



The Supreme Court of South Carolina

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February 12, 2016

The Honorable Beverly H. Whitfield
PO Box 678
Walhalla SC 29691-0678

REMITTITUR

Re: Scott F. Lawing v. Univar USA, Inc. (Trinity)
Lower Court Case No. 2005CP3700604, 2007CP3700030, 2005CP3700605
Appellate Case No. 2013-002464

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,

CLERK

cc: Larry C. Brandt, Esquire
Robert Paul Foster, Esquire
John S. Nichols, Esquire
William P. Walker, Jr., Esquire
Amy Lynn Neuschafer, Esquire
Christian Stegmaier, Esquire
S. Kirkpatrick Morgan, Jr., Esquire

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

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.

Appellate Case No. 2013-002464

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Oconee County
J. C. Nicholson, Jr., Circuit Court Judge

Opinion No. 27594
Heard April 9, 2015 – Filed December 2, 2015

AFFIRMED IN PART, REVERSED IN PART

John S. Nichols, of Bluestein, Nichols, Thompson &
Delgado, of Columbia, Robert P. Foster, of Foster &
Foster LLP, of Greenville, William P. Walker, Jr., and S.
Kirkpatrick Morgan, Jr., both of Walker and Morgan,
LLC, of Lexington, and Larry C. Brandt, of Larry C.
Brandt, PA, of Walhalla, all for Petitioners/Respondents.

Christian Stegmaier and Amy L. Neuschafer, both of
Collins and Lacy, PC, of Columbia, for Respondents/
Petitioners.

CHIEF JUSTICE TOAL: In this products liability action, Trinity Manufacturing, Inc. (Trinity), and Matrix Outsourcing, LLC (Matrix), argue that the court of appeals erred in reversing the trial court's decision to grant summary judgment to them on a strict liability cause of action. *See Lawing v. Trinity Mfg., Inc.*, 406 S.C. 13, 749 S.E.2d 126 (2013). In their cross-appeal, Scott and Tammy Lawing ask this Court to reverse the court of appeals' decision affirming the trial court's decision to charge the jury on the sophisticated user defense. We affirm in part and reverse in part the decision of the court of appeals.

FACTS/PROCEDURAL BACKGROUND

This case revolves around the packaging and labeling of sodium bromate, a chemical which contributed to a fire that occurred in a plant owned by Engelhard Corporation (Engelhard) in Seneca, South Carolina, in June 2004. At the time of the fire, Scott Lawing worked at Engelhard's Seneca plant as a maintenance mechanic.¹ Engelhard produced a precious metal catalyst used in the automobile industry, and refined metals from recycled materials.

To complete its refining process, Engelhard used approximately 120 metric tons per annum of sodium bromate, which is classified as an oxidizer. An oxidizer is a chemical that initiates or promotes combustion in other materials, thereby causing fire either by itself or through the release of oxygen or other gases. In other words, when an oxidizer such as sodium bromate is heated to a certain temperature, it releases oxygen and contributes to the combustion of other materials.

Engelhard purchased the sodium bromate from Univar USA, Inc. (Univar). Univar sourced the sodium bromate through Trinity, who in turn, utilized its subsidiary, Matrix, to obtain the sodium bromate from a Chinese manufacturer. The Chinese manufacturer shipped the sodium bromate to the Port of Charleston,

¹ Engelhard was later purchased by BASF Corporation, which now operates the facility.

and from there, a common freight carrier delivered the sodium bromate directly to Engelhard. Therefore, neither Univar, Trinity, nor Matrix ever inspected or handled the sodium bromate.

The shipment of sodium bromate involved in the fire was delivered to Engelhard on February 16, 2004, whereupon Engelhard inspected and accepted the shipment. The sodium bromate arrived packaged in woven plastic bags, each weighing twenty-five kilograms.² A warning label on one side of each bag displayed the universally recognized yellow oxidizer symbol.³ The reverse side of each bag contained black text, including the words "sodium bromate," and other information regarding the material safety data sheet (MSDS)⁴ for sodium bromate.

The bags of sodium bromate arrived at Engelhard stacked upon each other on wooden pallets, with thirty-six bags per pallet. The pallets were stacked two pallets high. Each of the pallets was "shrink-wrapped" so that the bags would remain on the pallet.

Paul Bailey, an Engelhard employee who was responsible for receiving shipments when the fire occurred, testified that none of the pallets in the February 2004 shipment contained warnings identifying the contents of the pallets as an oxidizer, and there were no warnings on the sides of the bags themselves that could be seen through the shrink-wrap. Within each shrink-wrapped pallet, some bags of the sodium bromate were stacked so that the black text on the bags appeared face-up, while other bags were positioned such that the yellow oxidizer symbol appeared face-up.

² Specifically, the bags were made of polypropylene and polyethylene—both combustible materials.

³ The oxidizer symbol is a yellow diamond with black borders. Inside the diamond is a drawing of a flame, and underneath, the words "OXIDIZER" or "OXIDIZING AGENT" appear in black ink. The United States Department of Transportation requires this symbol be used in the labeling of oxidizers such as sodium bromate. *See* 49 C.F.R. § 172.426 (2003).

⁴ Along with the delivery of the chemical, Engelhard was provided the MSDS for sodium bromate. The MSDS warned that if sodium bromate made contact with other materials, it could cause a fire, and that sodium bromate "[m]ay accelerate burning if involved in a fire." Engelhard maintained MSDSs in offices throughout its plant for the various chemicals used in its production.

At trial, Dr. Jerry Purswell, who testified as an expert in the field of Occupational Health and Safety Administration (OSHA) regulations, opined that the labeling on the bags of sodium bromate did not satisfy the OSHA HazCom requirements⁵ for an appropriate warning label because the oxidizer symbol was not prominently displayed on the bags. Dr. Purswell testified that in his opinion, the written material on the bags did, however, satisfy the relevant Department of Transportation (DOT) requirements.⁶

Upon receipt of a shipment of sodium bromate, Engelhard employees typically moved the double-stacked pallets of sodium bromate—still shrink-wrapped—directly to the warehouse for storage, where Engelhard stored the chemical until it was needed for production.

On May 20, 2004—the week before Engelhard's annual "shutdown week"—Engelhard employees moved four pallets of sodium bromate from the warehouse to the refinery hallway to be used in production. During the shutdown week, Engelhard stopped regular production in order to perform routine maintenance. However, Engelhard policies provided that production materials were not to be left in the refinery during shutdown week.

On June 1, 2004, Lawing, along with Keith Black and Curtis Martin, were assigned to work under Steve Knox during the shutdown week as part of a maintenance crew tasked with using an oxyacetylene cutting torch to cut out and replace condensate pipe in the refinery hall—not far from where the four pallets of sodium bromate had recently been moved.

Pursuant to Engelhard's policies, use of the oxyacetylene torch required the issuance of a hazardous work permit prior to the commencement of the project. Engelhard policies provided that before the permit could be issued, "a thorough inspection of the immediate work area and all areas adjacent for the presence of

⁵ 29 C.F.R. § 1910.1200(f) (2003). Essentially, the regulation requires labels on the containers of hazardous chemicals; states that the labels must provide the identity of the hazardous chemicals and appropriate hazard warnings; and describes other requirements for the labels, i.e., that the warnings must be "prominently displayed on the container." *See id.*

⁶ 49 C.F.R. § 172.406 (2003) (describing the proper placement of labels on packages containing hazardous materials); 49 C.F.R. § 172.407 (2003) (setting forth requisite label specifications, such as durability, design, size, and color).

combustible and/or flammable materials" must take place and that "[a]ll such materials will be removed to a safe location for the duration of the Hotwork [sic]." Therefore, to obtain a hazardous work permit for the project, Knox toured the work area prior to the start of the maintenance work. Knox testified that he noticed the pallets of sodium bromate within the work area, and walked close enough to the pallets to ensure that there was no oxidizer symbol on them. Although Knox did not see the oxidizer symbol, he noticed black text on the sides of the bags. Knox did not know what sodium bromate was, but admitted that if he had seen an oxidizer symbol on the pallets, he would have ensured that employees moved the pallets from the work area before the maintenance began.⁷

Martin and Lawing each testified that they noticed the bags of sodium bromate in the work area on the day of the fire, but saw no label indicating that they should move the bags. Lawing testified that when he saw the bags, he looked for a "label or something that told me I needed to move it" and when he did not see one, he "thought they were fine." Lawing stated that if he had seen an oxidizer symbol, he would have moved the pallets. Lawing testified that at the time, he thought the bags contained baking soda.

The maintenance crew used the oxyacetylene torch to cut the pipe, which was suspended approximately fifteen to twenty feet above the floor. After about two hours of work, a piece of hot slag fell and landed on or near one of the pallets of sodium bromate. There was a "flash" on the pallet, which erupted into a ball of fire that engulfed Lawing, Martin, and Black. According to Knox, the eruption of fire "sounded like a jet taking off."

Each of the men suffered severe burns and serious injuries which totally disabled them and rendered them in need of substantial medical care for the rest of their lives. Lawing testified that he suffered second and third degree burns on forty-two percent of his body, and that his lungs and eyes were also burned.

The Lawings—as well as Black and Martin (collectively, the plaintiffs)⁸ commenced lawsuits against Univar, Trinity, and Matrix (collectively, the

⁷ Prior to the project, each of the maintenance workers received hazard communication training which taught them to recognize warning symbols—including the oxidizer symbol—on packages of chemicals as well as the importance of such labels.

⁸ Of the three plaintiffs whose cases were consolidated for trial, the Lawings are the only plaintiffs involved in this appeal.

defendants), each alleging causes of action for strict liability, negligence, and breach of the implied warranty of merchantability.⁹ The Lawings also asserted a breach of express warranty cause of action against Univar. Further, Tammy Lawing contended that she suffered loss of consortium as a result of her husband's injuries.

Prior to trial, the defendants made a number of dispositive motions, including motions for summary judgment on the Lawings' claims. In particular, the defendants filed a joint motion for summary judgment on the Lawings' strict liability cause of action. The trial court addressed these motions and other matters during a two-day pre-trial hearing. The trial court granted the defendants' motion for summary judgment on the strict liability claim, ruling that Lawing was not a "user" of sodium bromate as required by section 15-73-10 of the South Carolina Code. S.C. Code Ann. § 15-73-10 (2005) (requiring a plaintiff to be a "user" or "consumer" of a product to recover under a strict liability theory).

The trial court consolidated the plaintiffs' cases and bifurcated the trial into a liability phase and a damages phase. Five causes of action were submitted to the jury. Three were against all of the defendants: negligence as to packaging, negligence as to warning labels,¹⁰ and breach of the 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.

Although the trial court had denied the defendants' motion for a directed verdict as to the sophisticated user defense at the conclusion of all of the evidence,

⁹ Each plaintiff sought and received workers' compensation benefits as a result of the fire. Accordingly, the Workers' Compensation Act provided the exclusive remedy against Engelhard. *See* S.C. Code Ann. § 42-1-540 (2015) (providing that the rights and remedies granted to an employee under the Workers' Compensation Act "shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin as against his employer, at common law or otherwise, on account of such injury loss of service or death").

¹⁰ With regard to the claims involving the warning labels—or lack thereof—on the sodium bromate, the plaintiffs proceeded under the theory that the suppliers should be held liable because the requisite warning labels were not prominently displayed or clearly visible.

the court charged the defense to the jury. As to the negligence cause of action, the trial court charged the jury, in pertinent part:

Federal regulations impose a duty on suppliers to warn of possible dangers arising from the use of their product. This requirement comes from the [OSHA] regulation[] 1910.1200(f), which says that the chemical manufacturer, importer, or distributor shall ensure that each container of hazardous chemicals leaving the workplace is labeled, tagged or marked with the following: [i]dentity of the hazardous chemicals; appropriate hazard warnings; and the name and address of the chemical manufacturer, importer, or other responsible party. The federal regulations are in evidence. The court has ruled that the circumstantial evidence in the case proves that the bags were labeled. The plaintiff alleged that the labels were not clearly visible or prominently displayed, not that there was not a label on the bags.

The trial court then explained that South Carolina common law requires a supplier of a dangerous product to provide a warning to the user, consumer, or purchaser. The trial court stated:

A supplier may provide the information needed for the safe use of the product to a third person, but this may not relieve the supplier of responsibility in all cases. Where the supplier provides the information to a third person, and not directly to the user, consumer, or purchaser, the supplier must give all the information needed for the product's safe use and must use a method of giving that information that reasonably ensures that it will reach the user, consumer, and purchaser. The supplier must inform the third person of the dangerous character of the product or of the precautions which must be used in using the product to make it safe. The supplier has a duty to be reasonably sure that the information or warning about the product will reach those the supplier should expect to use the product. To determine whether the supplier should reasonably expect the method used to reach the user, consumer, or purchaser, you should consider the magnitude of the danger, the purpose for which the product is made, and the practical means of disclosing the information. If the supplier should reasonably foresee that the warnings given to third parties, will not be adequately passed on to the probable users, consumers, or purchasers of the product and that the dangers will not be obvious to the users, consumers, or purchasers, the supplier's duty

to warn may extend to those persons endangered or affected by the foreseeable use of the product. A sophisticated user defense could be appropriate under the circumstances. I will charge you on the sophisticated user defense later.

After explaining the elements of negligence, the trial court charged the sophisticated user defense:

The [defendants] have also pled the sophisticated user defense. Now, ladies and gentlemen, under the South Carolina law, a distributor or supplier has no duty to warn of potential risks or dangers inherent in a product if the product is distributed to what we call a learned intermediary or distributed to a sophisticated user who might be in a position to understand and assess the risks involved, and to inform the ultimate user of the risks, and to, therefore, warn the ultimate user of any alleged inherent dangers involved in the product. Simply stated, the sophisticated user 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 and can be reasonably relied upon to warn ultimate users of the product. Such an employer has a duty to warn his employees of the danger of the product.

You may consider a number of factors in determining whether the sophisticated user [defense] applies. Those factors include: The dangerous condition of the product; the purpose for which the product is used; the form of any warnings given; the reliability of the third party as a conduit of necessary information about the product; the magnitude of the risk involved and the burdens imposed on the supplier by requiring that it directly warn all users.

If you find that the sophisticated user defense applies in this case, then you must find that the defendants owed no duty to warn; therefore, you must find in favor of the defendants on the plaintiffs' negligence claim.

The jury found for the Lawings on only one cause of action: breach of express warranty as to warning labels against Univar. The jury returned defense

verdicts on the Lawings' other causes of action. Thereby, Trinity and Matrix were absolved of liability.¹¹

A consolidated appeal to the court of appeals followed. However, during the pendency of the appeal, Univar settled with all of the plaintiffs. Only the Lawings' appeal of the grant of summary judgment on their strict liability claim and their appeal of the jury verdict in favor of Trinity and Matrix proceeded to disposition at the court of appeals.

The court of appeals affirmed the trial court's decision to charge the sophisticated user defense on the negligence and breach of the implied warranty of merchantability claims. *Lawing*, 406 S.C. at 33, 749 S.E.2d at 136. In addition, the court of appeals reversed the trial court's decision to grant Trinity and Matrix's summary judgment motion on the strict liability claim, finding that the trial court too narrowly interpreted the term "user" under section 15-73-10, and holding that Lawing was indeed a "user" of sodium bromate for purposes of the statute. *Id.* at 37, 749 S.E.2d at 138. Therefore, the court of appeals remanded the matter for a new trial on the Lawings' strict liability claim. *Id.* at 37, 749 S.E.2d at 139.

The Lawings, as well as Trinity and Matrix, filed petitions for writs of certiorari, asking this Court to review the court of appeals' decision. This Court granted both petitions for writs of certiorari to review the court of appeals' opinion pursuant to Rule 242, SCACR.

ISSUES PRESENTED

- I. Whether the court of appeals erred in holding that Lawing was a "user" of the sodium bromate for purposes of section 15-73-10, and thus reversing the trial court's decision to grant Trinity and Matrix summary judgment on the Lawings' strict liability cause of action?
- II. Whether the court of appeals erred in affirming the trial court's decision to charge the jury on the sophisticated user defense?

¹¹ Black and Martin settled with Trinity and Matrix before trial.

LAW/ANALYSIS

I. *Strict Liability Cause of Action*

Trinity and Matrix argue that the court of appeals erred in holding that Lawing was a "user" of the sodium bromate, and therefore, the court of appeals erred in reversing the trial court's grant of summary judgment on the strict liability claim, which was based on the trial court's finding that Lawing was not considered a "user" under section 15-73-10 of the South Carolina Code. Moreover, Trinity and Matrix argue that the court of appeals set forth a far too expansive definition of "user" for purposes of a strict liability analysis under South Carolina law.

a. **Standard of Review**

When reviewing an order granting summary judgment, the appellate court applies the same standard as that used by the trial court pursuant to Rule 56(c), SCRPC. *Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011). Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRPC; *Turner*, 392 S.C. at 766, 708 S.E.2d at 769.

"Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo." *Perry v. Bullock*, 409 S.C. 137, 140, 761 S.E.2d 251, 252–53 (2014) (citation omitted).

b. **Section 15-73-10**

Section 15-73-10 of the South Carolina Code provides that "[o]ne who sells any product in a defective condition unreasonably dangerous to **the user or consumer** . . . is subject to liability for physical harm caused to the ultimate user or consumer . . ." S.C. Code Ann. § 15-73-10 (2005) (emphasis added).¹² This section imposes strict liability upon the manufacturer and seller of a product for an injury to any "user or consumer" if the product reaches the user or consumer without substantial change in the condition in which it is sold. *Id.*; *Fleming v. Borden, Inc.*, 316 S.C. 452, 457, 450 S.E.2d 589, 592 (1994).

¹² "This provision, which was adopted by the General Assembly in 1974, codified, nearly verbatim, Restatement (Second) of Torts § 402A." *In re Breast Implant Prod. Liab. Litig.*, 331 S.C. 540, 545, 503 S.E.2d 445, 447 (1998).

Section 15-73-10 does not define "user." Instead, the General Assembly expressly adopted the comments to section 402A of the Restatement of Torts (Second)—which discuss the meaning of "user"—as the expression of legislative intent for that section. *See* S.C. Code Ann. § 15-73-30 (2005) ("Comments to [section] 402A of the Restatement of Torts, Second, are incorporated herein by reference as the legislative intent of this chapter.").

Comment *l* to section 402A of the Restatement of Torts (Second), titled "User or consumer," provides in pertinent part:

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. 1 (1965) (emphasis added).

Comment *o*, however, explains that in comment *l*, the American Law Institute (ALI) did not intend to express either approval or disapproval of expanding section 402A to allow recovery to those other than users or consumers. Comment *o* provides, in pertinent part:

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

Restatement (Second) of Torts § 402A cmt. o (emphasis added).

We have not yet applied the comments to section 402A to determine whether a plaintiff should be considered a "user" under section 15-73-10. In fact, there has been only one occasion on which we have addressed the interpretation of the term "user" under section 15-73-10 for purposes of a strict liability claim. See *Bray v. Marathon Corp.*, 356 S.C. 111, 116, 588 S.E.2d 93, 95 (2003).

In *Bray*, we found that an employee who suffered an emotional injury after watching a coworker being crushed by a trash compactor was a "user" of the trash compactor for purposes of section 15-73-10 because she was operating the controls of the defective trash compactor at the time of the accident. 356 S.C. at 116, 588 S.E.2d at 95. Further, in line with comment o, we provided that a bystander analysis does not apply to a strict liability cause of action, stating that a "user of a defective product is not a mere bystander but a primary and direct victim of the product defect." *Id.* at 117, 588 S.E.2d at 95.

The Lawings argue that Lawing was precisely the type of user for whom any warnings on the sodium bromate should have been intended, and therefore, the comments to section 402A support reversal of the trial court's decision on this issue. We agree.

As an expert at trial testified, a product's labeling is considered part of the product's package. See also Restatement (Second) of Torts § 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 very purpose of warnings issued through labels on products 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." David G. Owen, *Products Liability Law* 621 (2d ed. 2008). Indeed, labels and other aspects of packaging are typically a user's first line of defense in assessing a product's danger, and oftentimes, the only indication that a product is a highly flammable or otherwise dangerous product.

The fact that Lawing noticed the pallets of sodium bromate within the work area on the day of the fire—but failed to request their removal because he did not see a label indicating their dangerous nature—is crucial for purposes of

determining whether he should be considered a "user" of the sodium bromate. According to Lawing's testimony, he used the sodium bromate's labeling—or the lack thereof—to evaluate the safety of the product the day of the fire. Therefore, we find that Lawing's actions fall under comment 1 because Lawing used the information on the sodium bromate's packaging to complete work in close proximity to the pallets of sodium bromate, and to assess the need to avoid or move the nearby sodium bromate, regardless of the fact that he did not actually handle the sodium bromate.

Similar to the court of appeals, we find that Lawing was not a "casual bystander" with regard to the sodium bromate. *See Lawing*, 406 S.C. at 34, 749 S.E.2d at 137. On the day of the fire, there was the potential for Lawing to interact with the sodium bromate while completing his work in the refinery hall, especially after Engelhard employees failed to move the sodium bromate from the work area before the maintenance began. As the court of appeals stated, the examples set out in comment 0 "illustrate that the [ALI] 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.*

c. Court of Appeals' Definition of "User"

Although the court of appeals properly found that Lawing should be considered a "user" under section 15-73-10, we agree with Trinity and Matrix's contention that the court of appeals set forth far too broad a definition of "user" for purposes of a strict liability analysis in South Carolina.

After citing the comments to section 402A discussing the definition of "user," the court of appeals stated:

Considering the comments together, we believe the legislature intended that the term "user" include persons who could foreseeably come into contact with the dangerous nature of a product. Thus, a person who examines a product for warnings and other safety information is one whom the seller intends will use that information to avoid the dangers associated with the product, and thus is a person who foreseeably could come into contact with its dangerous nature.

Lawing, 406 S.C. at 34–35, 749 S.E.2d at 137 (emphasis added).

As evident from our application to Lawing in this case, we would not restrict the term "user" to plaintiffs who are injured while handling or operating the dangerous product. However, the court of appeals' expansive definition including as a "user" all "persons who could foreseeably come into contact with the dangerous nature of a product" could be interpreted as to allow a bystander employee to recover under section 15-73-10. As discussed, *supra*, *Bray* clearly prohibits bystander recovery for purposes of strict liability. *See Bray*, 356 S.C. at 117, 588 S.E.2d at 95. Furthermore, including a foreseeability analysis in a determination of whether a plaintiff constitutes a "user" under section 15-73-10 is improper. *See Bray*, 356 S.C. at 117, 588 S.E.2d at 96 ("Because [section] 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.").

A case-by-case analysis is more appropriate for courts' determination of who constitutes a "user" under section 15-73-10. Therefore, we hold that the court of appeals erred in setting forth its broad definition of "user," and affirm as modified the court of appeals' decision on this issue.

II. Sophisticated User Jury Instruction

The Lawings argue that the court of appeals erred in affirming the trial court's decision to charge the sophisticated user defense to the jury. We agree.

An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court committed an abuse of discretion. *Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008) (citing *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)). An abuse of discretion occurs when the trial court's ruling is based on an error of law or is not supported by the evidence. *Id.*

Suppliers and manufacturers of dangerous products are generally under a duty to warn the ultimate user of the dangers associated with the use of the product. *See Livingston v. Noland Corp.*, 293 S.C. 521, 525, 362 S.E.2d 16, 18 (1987) (citing *Gardner v. Q.H.S., Inc.*, 448 F.2d 238, 242 (4th Cir. 1971) (finding that the duty to warn arises when the user may not realize the potential danger of a product)). However, the sophisticated user doctrine, which arose from comment *n* to section 388 of the Restatement (Second) of Torts,¹³ recognizes that a supplier

¹³ Section 388 provides that one who supplies a chattel directly or through a third

may rely on an intermediary to provide warnings to the ultimate user if the reliance is reasonable under the circumstances. *See* Restatement (Second) of Torts § 388 cmt. n. The sophisticated user doctrine is typically applied as a defense to relieve the supplier of liability for failure to warn where it is difficult or even impossible for the supplier to meet its duty to warn the end user of the dangers associated with the use of a product, and the supplier therefore relies on the intermediary or employer to warn the end user. *See id.*

In arguing that the court of appeals erred in affirming the trial court's decision to charge the jury on the sophisticated user defense, the Lawings contend that the sophisticated user defense is not the law of South Carolina. We agree that prior to the court of appeals' opinion in this case, neither this Court, nor the court of appeals, had explicitly adopted the defense.¹⁴ However, we need not formally

person a chattel for another to use is subject to liability for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier: (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied; (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous. Restatement (Second) of Torts § 388 (1965).

¹⁴ The court of appeals stated in its opinion that when it affirmed a trial court's decision to charge the jury on the sophisticated user defense in *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 462 S.E.2d 321 (1995), the court "recognized that the sophisticated user doctrine is part of the products liability law of South Carolina." *Lawing*, 406 S.C. at 23, 749 S.E.2d at 131. In affirming the jury charge in *Bragg*, however, the court of appeals referenced section 388 of the Restatement (Second) of Torts—upon which the sophisticated user doctrine is based—but did not state whether South Carolina courts had adopted that section. *Bragg*, 319 S.C. at 550, 462 S.E.2d at 332 ("The sophisticated user defense outlined in section 388 of the Restatement (Second) of Torts has been adopted by numerous jurisdictions."). We note that the only mention of section 388 from this Court—albeit not in the context of whether the sophisticated user defense is a viable one—was in a dissent in *Claytor v. General Motors Corporation*, 277 S.C. 259, 267, 286 S.E.2d 129, 133 (1982) (Lewis, C.J., dissenting). Further, although the court in *Bragg* found that the jury's charge was an "accurate recitation" of the sophisticated user doctrine as "adopted by a majority of jurisdictions," it did not provide that the sophisticated

adopt the doctrine at this time because as discussed, *infra*, the facts of this case do not implicate the sophisticated user defense.¹⁵

When instructing the jury, the trial court is required to charge only principles of law that apply to the issues raised in the pleadings and developed by the evidence in support of those issues. *Clark*, 339 S.C. at 390, 529 S.E.2d at 539 (citing *Tucker v. Reynolds*, 268 S.C. 330, 335, 233 S.E.2d 402, 404 (1977)). Accordingly, the threshold question in determining whether the trial judge erred in charging the sophisticated user defense to the jury is whether the law was implicated by the evidence in this case. We find that it was not, and therefore hold that the trial court erred in charging the sophisticated user defense.

Trinity and Matrix—similar to the court of appeals—center their argument around Engelhard's knowledge of the nature and use of sodium bromate, an unsurprising approach given that the sophisticated user defense revolves around an intermediary's knowledge and awareness of the danger associated with the use of a particular product. *See Lawing*, 406 S.C. at 30–32, 749 S.E.2d at 135–36. Indeed, based on the testimony in this case, there is no doubt that Engelhard was very familiar with sodium bromate and understood its dangerous nature.

However, a sophisticated user has a responsibility separate and apart from the responsibility to adequately label a dangerous product. Under the specific factual circumstances in this case, the proper focus is the *labeling* on the sodium bromate shipped to Engelhard, not the *use* of sodium bromate in Engelhard's plant. Engelhard's knowledge of the dangers of sodium bromate does not affect the

user defense was in fact the law of South Carolina. *See Bragg*, 319 S.C. at 550–51, 462 S.E.2d at 332.

¹⁵ Likewise, to the extent that the Lawings contest the correctness of the trial court's sophisticated user defense jury charge—which took a common law approach to the doctrine, as opposed to the Restatement approach—we do not address that issue. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding that the Court need not address remaining issues when resolution of a prior issue is dispositive).

suppliers' duty to properly label sodium bromate as a hazardous and flammable product, because the knowledge of sodium bromate's inherent qualities are useless to a person who comes into contact with the chemical but cannot identify it.¹⁶

In other words, there is a critical distinction between an intermediary's knowledge of the dangerous qualities and nature of a product, and the ability of the third party user to identify and recognize that product on its face. When considering only Engelhard's use of sodium bromate in its manufacturing process, it follows that Engelhard is a "sophisticated user." However, when, as here, labeling is the underlying issue, the adequacy of the labeling on the sodium bromate does not require a sophisticated user analysis. If we conflate the two analyses—as the dissent would have us do—we would absolutely absolve suppliers of their responsibility to label dangerous products during shipment and upon delivery. The fact that a sophisticated user of a particular product ultimately receives the product does not permit the supplier to decide whether or not to adequately label the dangerous product as such.

Black testified that employees like himself utilized labeling on products as their "first line of defense" within the plant. Because maintenance workers, including Lawing, received training to familiarize themselves with hazard labels, i.e., the oxidizer symbol, with no visible hazard label, these employees who encountered the shrink-wrapped pallets of sodium bromate were unable to identify it as a dangerous product. Under these facts, Engelhard's knowledge regarding the properties of sodium bromate and its transfer of that information to its employees is insignificant.

Therefore, we find that the evidence does not support a jury charge on the sophisticated user defense because the evidence in this case that *does* support that charge—i.e., Engelhard's experience with sodium bromate, the fact that it employed chemical engineers, and the MSDSs which were available—is merely a distraction from the real issue: the visibility of the labels indicating danger on the pallets of sodium bromate. Accordingly, the trial court abused its discretion in charging the sophisticated user defense to the jury, and we reverse the court of appeals' decision on this issue.

¹⁶ The trial court apparently had a similar concern while hearing pre-trial motions, as it asked counsel, "How is a sophisticated user like Engelhard and their employees going to know the stuff is what it is unless it is properly labeled?"

CONCLUSION

Based on the foregoing, we affirm the court of appeals' decision reversing the trial court's grant of summary judgment to Trinity and Matrix on the Lawings' strict liability claim, but in doing so, modify the definition of "user" set forth by the court of appeals for purposes of section 15-73-10.

Further, because the evidence in this case does not support the sophisticated user defense, we find that trial court erred in charging the defense to the jury. Accordingly, we reverse the court of appeals' decision affirming the jury charge, and remand the Lawings' negligence and implied warranty of merchantability claims for a new trial.

BEATTY and HEARN, JJ., concur. KITTREDGE, J., concurring in part and dissenting in part in a separate opinion. PLEICONES, J., dissenting in a separate opinion.

JUSTICE KITTREDGE: I concur in part and respectfully dissent in part. I join the majority in its construction of the term "user" for purposes of section 15-73-10 of the South Carolina Code (2005). I dissent with respect to the "sophisticated user" doctrine and would adopt what I believe to be the excellent analysis of the court of appeals concerning the doctrine and its application to this case.

I offer two additional comments. First, I do not agree with the majority "that prior to the court of appeals' opinion in this case, neither this Court, nor the court of appeals, had explicitly adopted the [sophisticated user] defense." The doctrine was clearly recognized in *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 550, 462 S.E.2d 321, 332 (Ct. App. 1995), when the court of appeals "conclude[d] the trial court properly charged the jury concerning the sophisticated user defense."

Nevertheless, I would modify *Bragg* in one respect. The jury charge approved in *Bragg* instructed the jury that manufacturers have no duty to warn of risks associated with a product when the product is to be distributed to a "learned intermediary" or sophisticated user. *Id.* at 549, 462 S.E.2d at 331. A similar charge was given in this case. See *Lawing v. Trinity Mfg., Inc.*, 406 S.C. 13, 32, 749 S.E.2d 126, 136 (Ct. App. 2013). However, contrary to the jury charges in *Bragg* and in this case, the sophisticated user doctrine does not negate the existence of a duty on the part of the manufacturer. As the court of appeals correctly observed, "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."¹⁷ *Id.* at 28, 749 S.E.2d at 133.

Second, I would not avoid the issue of the sophisticated user doctrine's existence and applicability by creating a distinction between the labeling and the use of the sodium bromate, as if the two are not related. I view the issues of labeling and use as inextricably connected in this case. It is undisputed that Trinity Manufacturing and Matrix Outsourcing knew that Engelhard employees would be in close proximity to the sodium bromate, working with or around the dangerous product. While acknowledging "Engelhard was very familiar with sodium bromate and

¹⁷ The court of appeals did not address, and properly so in my judgment, the effect of this erroneous jury instruction in this case because it was not preserved for appellate review. *Id.* at 32, 749 S.E.2d at 136.

understood its dangerous nature," the Court states that "Engelhard's knowledge of the dangers of sodium bromate does not affect the suppliers' duty to properly label sodium bromate as a hazardous and flammable product." I believe Engelhard's knowledge of the dangers of sodium bromate is at the heart of the sophisticated user defense. Engelhard's knowledge of those dangers is a critical factor in assessing "whether the supplier . . . acted reasonably in assuming that the intermediary 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, 253 n.2 (4th Cir. 1993)). Again, I refer to the court of appeals' opinion:

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.

Lawing, 406 S.C. at 31–32, 749 S.E.2d at 135–36. I would affirm the court of appeals with respect to the sophisticated user doctrine.

JUSTICE PLEICONES: I respectfully dissent. I agree with Justice Kittredge that the Court of Appeals properly decided the "sophisticated user" issue, and that the doctrine has been part of South Carolina's jurisprudence since 1995. I disagree with the majority, with Justice Kittredge, and with the Court of Appeals, however, on the question whether Lawing was a 'user' within the meaning of S.C. Code Ann. § 15-73-10 (2005), and would therefore uphold the trial court's decision to grant summary judgment to Trinity and Matrix on Lawing's strict liability claim.

Section 15-73-10 imposes strict liability on sellers to users and consumers under certain circumstances. The meaning of the terms "user" and "consumer" are elucidated by the Comments to § 402A of the Restatement of Torts Second.¹⁸ Comment I provides: "'User" includes those who are passively enjoying the benefit of the product . . . as well as those who are utilizing it for the purpose of doing work upon it" At the time of this horrific accident, the sodium bromate was being stored, albeit in an improper location, "until it was needed for production." *Lawing v. Univar, USA, Inc.*, *supra* at p. _____. Moreover, the accident occurred during "shutdown week" when no "regular production" took place. *Id.* Given these circumstances, I would find that Lawing was not a 'user' within the meaning of § 15-73-10 when the fire occurred, because at that juncture neither he nor Engelhard was "utilizing [the sodium bromate] for the purpose of doing work upon it" within the meaning or contemplation of Comment I.

This is a tragic case, but for the reasons given above, I respectfully dissent, and would affirm the Court of Appeals on the "sophisticated user" issue, and reverse that court on the "user within the meaning of § 15-73-10" issue and reinstate the trial court's order granting summary judgment to Trinity and Matrix.

¹⁸ Pursuant to S.C. Code Ann. § 15-73-30 (2005), these comments are incorporated by reference and are deemed to express the General Assembly's legislative intent.

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Scott F. Lawing and Tammy R. Lawing, Appellants,

v.

Trinity Manufacturing, Inc., Matrix Outsourcing, LLC,
and Univar, USA, Inc., Defendants,

Of whom Trinity Manufacturing, Inc. and Matrix
Outsourcing, LLC are Respondents.

Appellate Case No. 2009-112467

Appeal From Oconee County
J.C. Nicholson, Jr., Circuit Court Judge

Opinion No. 5166
Heard June 12, 2013 – Filed August 21, 2013

**AFFIRMED IN PART, REVERSED IN PART, AND
REMANDED**

John S. Nichols, Bluestein, Nichols, Thompson, &
Delgado, LLC, of Columbia; Robert C. Foster, Foster &
Foster, LLP, of Greenville; William P. Walker, Jr. and S.
Kirkpatrick Morgan, Jr., Walker & Morgan, LLC, of
Lexington; and Larry C. Brandt, of Walhalla, for
Appellants.

Christian Stegmaier, Collins & Lacy, PC, of Columbia;
Amy Lynn Neuschafer, Collins & Lacy, PC, of Murrells
Inlet; Ellis M. Johnston, II and Joshua L. Howard, both
of Haynsworth Sinkler Boyd, PA, of Greenville; and

Gray Thomas Culbreath, Gallivan, White & Boyd, PA, of
Columbia, for Respondents.

FEW, C.J.: Scott Lawing suffered severe burns over almost half his body when a large amount of a highly-flammable chemical caught fire at his jobsite. He brought a products liability lawsuit against several entities in the supply chain for the chemical. After a six-week jury trial, the trial court awarded substantial damages to Lawing and two of his co-workers. Lawing nevertheless appeals, arguing the trial court made two erroneous rulings. First, Lawing contends the court erred in finding he was not a "user" of the chemical and granting summary judgment against him on his strict liability claim. Second, he contends the court should not have charged the jury on the sophisticated user doctrine. We affirm the trial court's decision to charge the sophisticated user doctrine, but reverse the decision to grant summary judgment because we find the trial court employed too restrictive a definition of the term "user." We remand for a new trial on Lawing's strict liability claim.

I. Facts

Engelhard Corporation was a world leader in refining precious metals. Before Engelhard was purchased in 2006, Engelhard operated a 400,000 square-foot facility in Seneca, where it produced a precious metal catalyst for use in the automobile industry and reclaimed precious metals from recycled materials.¹ Engelhard's refining processes involved the use of sodium bromate, which is an oxidizer. When heated to 700 degrees Fahrenheit, sodium bromate releases oxygen, which increases combustion in an existing fire. Engelhard was using approximately 132 tons of sodium bromate per year in its refining operations at the time of this accident.

Beginning in 2002, Engelhard bought sodium bromate from Univar, USA, a chemical distribution company. In December 2003, Engelhard submitted a purchase order to Univar for 170 tons of sodium bromate to cover Engelhard's anticipated needs for 2004.

Univar ordered the sodium bromate from Trinity Manufacturing, a chemical manufacturer. Trinity did not make sodium bromate, so it contracted with its subsidiary, Matrix Outsourcing, to obtain the product. Matrix ordered the sodium

¹ BASF Corporation now operates the facility.

bromate from a Chinese exporting company, which, in turn, bought the chemical from a manufacturer in that country.

The manufacturer packaged the sodium bromate in white plastic bags that held twenty-five kilograms each. The bags had printing on both sides. On one side, "PRODUCT: SODIUM BROMATE 99.7% MIN." appeared in black ink near the top. Other information appeared below that, including the product code; the gross weight, tare weight, and net weight; and "MADE IN CHINA." On the other side of the bags, the manufacturer printed the standard symbol for an oxidizing agent. The symbol is a yellow diamond with black outlines. Inside the diamond is a drawing of a flame on top of a line, followed by "OXIDIZING AGENT" and "5.1" in black ink. The United States Department of Transportation requires this symbol to be used in labeling oxidizers such as sodium bromate. *See* 49 C.F.R. § 172.426 (2003) (requiring "the OXIDIZER label must be as follows," with image of symbol, and "the background color on the OXIDIZER label must be yellow").

Someone in the Chinese portion of the supply chain stacked the bags onto wooden pallets and shrink-wrapped the bags onto the pallets. Each pallet contained thirty-six bags. The shipment involved in the accident consisted of twenty pallets.

The shipment traveled from China to the port in Charleston. From there, a trucking company delivered the shipment directly to Engelhard in February 2004. Upon the shipment's arrival at the facility, Engelhard inspected it. One of the Engelhard employees who unloaded the shipment testified that when he looked at the pallets, some had bags with black writing on them and others had bags with the oxidizer symbol. However, he testified, "we were able to determine the difference and notice that they were the same thing because they do say 'sodium bromate' on them." After inspection, Engelhard accepted the shipment, and its employees moved it to a storage area.

Matrix provided Engelhard a material safety data sheet (MSDS) for the sodium bromate. Among other things, the MSDS said, "DANGER! OXIDIZER. Contact with other material may cause fire," and sodium bromate "[m]ay accelerate burning if involved in a fire. Containers may explode with heat. Prolonged exposure to fire or heat by the material may result in explosion." The MSDS also instructed users not to store sodium bromate next to combustible materials and to keep it from contacting organic matter.

Engelhard was already aware of the dangers described in the MSDS. Engelhard employed between fifteen and twenty chemical engineers in its laboratory at the

facility in Seneca. One engineer testified he knew that sodium bromate, as an oxidizer, "was always dangerous." Another testified the engineers "knew [sodium bromate] would support combustion and was an oxidizer." In addition, Frank Lamson-Scribner, the facility's operations and production manager, was asked at trial whether anyone working in the facility realized there was a risk that the sodium bromate could cause a fire like the one that occurred. He testified, "I think there are people in the plant that knew what the sodium bromate did."

Engelhard used roughly 500 chemicals in its operations at the Seneca facility, including between five and ten different oxidizers. Lamson-Scribner testified that between fifty and seventy-five of those 500 chemicals were hazardous. To protect employees, Engelhard provided safety training on hazardous materials and hazard communications. It taught employees that an MSDS contains information about a chemical and instructed them to look up the MSDS if they had a safety concern. Employees could access copies of MSDSs using computers located in several areas of the facility. Engelhard also trained employees to recognize and understand labels and symbols on chemical containers. One of the labels covered in that training was the oxidizer symbol. Finally, Engelhard taught employees that oxidizers can be hazardous if exposed to combustion.

In May 2004, Engelhard moved several pallets of the sodium bromate out of storage to a staging area in a hallway near some of the refining machinery.

The following month, Engelhard shut down the facility to perform maintenance. Lawing, a maintenance worker, was part of a team assigned to replace a metal pipe suspended from the facility's ceiling in a pipe rack. To remove the old pipe, the team would have to cut it into pieces using a blowtorch. This would cause hot molten bits of metal to fall from the pipe as it was being cut. The pipe rack passed directly over the staging area where Engelhard had chosen to store the pallets.

At the time of the accident, Engelhard had adopted a written procedure requiring that before employees could do any maintenance work that could create an ignition source for combustible or flammable materials, an Engelhard permit supervisor had to issue an internal "hot work" permit. One of the requirements for obtaining the permit was that immediately before the work was to begin, the supervisor of the work had to inspect the work area for the presence of any combustible materials. The procedure further required that "[a]ll such materials . . . be removed to a safe location for the duration" of the project.

On the morning of June 1, 2004, Steve Knox, the leader of the pipe removal team, inspected the work area with Tim Wald, the permit supervisor. Knox noticed the pallets but did not know what was in the bags. Engelhard policy required that when an employee encountered a substance and did not know what it was, the employee was to contact a supervisor. Knox did not contact his supervisor about the bags. He saw black writing on the bags, but he did not look closely enough to read it. Knox knew what the oxidizer symbol meant. He did not see such a symbol on the bags, but he did not attempt to turn any of the bags over. No one removed the pallets from the work area, and Wald issued the hot work permit.

After Wald issued the permit, but before the team began working, Lawing looked at the pallets to see if there was "[a] label or something that told [him he] needed to move" them. He saw nothing on the bags indicating he should not work near them. Seeing nothing to cause concern and knowing Wald had already issued the permit, he thought the pallets "were fine." Lawing testified he knew what the oxidizer symbol meant and would have moved the bags out of the work area if had he seen the symbol.

The team began removing the pipe later that day. Lawing's job was to stand in the pipe rack and lower cut sections of the pipe down from the rack to another man in a lift. At one point, while the men were working near the pallets, Knox saw a "flash" on one of the pallets. Within two or three seconds, an "inferno" "erupted" from the pallets and shot up into the pipe rack. Lawing jumped from the rack to the lift but could not get away from the fire. The flames enveloped him, and he could feel fire go into his mouth. Lawing does not remember whether he jumped or fell from the lift, but the drop to the floor was over twenty feet. The impact shattered his heels, ankles, and four vertebrae. He also lacerated his head in the fall. When he landed, he was still on fire. He testified, "I thought I was going to die. I thought I was dying."

The fire burned forty-two percent of Lawing's skin, including his face, ears, arms, and legs. It also burned his lungs. He needed approximately fifty stitches to close the lacerations on his head. He spent over a month in a hospital burn unit, undergoing skin grafts, orthopedic surgeries, and other treatments. Despite Lawing receiving over \$1,000,000 in medical treatment, many of his injuries are permanent. In addition to causing severe disfigurement, the fire caused Lawing to develop asthma for which he will need medication for the rest of his life. He also has trouble seeing and will need medication for his eyes, which can no longer lubricate themselves and are very sensitive to light.

II. Procedural History

Lawing and the other two workers injured in the accident filed products liability lawsuits against Univar, Trinity, and Matrix. Lawing asserted causes of action against all three defendants for negligence, strict liability, and breach of implied warranty of merchantability. In addition, he asserted a cause of action against Univar for breach of express warranties contained in Engelhard's purchase order.² Lawing asserted these causes of action under two theories: first, the defendants supplied the sodium bromate in bags that were in a defective and unreasonably dangerous condition because the bags were made of combustible material; and second, the defendants failed to adequately warn of the sodium bromate's "propensity . . . to ignite explosively in the presence of the packaging materials used."³

After a lengthy period of discovery, the defendants filed a joint motion for summary judgment on Lawing's strict liability cause of action. They argued that under section 15-73-10 of the South Carolina Code (2005), only a "user" or a "consumer" of a product may recover on a claim for strict liability, and because Lawing was not using or consuming the sodium bromate when he was burned, he could not recover in strict liability. The trial court agreed and granted the motion.

The trial court consolidated Lawing's case with the two others, and then bifurcated the trial into liability and damages phases. In its jury charge in the liability phase, the trial court instructed the jury on the sophisticated user doctrine. The jury returned verdicts for all three plaintiffs on their claims against Univar for breach of express warranty. However, the jury returned defense verdicts on Lawing's other causes of action.⁴

² The purchase order provided that each package must be marked to comply with 29 C.F.R. § 1910.1200 (2003), which is an Occupational Safety and Health Administration hazard communication regulation, and with Department of Transportation labeling and packaging regulations.

³ Lawing's wife asserted a cause of action against all three defendants for loss of consortium.

⁴ The other two plaintiffs settled with Trinity and Matrix before trial.

Lawing filed a joint motion for judgment notwithstanding the verdict or a new trial. He argued the trial court should not have charged the jury on the sophisticated user doctrine and should not have granted the defendants summary judgment on his strict liability cause of action. The trial court denied the motion.

In the damages phase, where the plaintiffs proceeded only against Univar, the jury awarded \$1,900,000 to Lawing and \$100,000 to his wife. Lawing filed a motion for new trial additur. The trial court granted the motion and increased the award to \$4,100,000. Mrs. Lawing also filed a similar motion, which the trial court denied.

The case initially came to this court as a cross-appeal: Univar filed a notice of appeal, and Lawing filed a notice of cross-appeal naming all three defendants as respondents. While the case was pending in this court, Univar settled with Lawing, leaving only Lawing's appeal against Trinity and Matrix.

III. Charging the Sophisticated User Doctrine

Lawing makes several arguments in his challenge to the trial court's decision to charge the jury on the sophisticated user doctrine. We address them in turn.

A. The Sophisticated User Doctrine Is the Law in South Carolina

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. We 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.

As we will explain in section III.B of this opinion, the 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.

B. The Doctrine Is Not Preempted

Lawing next argues that even if the doctrine is the law in this state, federal law impliedly preempts it. He contends the sophisticated user doctrine conflicts with certain federal regulations because it "stands as an obstacle" to their "purposes and objectives." See *Priester v. Cromer*, 401 S.C. 38, 43, 736 S.E.2d 249, 252 (2012) (stating "any state law that conflicts with federal law is" preempted); 401 S.C. at 44, 736 S.E.2d at 252 (stating federal law impliedly preempts state law where "the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives'" of the federal law (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 404, 85 L. Ed. 581, 587 (1941))). We find the doctrine is not preempted.

1. The Sophisticated User Doctrine

To explain that the sophisticated user doctrine is not preempted, we must first explain what it is. The sophisticated user doctrine is based on section 388 of the Restatement (Second) of Torts (1965). *Bragg*, 319 S.C. at 550, 462 S.E.2d at 332; see generally David G. Owen, *Products Liability Law* 624 (2d ed. 2008) (stating the "sophisticated user doctrine[] [is an] offshoot[] of a general principle expressed in *Restatement (Second) of Torts* § 388"). Section 388 is the basis of a products liability claim for negligent failure to warn. See *Livingston v. Noland Corp.*, 293 S.C. 521, 525, 362 S.E.2d 16, 18 (1987) (reciting the elements of a negligent failure-to-warn claim in products liability (citing *Gardner v. Q. H. S., Inc.*, 448 F.2d 238, 242 (4th Cir. 1971) (applying South Carolina law and relying on section 388))).⁵ On any negligence claim, including one for products liability, the plaintiff must prove the defendant failed to exercise reasonable care. *Branham v. Ford Motor Co.*, 390 S.C. 203, 210, 701 S.E.2d 5, 9 (2010). To understand the sophisticated user doctrine, it is particularly important that when determining

⁵ See also *Holst v. KCI Konecranes Int'l Corp.*, 390 S.C. 29, 43-44, 699 S.E.2d 715, 723 (Ct. App. 2010) (quoting *Livingston*). The supreme court in *Livingston* and this court in *Holst* did not cite section 388. However, the elements listed in both opinions for a negligent failure-to warn claim track precisely the elements of section 388, and those elements can be traced directly to *Gardner*, a Fourth Circuit opinion applying South Carolina law, in which the court relied on section 388. See 448 F.2d at 242.

whether any defendant acted with reasonable care, the jury should consider all the surrounding facts and circumstances. *See generally Thomas v. Atl. Greyhound Corp.*, 204 S.C. 247, 253, 29 S.E.2d 196, 198 (1944) ("Negligence is the want of due care; and due care means commensurate care under all the circumstances.").

The seller of a product is under a duty to warn the end user of dangers associated with the use of the product. *See* 63A Am. Jur. 2d *Products Liability* § 1089 (2010) ("The supplier has a duty to warn the ultimate user . . ."). Under some circumstances, however, it may be difficult or even impossible for the seller to meet its duty to warn the end user. One such circumstance is where, as in this case, the seller supplies a product to an intermediary, such as a large employer whose employees are the people who will be using the product. This circumstance is specifically addressed in comment n to section 388, entitled "Warnings given to third person." In this comment, the American Law Institute recognized that products "are often supplied for the use of others, although the [products] . . . are not given directly to those for whose use they are supplied." § 388 cmt. n. The Institute explained, "All sorts of [products] may be supplied for the use of others, through all sorts of third persons and under an infinite variety of circumstances." *Id.*

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.

The sophisticated user doctrine does nothing more than require the jury, in determining whether a seller of a product acted with reasonable care in fulfilling its duty to warn, to consider what the seller knew about the sophistication of the buyer with regard to the dangers associated with the use of the product. This is essentially what we explained in *Bragg* when we stated, "In defining the sophisticated user defense, . . . 'the question 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 (quoting *O'Neal*, 10 F.3d at 253 n.2). Thus, the sophisticated user doctrine applies when there is evidence the seller of a product was aware that an intermediate purchaser understood the dangers associated with the product and had the ability to effectively communicate those dangers to the end user. See *O'Neal*, 10 F.3d at 252 (stating the sophisticated user doctrine applies "when the supplier shows that it was reasonable to believe that a warning was unnecessary because the intermediary was already well aware of the danger").⁶ The doctrine requires the jury to consider such evidence in determining whether the seller acted reasonably in warning of the dangers associated with the product, and particularly whether the seller acted reasonably in the extent to which it relied on the purchaser to warn the end user.

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 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.*, 852 N.E.2d 100, 109 (Mass. 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.

⁶ *O'Neal* was decided under Maryland law. 10 F.3d at 251. As demonstrated by this court's reliance on it in *Bragg*, 319 S.C. at 550, 462 S.E.2d at 332, however, its reasoning as to the sophisticated user doctrine is no less applicable in South Carolina.

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.

2. Lawing's Preemption Argument

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."⁷ 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

⁷ Lawing also points out that the portions of § 1910.1200 on which he relies have been adopted by the state Department of Labor, Licensing, and Regulation. *See* 9 S.C. Code Ann. Regs. Ch. 71, Art. 1, Subart. 6 (2012).

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.*, 579 A.2d 1191, 1199 (Md. Ct. Spec. App. 1990), *aff'd*, 601 A.2d 123 (Md. 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.

C. Evidence Supported Giving the Charge

A trial court is required to charge principles of law that apply to the issues raised in the pleadings and supported by the evidence at trial. *Clark v. Cantrell*, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000). Lawing argues the evidence did not warrant charging the jury on the sophisticated user doctrine. We disagree.

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.

D. Errors in the Substance of the Charge

Therefore, the trial court correctly decided to charge the sophisticated user doctrine to the jury. *See O'Neal*, 10 F.3d at 252. However, the court incorrectly charged the jury that under the doctrine, "a distributor or supplier has no duty to warn of potential risks or dangers inherent in a product if the product is distributed to what we call a . . . sophisticated user," and that "[i]f you find that the sophisticated user defense applies in this case, then you must find that the defendants owed no duty to warn." We will not address this error, however, because it is not preserved for appellate review.

After the jury charge, the trial court asked the lawyers if they had any objections. Lawing's 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. Therefore, Lawing's arguments regarding the substantive correctness of the charge are not preserved. *See Harris v. Univ. of S.C.*, 391 S.C. 518, 528, 706 S.E.2d 45, 50 (Ct. App. 2011) (finding argument regarding substance of jury charge unpreserved because it was not raised to and ruled upon by the trial court).

We affirm the trial court's decision to charge the jury on the sophisticated user doctrine.

IV. Granting Summary Judgment on the Strict Liability Claims

South Carolina Code section 15-73-10 provides, "One who sells any product in a defective condition unreasonably dangerous to the user or consumer . . . is subject to liability for physical harm caused to the ultimate user or consumer . . ." See also *Bray v. Marathon Corp.*, 356 S.C. 111, 117, 588 S.E.2d 93, 96 (2003) (stating section 15-73-10 "limits liability to the user or consumer" of a product). In granting summary judgment against Lawing on his strict liability cause of action, the trial court held Lawing was not a user or consumer of the sodium bromate. Lawing argues the trial court took too narrow a view of the term "user." We agree.

The parties' dispute over the meaning of "user" is a question of statutory interpretation, the goal of which is to give effect to the legislature's intent. *Kerr v. Richland Mem'l Hosp.*, 383 S.C. 146, 148, 678 S.E.2d 809, 811 (2009); see also *Bray*, 356 S.C. at 117 n.6, 588 S.E.2d at 96 n.6 (noting in its discussion of section 15-73-10 that "the judiciary is limited to interpretation and construction of that statute"). In enacting section 15-73-10 and several related sections, the legislature did not use specific definitions to express its intent regarding these terms. Rather, the legislature stated that the American Law Institute's comments to section 402A of the Restatement (Second) of Torts (1965) are "the legislative intent."⁸ S.C. Code Ann. § 15-73-30 (2005). Therefore, to determine what the legislature meant by "user," we look to the comments to section 402A.

Several comments illustrate who is a user. First, comment 1 is entitled "User or consumer." Although the comment does not specifically define either of the terms, it indicates they are to be construed broadly. The comment explains that a person may recover in strict liability even though he did not buy the product: "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." § 402A cmt. 1 (emphasis added). In addition, "Consumers' include not only those who in fact consume the product, but also those who prepare it for consumption." *Id.* Finally, user is not limited to someone actively operating or manipulating the product; rather, it "includes those who are passively enjoying the benefit of the product." *Id.*

⁸ Section 15-73-10 is an "almost verbatim" codification of section 402A. *Schall v. Sturm, Ruger Co.*, 278 S.C. 646, 648, 300 S.E.2d 735, 736 (1983).

Second, comment 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.

Finally, comment o helps define "user" and "consumer" by illustrating what those terms do not mean. When the American Law Institute adopted section 402A, it stated it expressed no opinion as to whether the rule should apply "to persons other than users or consumers." § 402A caveat. Explaining that caveat, comment o describes a "non-user" as a "[c]asual bystander" and others whose contact with the product is incidental, such as "a passer-by injured by an exploding bottle, or a pedestrian hit by an automobile." § 402A cmt. o. These examples illustrate that the Institute intended that the people to be excluded from the definition of "user" and "consumer" are much farther removed from the product than Lawing and his co-workers were from the sodium bromate.

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

Surprisingly, there is little case law on the definition of "user" under section 402A. In *Patch v. Hillerich & Bradsby Co.*, 257 P.3d 383 (Mont. 2011), the Supreme Court of Montana addressed a completely different factual situation that nevertheless helps us understand whether Lawing is a user on the facts of this case. 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 Owen, *supra*, at 621 ("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.").

Trinity and Matrix make two other arguments regarding Lawing's status as a user under section 15-73-10. First, they argue *Bray* 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.

V. Conclusion

We **AFFIRM** the trial court's decision to charge the jury on the sophisticated user doctrine. However, we **REVERSE** the trial court's decision granting summary judgment on Lawing's strict liability cause of action, and we **REMAND** to the circuit court for a new trial only on that cause of action.

GEATHERS and LOCKEMY, JJ., concur.