THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

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

Scott F. Lawing and Tammy R. Lawing.....Petitioners/Respondents,

v.

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

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

RESPONDENTS/PETITIONERS' PETITION FOR REHEARING

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TO: THE HONORABLE JUSTICES OF THE SOUTH CAROLINA SUPREME COURT:

Pursuant to Rules 221 and 240 of the South Carolina Appellate Court Rules, Respondents/ Petitioners Trinity Manufacturing, Inc. and Matrix Outsourcing, LLC request this Honorable Court grant rehearing in the instant matter. Respondents/Petitioners respectfully aver that the following arguments demonstrate several material points overlooked or misapprehended by the Court, which warrant reconsideration by this tribunal.

LAW/ANALYSIS

I. The Majority Overlooked or Misapprehended the Parameters of the Comments in Restatement (Second) of Torts § 402A When It Held Lawing Was a "User" of the Sodium Bromide and/or Its Packaging

To prove a claim under a strict liability theory in South Carolina, a plaintiff must prove, inter alia, that he or she is a "user" or "consumer" of the product. See S.C. Code Ann. § 15-73-10. In its disposition of the instant case on appeal, based upon its review, analysis, and interpretation of comments l[1]and o[2] of Restatement (Second) of Torts § 402A (the genesis of §

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[1] Comment l of Restatement (Second) of Torts § 402A states:

> User or consumer. In order for the rule stated in this Section to apply, it is not necessary that the ultimate user or consumer have acquired the product directly from the seller, although the rule applies equally if he does so. He may have acquired it through one or more intermediate dealers. It is not even necessary that the consumer have purchased the product at all. He **may** be a member of the family of the final purchaser, or his employee, or a guest at his table, or a mere donee from the purchaser. The liability stated is one in tort, and does not require any contractual relation, or privity of contract, between the plaintiff and the defendant.
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> "Consumers" include not only those who in fact consume the product, but also those who prepare it for consumption; and the housewife who contracts tularemia while cooking rabbits for her husband is included within the rule stated in this Section, as is also the husband who is opening a bottle of beer for his wife to drink. Consumption includes all ultimate uses for which the product is intended, and the customer in a beauty shop to whose hair a permanent wave solution is applied by the shop is a consumer. **"User" includes those who are passively enjoying the benefit of the product, as in the case of passengers in**

15-73-10),[3] the majority held Petitioner/Respondent Scott Lawing was a "user" of the sodium bromide, which was used extensively by his employer, Englehard, in its refining processes. This

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> **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.**

(emphasis added).

[2] Comment o of Restatement (Second) of Torts § 402A provides:

> Injuries to non-users and non-consumers. **Thus far the courts, in applying the rule stated in this Section, have not gone beyond allowing recovery to users and consumers**, as those terms are defined in Comment l. **Casual bystanders, and others who may come in contact with the product, as in the case of employees of the retailer, or a passer-by injured by an exploding bottle, or a pedestrian hit by an automobile, have been denied recovery**. There may be no essential reason why such plaintiffs should not be brought within the scope of the protection afforded, other than that they do not have the same reasons for expecting such protection as the consumer who buys a marketed product; but the social pressure which has been largely responsible for the development of the rule stated has been a consumers' pressure, and there is not the same demand for the protection of casual strangers. The Institute expresses neither approval nor disapproval of expansion of the rule to permit recovery by such persons.

(emphasis added).

The majority held "we would not restrict the term 'user' to plaintiffs who are injured while handling or operating the dangerous product." However, the majority clearly stated Lawing was not a "casual bystander," which apparently did not give rise to a Comment o "exception" analysis being injected into the equation.

[3] Restatement (Second) of Torts § 402A (1965) states:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
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> (a) the seller is engaged in the business of selling such a product, and
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> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
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> (2) The rule stated in Subsection (1) applies although

holding was apparently premised upon Lawing's purported "interaction"[4] with the product prior to engaging in welding activities. For the majority, "interaction" with a product ancillary to its intended use by persons who were not intended users of the product is satisfactory enough to create liability under §402A: "[W]e would not restrict the term 'user' to plaintiffs who are injured while handling or operating the dangerous product."

Conversely, the dissent of Justice Pleicones noted:

> The meaning of the terms "user" and "consumer" are elucidated by the Comments to §402A of the Restatement of Torts Second. Comment l 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 bromide 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 Englehard was "utilizing [the sodium bromide] for the purpose of doing work upon it" within the meaning or contemplation of Comment l.

(emphasis added) (footnotes omitted).

As an initial matter (in addition to adopting and concurring with Justice Pleicones' analysis), Respondents/Petitioners also reject the majority's assertion that Lawing "interacted" with the sodium bromide. "Interaction" connotes "use," which is something Lawing did not do. The sodium bromide had no function in Lawing's welding activities. The product was not

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> (a) the seller has exercised all possible care in the preparation and sale of his product, and
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> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

[4] When discussing his status in relation to the sodium bromide, the majority wrote: "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."

needed or used by Lawing to enable him to perform his job functions. Lawing did "use" the product. Whatever Lawing did in relation to the product did not put him in the ambit of §402A. Equating this "interaction," as characterized by the majority to a "use" for purposes of satisfying the §402A/§ 15-73-10 analysis is a judicially-created carve-out or expansion of §402A that is arguably untethered to any authority. For this reason, reconsideration by this tribunal is warranted.

As noted by Justice Pleicones, Lawing was neither passively enjoying the product or was utilizing it for the purpose of doing work upon it. The majority's definition of "user" does not fit into the sphere of the Comment l. Moreover, respectfully, this Court is precluded from expanding the definition of "user" to, for example, someone who was not the intended user of a product and who was not either passively enjoying the product or was utilizing it for the purpose of doing work upon it, as it recognized in Bray v. Marathon Corporation, 356 S.C. 111, 588 S.E.2d 93 (2003). See id. at 117 n.6, 588 S.E.2d at 96 n.6. (holding the Court lacked authority to modify § 15-73-10 and its effect where the General Assembly had already spoken by passing the statute).[5]

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[5] Specifically, the Bray Court stated :

> Where the legislature has, by statute, acted upon a subject, the judiciary is limited to interpretation and construction of that statute. Barnwell v. Barber-Colman Co., 301 S.C. 534, 393 S.E.2d 162 (1989) (finding punitive damages are not recoverable under Defective Products Act); Schall v. Sturm, Ruger Co., Inc., 278 S.C. 646, 300 S.E.2d 735 (1983) (absent clear legislative direction, strict liability cause of action under § 15-73-10 does not exist in South Carolina where product entered stream of commerce prior to enactment of statute and is alleged to have caused injury thereafter). If the Act is to be amended so as to provide for the requirement of a close relationship in the context of a strict liability cause of action, this must be accomplished by the legislature, not the court.

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

Moreover, this Court overlooks or misapprehends that while the way the product was stacked or shipped was potentially wrong,[6] there was nothing wrong with the container or packaging, which would engender the Court's Comment h analysis.[7] This comment states:

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[6] Respondents/Petitioners note that while strict liability does not lie for an injured employee who was not using the product in question at the time of injury, Lawing was not without remedy in tort. Specifically, under our law, the employee may pursue recovery from the product manufacturer, distributor, and seller via, inter alia, a theory of negligence. 30 S.C. Jur. Products Liability § 15. In this circumstance, the focus of the theory is on the conduct of the defendant and liability is determined according to fault. Id. (citing Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995)). A manufacturer or other supplier of a defective/harm-producing product is accountable to an injured party on ordinary negligence principles regardless of a lack of contractual relations with such party. Id. (citing Carolina Home Builders, Inc. v. Armstrong Furnace Co., 259 S.C. 346, 191 S.E.2d 774 (1972)).

In the instant case, in addition to their strict liability claim, Lawing pled and prosecuted negligence-based claims against Respondents/Petitioners, including a claim for negligence as to packaging and negligence as to warning labels. Upon its review of the evidence and application of the same to the law, the jury elected to return a verdict in favor of Respondents/Petitioners. Though he ultimately did not obtain a verdict from Respondents/Petitioners, Lawing was nevertheless were afforded due process and the opportunity to pursue recovery for his alleged damages concerning the packaging.

[7] Comment h of Restatement (Second) of Torts § 402A states:

> A product is not in a defective condition when it is safe for normal handling and consumption. If the injury results from abnormal handling, as where a bottled beverage is knocked against a radiator to remove the cap, or from abnormal preparation for use, as where too much salt is added to food, or from abnormal consumption, as where a child eats too much candy and is made ill, the seller is not liable. Where, however, he has reason to anticipate that danger may result from a particular use, as where a drug is sold which is safe only in limited doses, he may be required to give adequate warning of the danger (see Comment j), and a product sold without such warning is in a defective condition.
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> The defective condition may arise not only from harmful ingredients, not characteristic of the product itself either as to presence or quantity, but also from foreign objects contained in the product, from decay or deterioration before sale, or from the way in which the product is prepared or packed. 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. Where the container is itself dangerous, the product is sold in a defective condition. Thus a carbonated beverage in a bottle which is so weak, or cracked, or jagged at the edges, or bottled under such excessive pressure that it may

Where the container is itself dangerous, the product is sold in a defective condition. The container was neither dangerous or defective. The shipment of sodium bromate involved in the June 1, 2004, accident was delivered to Engelhard on February 16, 2004, **whereupon, it was inspected, verified, and accepted by Engelhard without complaint**. (R. pp. 1519 - 1523; R. pp. 1524 - 1531; R. p. 2315, line 6 – p. 2317, line 13; R. p. 2318, line 25 – p2319, line 12; R. p. 2326, line 22 – p. 2328, line 10; R. p. 2329, line 11 – p. 2332, line 20; R. p. 2333, line 8 – p. 2337, line 12; R. p. 2338, line 7 – p. 2343, line 1; R. p. 2352, line 8 – p. 2353, line 14; R. p. 2429, lines 19-22.) When it arrived at Engelhard, the sodium bromate involved in the accident was in a metal shipping container, sometimes referred to as a "connex box." (R. p. 2321, lines 6-23; R. p. 855, line 17 – p. 856, line 8.) The sodium bromate was in DOT and United Nations approved, individual, 25 kilogram, plastic woven bags, every one of which displayed the internationally recognized yellow diamond oxidizer warning label on one side and written information on the reverse side. R. p. 2431, lines 13-21; R. p. 2432, lines 10-14; R. p. 2436, lines 17-20; R. p. 1257, lines 12-13; R. pp. 1539-1540; R. pp. 1557-1563.)[8] This written information included the words "sodium bromate" and other information that could be used to

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> explode or otherwise cause harm to the person who handles it, is in a defective and dangerous condition. **The container cannot logically be separated from the contents when the two are sold as a unit, and the liability stated in this Section arises not only when the consumer drinks the beverage and is poisoned by it, but also when he is injured by the bottle while he is handling it preparatory to consumption.**

(emphasis added).

Respondents/Petitioners note that there is no evidence that Lawing "handled" or "consumed" the sodium bromide or its packaging in connection with his welding activities at Englehard. The absence of such evidence calls into question the applicability of Comment h as basis for the majority's holding in the "user" issue.

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

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

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

As required by Engelhard's procedures, once inspected and verified, the sodium bromate that it accepted on February 16, 2004, was inventoried and logged into Engelhard's internal computer system. The shipment, a total of 720 bags, was taken to the D-1 area of Engelhard's warehouse—i.e., the specific area of its warehouse where oxidizers are stored–where it would stay until it was specifically requested to be brought from storage for use in production. (R. p. 2343, line 24 – p. 2351, line 3; R. p. 2402, line 3 – p. 2403, line 25; R. p. 2404, line 12 – p. 2405, line 23; R. pp. 1485 - 1486.).

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

Respondents/Petitioners complied with international and national standards concerning warnings on the package. The yellow diamond oxidizer warning label on the packaging was the label utilized by Engelhard within its workplace. Moreover, the packages were clearly and unambiguously labeled as containing "sodium bromide." Once the sodium bromide was in Englehard's possession, it was Englehard's responsibility to properly store the sodium bromide in: (a) a proper area at all times; and (b) in a way that ensured the internationally recognized yellow diamond oxidizer warning label was visible to Lawing and the others (since the words "sodium bromide" were apparently meaningless to Steve Knox, the supervisor, among others in the detail, especially if Englehard was going to put the product in an area of the plant that could expose it to combustion. Respondents/Petitioners therefore cannot be held culpable for: (1) Englehard's improper storage of materials in the refinery during the shutdown week and in such a way that what was contained within the bags was not apparent to employees like Lawing; or (2) any failure by Englehard in its training and supervision of Lawing and the others at Engelhard to investigate conditions in their work areas. The majority's ruling in this case and its expansion of the definition of "user" under § 15-73-10 is: (1) unnecessary; (2) erroneous; and (3) constitutes an impermissible shifting of responsibility from the arguably culpable party, Englehard to the supplier.

Respondents/Petitioners assert the majority—while not acknowledging it dipped into a Comment o "exception" analysis–went beyond allowing recovery to "users" and "consumers," as traditionally defined, and awarded the status of "user" to Lawing, an individual falling into the parameters of "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," which have been historically been denied recovery under a

§402A analysis.

II. The Majority Overlooked or Misapprehended the Parameters of the Sophisticated User Doctrine When It Created a Distinction Between Product Labeling and the Use of the Sodium Bromate, As If the Two Are Not Related

A. The Sophisticated User Doctrine as Recognized Law in South Carolina

By opting not to expressly recognize the holding in Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995), regarding the Sophisticated User Doctrine, the majority opinion of this Court in the case sub judice throws into disarray an understanding that has been possessed by both the trial bench and bar for 20 years: that the Sophisticated User Doctrine is the law of South Carolina. Respectfully, Respondents/Petitioners aver this Court should reconsider its holding to clearly enunciate (and eliminate any ambiguity) for those current and future litigants engaged in products liability disputes in our state (and the judges and the juries called upon to adjudicate them) that this doctrine is recognized law and is a tenable defense that can be raised by defendants in such disputes when the evidence warrants the same. Respondents/Petitioners adopt the position of Justice Kittredge, who in his dissent, wrote:

> 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." **This 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.**[9]

(emphasis added).

Justice Pleicones concurred with Justice Kittredge and asserted "that the Court of Appeals properly decided the 'sophisticated user' issue."

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[9] Respondents/Petitioners note that certiorari in Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 550, 462 S.E.2d 321, 332 (Ct. App. 1995), was pursued following the Court of Appeals' disposition and was denied by this Court (denied Nov. 20, 1996).

The holding in Bragg[10] and its express recognition of the Sophisticated User Doctrine as a

[10] Specifically, the Court of Appeals in Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995) wrote:

> Finally, Bragg contends the trial court erred in charging Hi-Ranger's proposed charge number 25 which relates to the sophisticated user defense. The trial court charged:
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> > Now, ladies and gentlemen, under South Carolina law, a manufacturer 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, thereby, 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, the employer purchased for use in his business. Such an employer has a duty to warn his employees of the dangers of the product.
>
> We conclude the trial court properly charged the jury concerning the sophisticated user defense. The sophisticated user defense outlined in section 388 of the Restatement (Second) of Torts has been adopted by numerous jurisdictions. See Willis v. Raymark Indus., Inc., 905 F.2d 793 (4th Cir. 1990) (the sophisticated user defense may be permitted in cases involving an employer who is aware of the inherent dangers of a product which the employer purchases for use in its business; if the employer/purchaser has "equal knowledge" of the product's dangers, then the manufacturer may be able to rely on the employer/purchaser to protect its own employees from harm); see also Goodbar v. Whitehead Bros., 591 F.Supp. 552 (W.D.Va. 1984), aff'd sub nom. Beale v. Hardy, 769 F.2d 213 (4th Cir. 1985) (in failure to warn case brought by employees of foundry suffering from silicosis, the court found that because supplier had reason to believe that the knowledgeable industrial purchaser of the product (the foundry) would recognize the dangers associated with the product, the supplier's reliance on the foundry to warn and protect the workers was reasonable, and the supplier was not mandated to give warnings directly to the employees).
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> In O'Neal v. Celanese Corp., 10 F.3d 249 (4th Cir.1993), the Fourth Circuit Court of Appeals, applying Maryland law, upheld the district court's grant of judgment notwithstanding the verdict in favor of an equipment seller based upon the sophisticated user defense.[11] In defining the sophisticated user defense, the court explained, "it is not the specific knowledge of the intermediary that is

defense in South Carolina product liability cases has been relied upon as law by tribunals[11] and the authors of secondary authorities.[12] Bragg has guided a great deal of thought and decision-making in product liability circles, as well as judicial determinations, in this state for two decades. Respondents/Petitioners maintain the Sophisticated User Doctrine is therefore settled law in South Carolina and seeks a new opinion of this Court in the instant case via rehearing to clearly stating that fact.

> relevant. Rather, the question is whether the supplier, Celanese, acted reasonably in assuming that the intermediary would recognize the danger and take precautions to protect its employees." The court concluded the supplier was reasonable in relying on the employer to warn its employees since the employer was an experienced operator in the salvage business who knew or should have known that the red-orange paint applied to the plant equipment was an indication of lead paint.
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> There was significant evidence at trial that Ballenger was a large electrical contractor which frequently used and was familiar with aerial devices. In fact, the evidence established that Ballenger owned a number of bucket trucks. The evidence further established that Ballenger's management was well aware that conductive materials like conductive hoses should not be used in the buckets of aerial devices. Thus, the trial court correctly charged the jury concerning this defense asserted by Hi-Ranger and the trial court's charge was an accurate recitation of the law. The trial court's jury charge, considered as a whole, was proper.

Id. at 549-51, 462 S.E.2d at 331-32 (footnotes omitted).

The writing above is not dicta, but is instead a holding of the Court of Appeals.

[11] See, e.g, Stuart v. Springs Indus., Inc., 957 F. Supp. 2d 644, 650 (D.S.C. 2013) aff'd, 572 F. App'x 191 (4th Cir. 2014).

[12] See, e.g., Product Liability Desk Reference: A Fifty-State Compendium 735 (Stephen G. Morrison, James T. Irvin & Jay T. Thompson, eds., 2010); 30 S.C. Jur. Products Liability § 46; Ralph King Anderson, Jr., South Carolina Requests to Charge – Civil, 2002, § 32-8.

B. The Majority's Distinction Between Product Labeling and Use of the Sodium Bromate

In its disposition in the case at bar, a three justice majority determined it "need not formally adopt the [Sophisticated User] doctrine at this time because as discussed, infra, the facts of this case do not implicate the sophisticated user defense." Without any citation to authority—primary or secondary–the majority went on to hold:

> [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 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.
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> 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.
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> 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.
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> 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.

(emphasis in original) (footnotes omitted).

In his dissent, Justice Kittredge wrote:

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 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.

(emphasis added).

As noted above, in his separate dissent, Justice Pleicones maintained the Circuit Court's decision to charge the Sophisticated User Doctrine as a defense was proper and that the Court of Appeals' affirmance of the same should be upheld.

Respondents/Petitioners concur with Justice Kittredge's reflection that labeling and product use is inextricably connected. Respondents/Petitioners further note the majority said as much its earlier § 15-73-10 "user" analysis.

As Comment n to Restatement (Second) of Torts § 388 (the genesis of the Sophisticated User Doctrine) makes clear, the focus remains on the conduct of the supplier, but that conduct is judged in light of the circumstances. Among those circumstances is whether the supplier acted in a manner reasonably calculated to assure either that the necessary information would be passed on to the ultimate handlers of the product or that their safety would otherwise be attended to by the employer/buyer. The Fourth Circuit, in Willis v. Raymark Industries, Inc., 905 F.2d 793 (4th Cir. 1990), made the point exactly, stating: **"Comment n clearly focuses on what the product manufacturer[/supplier/distributor] knew and the reasonableness of its reliance on the employer prior to and during the time the workers were exposed**."[13] Id. at 797

[13] Justice Kittredge nails the analysis on the head by observing: "Engelhard's knowledge of those dangers is a critical factor in assessing 'whether the supplier ... acted reasonably in assuming that [Englehard] **would recognize the danger and take precautions to protect its employees**.'" The majority makes much of the fact that the product was shrink wrapped on pallets on the day of the subject accident, which they believe obscured the warnings on the packaging and therefore makes the Sophisticated User Doctrine immaterial to the case at bar as a matter of law. Arguably, shrink wrapping the product was necessary to get it across the Pacific Ocean and ultimately to South Carolina. As noted in analysis earlier in this petition, once Englehard took possession of the product, it was Englehard's product to properly store and use. Moreover, there were warnings and writing in English clearly evincing the product as being sodium chloride, an oxidizing agent, extant on the product. (R. p. 1539-1540.) Further, the product was supplied with MSDS sheets. Englehard knew what it had with regard to the

(emphasis added). This analysis, as enunciated by Willis, does not include any parsing or distinction being made between product labeling and its use.[14] Labeling and use are intertwined and inextricably linked. Further, what the product manufacturer/supplier/distributor knew and the reasonableness of its reliance on the employer/buyer prior to and during the time the workers were exposed are questions of fact (rather than matters of law) for a jury to decide.[15] The majority's parsing or distinction being made between product labeling and its use is discordant with, inter alia, Restatement (Second) of Torts § 388 and Willis. Accordingly, Respondents/Petitioners respectfully seek rehearing on the issue of Sophisticated User Doctrine being a tenable defense in the instant case.

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characteristics of sodium bromide and it possessed the (best) capability to share its knowledge with its workforce. Respondents/Petitioners therefore aver they were acted reasonably in assuming that Englehard **would recognize the danger and take precautions to protect its employees**, such as storing it in proper areas at all times per its stated protocols and unpacking and stacking the product upon receipt in such a way so as to clearly evince its contents to third persons such as Lawing. While the minds of some members of this Court may differ regarding Respondents/Petitioners' reasonable assumptions concerning Englehard, it is not for this Court to decide on either the sufficiency of the warnings as a matter of law or whether Respondents/Petitioners' assumptions concerning whether Englehard would recognize the danger and take precautions to protect its employees were in fact reasonable and appropriate: That determination was the sole province of the trial jury, which made those determinations at trial in 2008.

[14] This is especially true where, as in the instant case, there is evidence of warning extant on the packaging along with accompanying MSDS sheets.

[15] Contrary to the majority's view, Respondents/Petitioners aver that in the context of a Sophisticated User Doctrine defense, the adequacy of the direct warnings to the ultimate "users" is only one factor to consider, and not necessarily the decisive one. See, e.g., Kennedy v. Mobay Corp., 579 A.2d 1191, 1202 (Md. Ct. Spec. App. 1990). The information supplied on the MSDS and packaging was only a small part of the data supplied to or otherwise known by Englehard and, arguably, its employees such as Lawing due to, inter alia, the ubiquitousness of the sodium bromide at the facility. The circuit judge was correct in charging the jury on this defense, which apparently after weighing all of the evidence presented to it, determined that the asserted negligence and breach of warranty causes of action did not lie as to Respondents/Petitioners.

CONCLUSION

Respectfully, the majority overlooked or misapprehended the parameters of the comments in Restatement (Second) of Torts § 402A when it held Petitioner/Respondent Scott Lawing was a "user" of the subject sodium bromide and/or its packaging. Lawing was not a "user" of the subject sodium bromate for purposes of the strict liability analysis. Summary judgment was therefore warranted at the trial court level and should be restored.

Further, and again respectfully, the majority overlooked or misapprehended the parameters of the Sophisticated User Doctrine when it created a distinction between product labeling and the use of the sodium bromate, as if the two are not related. Labeling and product use are intertwined and inextricably linked as it relates to the applicability of the Sophisticated User Doctrine as a defense in product liability disputes. Additionally, as has been previously held, what the product manufacturer/supplier/distributor knew and the reasonableness of its reliance on the buyer prior to and during the time the workers were exposed are questions of fact (rather than matters of law) for a jury to decide. It is not for this Court (or the trial judge) to decide on either the sufficiency of the warnings as a matter of law or whether Respondents/Petitioners Trinity & Matrix's assumptions concerning whether Englehard would recognize the danger and take precautions to protect its employees were in fact reasonable and appropriate. That determination was the sole province of the trial jury, which made those determinations at trial in 2008.

For these reasons, Respondents/Petitioners seek reargument of the instant case and reconsideration of the majority's opinion in the instant case.

[SIGNATURE PAGE FOLLOWS]

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December 22, 2015

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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Appellate Case No. 2013-002464

Scott F. Lawing and Tammy R. Lawing..... Petitioners/Respondents,

v.

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

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

PROOF OF SERVICE

Counsel for Respondents/Petitioners Trinity Manufacturing, Inc. and Matrix Outsourcing, LLC certifies it has served Respondents/Petitioners Petition for Rehearing on all parties by depositing a copy of it in the United States Mail, postage prepaid, on December 22, 2015, addressed to the following attorneys of record:

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PROOF OF SERVICE – PETITION FOR REHEARING

Columbia, South Carolina
December 22, 2015