufacturing, Inc. and Matrix Outsourcing, LLC were neither negligent nor did they breach any implied warranty to Petitioner/Respondent Scott F. Lawing or his wife, Tammy R. Lawing. Further, as correctly held by the Court of Appeals, any deficiency in the charge given by the circuit judge was not appropriately objected to, which in turn operates to preclude further review concerning sufficiency for appellate review. Respondents/Petitioners therefore respectfully request the Supreme Court affirm the Court of Appeals with regard to the Sophisticated User Doctrine issue in the case at bar.

[SIGNATURE PAGE TO FOLLOW]

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**RESPONDENTS/PETITIONERS'
BRIEF OF RESPONDENT**

Columbia, South Carolina
November 5, 2014

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

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 Whom Trinity Manufacturing, Inc. and
Matrix Outsourcing, LLC,
are.....Respondents/Petitioners.

PROOF OF SERVICE

Counsel for Respondents/Petitioners Trinity Manufacturing, Inc. and
Matrix Outsourcing, LLC certifies it has served Respondents/Petitioners’
Brief of Respondents on all parties by depositing a copy of it in the United
States Mail, postage prepaid, on November 5, 2014, addressed to the
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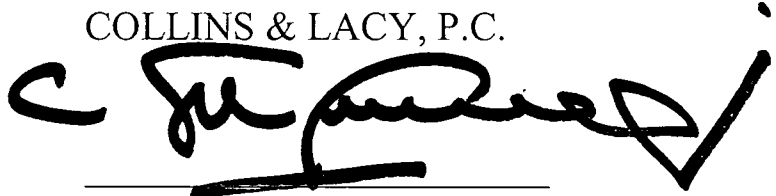
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RESPONDENTS/PETITIONERS’
BRIEF OF RESPONDENTS**

Columbia, South Carolina
November 5, 2014