THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

2006-CP-37-0030

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

v.

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

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

RESPONDENTS TRINITY MANUFACTURING, INC. AND MATRIX OUTSOURCING, LLC'S FINAL BRIEF

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PROLOGUE

Here is the problem. The bags were never intended to resist the heat produced by hot molten slag. That's the problem. The problem is not that this is an inferior or dangerous packaging. That's not it at all. The problem is it was exposed to hot molten slag.

The pallets of sodium bromate should have been removed from the hot work area. [The employer] Engelhard had many opportunities to do this, but it did not happen. If it had, this accident would not have happened and these gentlemen would not have been injured. Univar, Trinity, and Matrix are not responsible for this accident.

Ellis Johnston, Respondents Trinity & Matrix's trial counsel at closing argument.

STATEMENT OF ISSUES ON APPEAL

I. Whether the Circuit Court properly charged the Sophisticated User Doctrine as a defense to Appellants' negligence and implied warranty claims?[1]

II. Whether the application of the Sophisticated User Doctrine as a defense is preempted by federal law?[2]

III. Whether the Circuit Court properly granted summary judgment to Respondents Trinity and Matrix and Univar on Appellants' strict liability cause of action based upon the holding that Appellants did not come within the ambit of "users" and/or "consumers" for purposes of the South Carolina Product Liability Act, S.C. Code Ann. § 15-73-10 et seq.?[3]

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[1] In response to Appellants' Issues of Appeal numbers 3, 7, 8, 9, 10, and 11.

[2] In response to Appellants' Issues of Appeal numbers 1 and 2.

[3] In response to Appellants' Issues of Appeal number 12.

STATEMENT OF THE CASE

Mr. and Mrs. Martin commenced a products liability action against the Defendants by filing a summons and complaint on July 18, 2005. Their complaint alleged causes of action against all Defendants for strict products liability, negligence, and breach of implied warranty arising out of their involvement in the sale of the chemical sodium bromate, which was involved in a workplace accident that injured Mr. Martin on June 1, 2004. Mrs. Martin asserted a claim for loss of consortium. (R. pp. 1712-1719.)

On the same day, Mr. and Mrs. Black commenced an action against these same Defendants, alleging the same causes of action arising out of the same workplace accident. (R. pp. 1704-1711.) Mrs. Black's claim was later dropped. (R. pp. 1655-1656.)

On January 11, 2006, Mr. and Mrs. Lawing commenced an action against the same Defendants, alleging the same causes of action arising out of the same workplace accident. (R. pp. 1758-1765.)

All Defendants timely answered the aforementioned complaints, denying their material allegations and asserting numerous affirmative defenses. (R. pp. 1720-1757; R. pp. 1766-1785.) Univar later amended its answer as to each complaint, asserting additional affirmative defenses. (R. pp. 1786-1809.)

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

Prior to trial, Univar made a number of dispositive motions, including motions for summary judgment on the Plaintiffs claims for strict liability; for negligence and failure to warn; regarding the Plaintiffs' claims that were based in whole or, in part, on the alleged violation of the HazCom Standard; for strict liability, negligence, breach of warranty for lack of and/or inadequate warnings; for breach of express warranty; and, with respect to Messrs. Black and Martin, for failure to comply with § 42-1-560(b). (R. pp. 49-139; R. pp. 42-48; R. pp. 2060-2104; R. pp. 2105-2246; R. pp. 2247-2248; R. pp. 2048-2059.) The trial court addressed these motions and other

matters during a two-day pre-trial hearing, granting the Defendants' motion for summary judgment on the Plaintiffs' strict liability claim. (R. pp. 391-726.)

The Plaintiffs' cases were consolidated and the trial thereon was bifurcated into a liability phase and a damages phase, with the liability phase beginning before the Honorable J.C. Nicholson, Jr. and a jury on October 20, 2008. (R. p. 2309, lines 1-21; R. pp. 1654.) At the close of the Plaintiff's evidence, the Defendants' moved for and were denied a directed verdict on the issue of liability. (R. p. 1037, line 15 – p. 1095, line 15.) At the close of all evidence, the Defendants again moved for and were denied a directed verdict on the issue of liability. At this time, the trial court granted the Plaintiffs' motions for a directed verdict on the issue of the application of the OSHA HazCom Standard and also found, as a matter of law, the existence of the express warranty that the Plaintiffs alleged to have been given by Univar. (R. p. 2455, line 23 – p. 2496, line 22.)

Five total causes of action where thereafter submitted to the jury. Three against all Defendants: negligence as to packaging, negligence as to warning labels, and breach of implied warranty of merchantability. Two causes of action were against Univar only: breach of express warranty as to

packaging and breach of express warranty as to warning labels. On November 17, 2008, the jury returned a verdict in favor of the Plaintiffs on only one cause of action, breach of express warranty as to warning labels against Univar. The jury found against the Plaintiffs on all other causes of action, thereby, absolving Trinity and Matrix of liability. (R. pp. 1413-1420; R. p. 1269, line 16 – p. 1271, line 3.)

Univar timely moved for JNOV or, alternatively, a new trial. (R. pp. 2253-2272.) The trial court heard these motions on November 18, 2008 and, thereafter, entered an order denying Univar relief and also stating that the issues raised in Univar's motions would be addressed again after the damages portion of the trial. (R. pp. 1272-1354; R. pp. 2-5.)

Univar took an immediate appeal from the result of the liability phase of trial. Although this Court found Univar's appeal to be proper, it declined to stay the damages trial, instead holding Univar's liability appeal in abeyance until the trial on damages was concluded. (R. pp. 1871-1900; R. pp. 1657-1662; R. pp. 1663-1667.)

The damages phase of trial began on December 1, 2008. (R. pp. 2497) On December 12, 2008, the jury rendered the following damages verdicts: $2,600,000 in favor of Mr. Black; a total of $1,500,000 in favor of the

Martins ($100,000 being an award to Mrs. Martin for loss of consortium); a total of $2,000,000 in favor of the Lawings ($100,000 being an award to Mrs. Lawing for loss of consortium). (R. pp. 2498-2500; R. pp. 1668-1670.)

Univar timely filed/renewed its JNOV motion and also moved to have the awards in favor of Mr. Black and the Martins set off in accordance with their settlements with Trinity and Matrix. (R. pp. 2273-2301; R. pp. 2249-2252.) All Plaintiffs' moved for new trials absolute on the issue of damages or, alternatively, new trial nisi additur on the issue of damages. (R. pp. 377-390.)

The trial court heard post-trial motions on January 21, 2009, denying Univar JNOV at that time. (R. pp. 1355-1412.) On March 31, 2009, the trial court entered orders denying Univar a setoff and also denying all Plaintiffs but Messrs. Martin and Lawing's motions for new damages trials. (R. pp. 12-20; R. pp. 1671-1673.) On the same date, the trial court entered orders granting Messrs. Martin and Lawing new trials nisi additur on the issue of damages only, forcing Univar to chose between accepting additurs of $1,400,000 at to Mr. Martin and $2,000,000 as to Mr. Lawing or proceeding directly to a new damages trial. (R. pp. 1674-1686.)

This consolidated appeal timely followed. (R. pp. 1871-2047; R. pp. 1695-1703.)

STATEMENT OF FACTS[4]

Engelhard is a world leader in refining precious metals, and is a sophisticated user of many chemicals, including the chemical sodium bromate. (R. p. 2423, lines 18-22; R. p. 2434, lines 22-25; R. p. 2444, line 25 – p. 2445, line 19; R. p. 2446, line 12 – p. 2451, line 1; R. p. 2452, lines 6-23.) Sodium bromate is a strong oxidizing agent or "oxidizer." (R. p. 2343, lines 24-25; R. p. 2354, lines 22-23; R. pp. 1532 - 1536.) When heated to a certain temperature, it gives off oxygen and, thereby, greatly contributes to the combustion of other material. (R. p. 2357, line 23 – p. 2358, line 22; R. p. 785, line 23 – p. 788, line 1; R. p. 2418, lines 5-18.) Engelhard regularly uses sodium bromate in its refining process. (R. p. 2452, lines 6 – p. 2453, line 3.) At the time of the June 1, 2004, accident out of which the Plaintiffs' claims arise, Engelhard was purchasing approximately 120 metric tons of sodium bromate per year from Univar. (R. p. 2417, lines 12-18).

Engelhard began purchasing sodium bromate from Univar in 2002, having previously obtained the product from another supplier. (R. p. 760, line 24 – p. 761, line 3; R. p. 2416, lines 1-9; R. p. 2417, lines 12-18; R. p.

[4] In addition to the factual recitation presented here, where pertinent, facts will be cited within the arguments that follow.

2425, line 3 – p. 2427, line 19; R. p. 2430, line 19; R. p. 1564; R. p. 1565; R. p. 1566; R. pp. 1567-1568.) Univar sourced the sodium bromate it supplied Engelhard through Trinity and Matrix. Engelhard ordered the product from Univar; Univar then ordered it from Trinity; Trinity then ordered it from its subsidiary, Matrix. Matrix obtained the product from a Chinese manufacturer, whereupon, it was shipped to the United States and delivered directly to Engelhard by a common freight carrier, never having physically passed through the "workplace" of any of the Defendants. (R. pp. 1472 – 1474; R. p. 1475; R. p. 1564; R. p. 2314, lines 19-25; R. p. 2318, line 25 – p. 2319, line 12; R. p. 2324, line 22 – p. 2325, line 1; R. p. 2414, line 23 – p. 2415, line 17; R. p. 880, line 15 – p. 881, line 24; R. p. 2419, line 23 – p. 2420, line 17; R. p. 2421, line 16 – p. 2424, line 6; R. p. 1160, line 17 – p. 1161, line 16.)[5] Delivery of the product directly to Engelhard without its passage through any of the Defendants' facilities is known as a "drop shipment" or "drop shipping." (R. p. 2313, line 11 – p. 2314, line 25.)

The sodium bromate involved in the June 1, 2004, accident corresponds to Engelhard purchase order S006011 (the "Subject Purchase Order"). (R. p.

[5] As will be further discussed, infra, "workplace" is a defined term under the OSHA HazCom standard. 29 C.F.R. § 1910.1200(c).

753, line 10 – p. 755, line 2; R. pp. 1541 - 1556.) David Williams was Engelhard's purchasing manager at the time of the subject accident. (R. p. 758, lines 11-19.) He testified that, at that time, Engelhard was purchasing a number of products from Univar, including sodium bromate, and that he regularly dealt with Univar in procuring materials for Engelhard. (R. p. 759, lines 6-23.)

In December of 2003, Williams prepared the Subject Purchase Order, which was a "blanket" purchase order for all of the products Engelhard intended to buy from Univar (among others, sodium bromate) to meet its requirements for the coming year, i.e., 2004. As he did with some 40 to 50 other such blanket purchase orders to other suppliers, Williams gathered information regarding Engelhard's budgeted requirements for 2004 and entered it into Engelhard's **internal** computer system, creating the Subject Purchase Order on December 9, 2003. **Williams did not actually send the Subject Purchase Order to Univar until January 6, 2004**. (R. p. 2324, lines 16-21; R. p. 759, lines 6 – p. 761, line 6; R. pp. 1541 - 1556.) **Prior to this date, Williams had engaged in oral negotiations with Univar concerning "pricing."** (R. p. 761, lines 7-9) (emphasis added.)

The Subject Purchase Order contained the following language pertinent to the express warranty issues now before the Court:

> EACH PACKAGE MUST BE MARKED TO COMPLY WITH THE OCCUPATIONAL SAFETY AND HEALTH ASSOCIATION [sic] (OSHA) 1910.1200 REQUIREMENTS FOR PACKAGING AND LABELING AND THE DEPARTMENT OF TRANSPORTATIONS [sic] CODE OF FEDERAL REGULATIONS (CFR) 49 REQUIREMENTS. FAILURE TO COMPLY MAY RESULT IN THE CANCELLATION OF THIS AGREEMENT AND REFUSAL OF ANY OR ALL MATERIAL SHIPPED AGAINST THIS ORDER.
>
> ***
>
> THIS PURCHASE ORDER IS SUBJECT TO THE PROVISIONS ON THE FACE HEREOF AND THE INSTRUCTIONS, TERMS AND CONDITIONS ON THE REVERSE SIDE. PLEASE REVIEW THEM CAREFULLY. THEY WILL CONSTITUTE.OUR CONTRACT UNLESS WE AGREE IN WRITING TO CHANGES OR ADDITIONS.
>
> ***
>
> TERMS CONDITIONS
>
> EXCEPT AS MAY OTHERWISE BE SPECIFICALLY PROVIDED ON THE FACE SIDE HEREOF THE PARTIES AGREE THAT THE FOLLOWING TERMS AND CONDITIONS SHALL GOVERN THE TRANSACTION DESCRIBED ON THE FACE HEREOF. AS USED HEREIN THE TERM "BUYER" SHALL MEAN

AND INCLUDE ENGELHARD CORPORATION AND/OR ITS SUBSIDIARIES.

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COMPLIANCE WITH APPLICABLE LEGAL STANDARDS

. . . Vendor [i.e., Univar] warrants that it is and will be in compliance with all applicable provisions of federal, state and local laws and rules, regulations and standards promulgated thereunder, including without limitation the following, as amended from time to time: (a) Occupational Safety and Health Act of 1970.

(R. pp. 1541 - 1556.)

The shipment of sodium bromate involved in the June 1, 2004, accident left port in China on January 15, 2004, arriving at the Port of Charleston on February 6, 2004. (R. pp. 1569 - 1575; R. p. 1475; R. pp. 1476 - 1477; R. p. 1487; R. p. 753, lines 10 – p. 754, line 8; R. p. 2311, line 22 – p. 2314, line 4; R. p. 2320, lines 6-19; R. p. 2322, line 4 – p. 2323, line 9; R. p. 2347, line 8 – p. 2348, line 11.) It was delivered by truck 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.)

Engelhard followed an express, written procedure for receiving, inspecting, and verifying the different types of materials delivered to its Seneca facility. (R. pp. 1519-1523.) Among the types of materials addressed by this procedure were "Purchased Materials." Engelhard's procedure defined Purchased Materials as "Raw Materials purchased by the Purchasing Department." (R. pp. 1519-1523.) Sodium bromate was such a Purchased Material. (R. p. 758, line 11 – p. 759, line 18.)

According to Engelhard's procedure:

> Raw materials purchased by the Purchasing Department . . . are received in the Shipping/Receiving Area of the Warehouse and, after appropriate verification and inspection, are accepted into CIMS inventory by the Receiving Department. **Acceptable raw materials are stored in the warehouse until required by the Production Departments.**

(R. pp. 1519 – 1523) (emphasis added). "CIMS" stands for Customer Information Management System. (R. pp. 1519-1523.) It is Engelhard's computerized inventory control system. Materials received and accepted are entered into the system and identified by lot number so that the physical

location within the facility of each shipment of material received is tracked. (R. p. 2322, lines 4-22; R. p. 2343, lines 2-23; R. p. 2347, line 9 – p. 2351, line 3.)

Harriet Simmons is Engelhard's distribution manager, a position she has held since shortly before the time of the June 1, 2004 accident. In this position, she oversees Engelhard's receiving dock, shipping dock, and warehouse facilities. (R. p. 750, lines 14-20.) She confirmed that Engelhard's procedures required her department to check deliveries for compliance with the language in the Subject Purchase Order, in particular, that the goods were compliant with OSHA labeling requirements and DOT regulations. This procedure required every pallet of the shipment of the sodium bromate involved in this case to be checked for such compliance, and Simmons felt "certain" that this procedure was followed on February 16, 2004. (R. p. 2326, line 22 – p. 2328, line 8; R. p. 2333, line 8 – p. 2337, line 12; R. p. 2338, line 7 – p. 2343, line 23; R. pp. 1519 - 1523; R. pp. 1524 - 1531.) All of Engelhard's receiving employees were aware of the product lines Engelhard was receiving and, if a material was delivered to Engelhard without appropriate hazard labels, the shipment would be refused and the vendor, along with the appropriate safety and/or management authorities,

would be contacted. (R. p. 2331, line 15 – p. 2332, line 20.) The record is clear that, after its acceptance by Engelhard, Univar had no responsibility for – or ability to control – the storage, use, or handling of the subject sodium bromate in the Engelhard facility. (R. p. 2355, lines 5-24; R. p. 2435, lines 8-21.)

As evidenced by Trinity's preparation of a packing list for the subject sodium bromate on **January 1, 2004**, and Matrix's issuance of a purchase order to the Chinese exporter for the subject sodium bromate on **January 2, 2004**, Univar had already taken action to supply Engelhard with the sodium bromate involved in the June 1, 2004, accident by the time the Subject Purchase Order (which contains the purported language of express warranty as to warning labels upon which the Plaintiffs rely) was sent to Univar on **January 6, 2004**. (R. pp. 1472-1474; R. p. 2310, line 22 – p. 2311, line 12.)

Univar's invoice for the subject sodium bromate was issued to Engelhard on February 16, 2004. This invoice, which Engelhard duly paid, contained the following language pertinent to the express warranty issues now before this Court:

> Univar USA Inc. warrants that the goods conform to Univar USA Inc.'s current published specifications. UNIVAR USA INC. MAKES NO OTHER

> WARRANTY, EXPRESS OF IMPLIED, INCLUDING FITNESS FOR A PARTICULAR PURPOSE OR MERCHANTIBILITY, BUYER ASSUMES ALL RISK OF LIABILITY RESULTING FROM USE OF SUCH GOODS. UNIVAR USA INC.'S LIABILITY FOR NONCONFORMING GOODS IS EXLCLUSIVELY LIMITED AT UNIVAR USA INC.'S OPTION, TO THE GOOD'S PURCHASE PRICE OR REPLACEMENT OF THE GOODS. UNIVAR USA INC. IS NOT LIABLE FOR INCIDENTAL OR CONSEQUENTIAL DAMAGES.

(R. p. 1476.)

When it arrived at Engelhard on February 16, 2004, the sodium bromate involved in the June 1, 2004, 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.)[6] This

[6] 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.)

written information included the words "sodium bromate" and other information that could be used to look up the material safety data sheet ("MSDS") for sodium bromate. Univar provided the MSDS for sodium bromate to Engelhard, and it was accessible to the Plaintiff 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.) For the Court's edification, Univar notes that photographs depicting sodium bromate representative of that involved in the subject accident were introduced at trial as the Defendants' liability phase Exhibit Nos. 94 and 103. (R. p. 2428, line 6 – p. 2429, line 18; R. p. 2433, lines 8-16; R. pp. 1539 - 1540; R. pp. 1557 - 1563.)

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.) 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.)

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

The condensate return pipe was made of carbon steel and was suspended some 15 to 20 feet above the floor along with numerous other pipes in what is referred to as a "pipe rack." (R. p. 817, line 22 – p. 818, line 25; R. p. 2363, line 24 – p. 2365, line 5.)[7] Engelhard knew that removal of the section of pipe would require the use of an oxyacetylene cutting torch. (R. p. 2398, lines 5-12.) Using the torch, an approximately 60 to 100-foot section of pipe was to be cut and removed in a number of smaller pieces. (R. p. 2363, lines 20-23.) Use of the torch to cut the pipe was certain to produce and scatter hot molten slag. (R. p. 2398, lines 5-12.)

The work crew involved in the actual removal of the condensate pipe consisted of four men: Mr. Black, Mr. Martin, Mr. Lawing, and Steve Knox. Knox was Engelhard's maintenance "lead," i.e., the leader of the work crew. He selected Mr. Black, Mr. Martin, and Mr. Lawing to work with him on the project and had supervisory authority over them. Another man, Mark Powell, served a "fire watch" for the project – he did not take part in the actual removal of the pipe but was required by Engelhard's hot work procedure – as

[7] The pipe rack is depicted in the Plaintiffs' liability phase Exhibit No. 85. (R. pp. 2501 – 2515.)

well as OSHA's welding code[8] – to have a fire extinguisher "immediately" available for use. (R. p. 814, line 4 – p. 815, line 21; R. p. 817, line 22 – p. 818, line 4; R. p. 2369, line 2 – p. 2371, line 20; R. p. 1514.)

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

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

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[8] To be clear, under OSHA, welding includes the operation of gas welding and "cutting" equipment. 29 C.F.R. 29 § 1910.251(a). In 29 C.F.R. § 1910.252(a)(ii), OSHA requires that "[s]uitable fire extinguishing equipment shall be maintained in a state of readiness for instant use."

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

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

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

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

Engelhard's procedure further requires that:

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

(R. p. 1514; R. p. 2389, line 1 – p. 2391, line 5 (emphasis added).)[10] Additionally, OSHA expressly requires that, "[i]f the object to be welded or cut cannot readily be moved, all movable fire hazards in the vicinity shall be taken to a safe place." 29 C.F.R. § 1910.252(a)(i). OSHA investigated the accident the day after it happened.

As per Engelhard procedure, prior to issuance of the hazardous work permit authorizing hot work, the entirety of the hot work area was marked with red "danger" tape. (R. p. 2375, line 8 – p. 2376, line 19; R. p. 2383, line 21 – p. 2384, line 4; R. p. 1484.) Knox and Wald walked through the entire area within the red "danger" tape, i.e., the hot work area. Knox expressly testified that, although he did not at the time know what chemical they contained, he personally noticed the pallets of sodium bromate within the hot work area, i.e., where they were located at the time of the accident. Knox walked over to the pallets and viewed the bags thereon close enough to tell there was black writing on the sides of the bags that were facing up. He did not look at the bags close enough to read this writing. While he testified that

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

he did not see a yellow diamond oxidizer warning label on the sides of the bags that were facing up, he admitted that he did not make any attempt to turn the bags over to look for the label. (R. p. 2375, line 8 – p. 2376, line 19; R. p. 2385, line 20 – p. 2386, line 2; R. p. 2387, line 13 – p. 2390, line 2; R. p. 832, line 17 – p. 833, line 16; R. p. 2394, line 3 – p. 2395, line 3; R. p. 1484.) Knox acknowledged that, pursuant to Engelhard procedure, a supervisor was supposed to be contacted when unidentified materials were encountered and that, despite the fact that he did not know what material was on the pallets in the hot work area, he did not do so. (R. p. 2392, line 18 – p. 2393, line 1; R. p. 2395, lines 4-24.)

After this inspection of the entirety of the hot work area – which, of course, gave Knox personal knowledge of the existence of the pallets (i.e., combustible and/or flammable material) within the hot work area – a hazardous work permit authorizing hot work was nonetheless issued. On this permit, it was wrongfully stated that the "Work Area [was] Clear of All Flammable Materials. (R. p. 2372, line 19 – p. 2374, line 14; R. p. 1464.) The record is clear that, in addition to being signed by the Engelhard permit supervisor, Wald, the hazardous work permit authorizing hot work was signed by Knox, who acknowledged that his signature represented his

affirmation that he had reviewed and approved of the permit. (R. p. 2387, line 2 – p. 2388, line 9; R. p. 1514.) Nonetheless, Knox expressly conceded that the hot work area was not cleared of all flammable materials, in fact, acknowledging that simply leaving the then unidentified plastic bags and wooden pallets in the work area was a failure to clear the hot work area of flammable materials. (R. p. 2388, lines 10 – p. 2390, line 2.)[11]

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

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

The accident occurred around lunchtime. The men were in the proximity of Area 12 in the refinery, an area known as the "bromate" leech. (R. p. 2399, lines 1-5; R. p. 2438, lines 16-21.) Knox had come down from the pipe rack. Mr. Black and Mr. Lawing remained harnessed in the pipe rack with Mr. Martin in a lift nearby. According to Knox, while the cutting operation was ongoing, there was a "flash on the pallet" which, within two to three seconds thereafter, became a fiery inferno. After seeing the flash on the pallet, Knox (not Powell) attempted to retrieve the fire extinguisher (which Powell was supposed to have immediately available), but was unable to do so in time to prevent the chemical reaction and fire that injured the Plaintiffs. (R. p. 2380, line 16 – p. 2381, line 15; R. p. 2382, lines 17-24.)

These injuries led the Plaintiff Workers to seek and receive workers' compensation benefits, and the Plaintiffs to pursue this third-party litigation, which, with respect to Mr. Black and the Martins, has already resulted in a minimum recovery of $4,500,000.

STANDARD OF REVIEW

I. Conduct of Trial: Charging of the Jury

The conduct of trial is largely within the trial judge's sound discretion, the exercise of which will not be disturbed on appeal absent an abuse of that discretion or the commission of a legal error that results in prejudice for appellant. Williams v. Riedman, 339 S.C. 251, 529 S.E.2d 28 (2000); Baber v. Greenville County, 327 S.C. 31, 488 S.E.2d 314 (1997); South Carolina Dep't of Highways & Public Transportation v. Galbreath, 315 S.C. 82, 431 S.E.2d 625 (Ct. App. 1993).

The conduct of trial includes the trial judge's charging of the law to the jury at the conclusion of the presentation of evidence. See S.C. Const. art. V, § 21 (stating the trial judge's role at trial includes declaring the law to the jury); see also, e.g., Strader v. Tennessee, 362 S.W.2d 224, 229 (Tenn. 1962) ("It is the duty of the circuit judge to charge the law applicable to the evidence ....").

The judge alone is the arbiter of what law is charged to the jury for its application to the evidence during its determination of culpability. See McWee v. State, 357 S.C. 403 n.4, 593 S.E.2d 456 n.4 (2004) (quoting "standard language that appears in jury charges," which states: "As the

presiding judge, I am the sole judge of the law of this case, and it is your duty as jurors to accept and apply the law as I now state it to you.").

Whether in the civil or the criminal context, our case law is legion in holding an appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion. E.g., State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007). Therefore, the appellate tribunal reviews the evidence only to determine whether it was sufficient to submit a charge to the jury.

II. Exclusive Province of Trial Jury to Make Findings of Fact

A. General Rule

The tasks of resolving contradictions in evidence, determining witnesses credibility, and deciding what testimony to accept when resolving a case are all left to the jury as factfinder. See Cammer v. Atlantic Coast Line R. Co., 214 S.C. 71, 81, 51 S.E.2d 174, 178 (1948) (holding explicitly that tasks of resolving contradictions in evidence, determining witnesses credibility, and deciding what testimony to accept when resolving a case are all left to the jury as factfinder; and "[t]hese propositions are such elementary observations there is no need to cite supporting authority").

In an action at law, on appeal of a case tried by a jury, this Court may only correct of errors of law. Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010) (citing Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976)).

Concordantly, the factual findings of the jury will not be disturbed unless no evidence reasonably supports the jury's findings. Id. Stated another way, a reviewing court is constrained from substituting its own factual findings and application of the same to the law for that of the trial jury in an action at law. Cf. State v. Brown, 360 S.C. 581, 602 S.E.2d 392 (2004) ("[A]n appellate court does not sit as a factfinder in a criminal case and should avoid resolving cases in a manner which appears to place the appellate court in the jury box."); Town of Belton v. Campbell, 103 S.C. 424, __, 88 S.E. 30, 31 (1916) (holding in a criminal action involving the violation of a town ordinance prohibiting the storing and selling of intoxicants that the Supreme Court would not delve into the question as to whether the substance at issue was forbidden by the ordinance, stating such a finding was "[A] question of fact with which this court has nothing to do. It has no jurisdiction to find the facts in a case at law."); see also 75 Am. Jur. 2d Trial § 603 at n.1 ("Under the Seventh Amendment to the Federal Constitution, which provides

that 'no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law,' neither the U.S. Supreme Court nor a U.S. court of appeals can redetermine facts found by a jury any more than a U.S. district court can predetermine them.") (citing Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 82 S. Ct. 780, 7 L. Ed. 2d 798 (1962)).

B. Findings at Trial Regarding Whether a Product Warning was Adequate

In the products liability context, the determination of whether a product warning was adequate is one of fact for the jury to decide. See 30 S.C. Jur. Products Liability § 39 (citing Allen v. Long Mfg. NC, Inc., 332 S.C. 422, 505 S.E.2d 354 (Ct. App. 1998); see also Sharp v. Wyatt, Inc., 627 A.2d 1347, 1361 (Conn. Ct. App. 1993) (in a products liability case involving whether the defendants discharged their duty to warn: "Whether a warning is adequate is a decision for the trier of fact."); see also 63A Am. Jur. 2d Products Liability § 1108 ("It is generally for the jury to determine the extent and effect of the plaintiff's knowledge of the product or danger.").

C. Findings at Trial Regarding Whether Individual or Entity Is a Sophisticated User

Whether an individual or entity is a sophisticated user is ordinarily a question of fact to be decided by a jury. See 63A Am. Jur. 2d Products Liability § 1108.

III. Summary Judgment

Pursuant to the South Carolina Rules of Civil Procedure, summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See Rule 56(c), SCRCP ("A motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."); Wilson v. Moseley, 327 S.C. 144, 488 S.E.2d 862 (1997); Holst v. KCI Konecranes Intern. Corp., 390 S.C. 29, 699 S.E.2d 715 (Ct. App. 2010).

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Hedgepath v. Am. Tel. & Tel. Co., 348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001).

When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Id.; Ellis v. Davisdon, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004). To that end, the circuit judge is not required to "single out some one morsel of evidence and attach to it great significance when patently the evidence is introduced solely in a vain attempt to create an issue of fact that is not genuine." Main v. Corley, 281 S.C. 525, 527, 316 S.E.2d 406, 407 (1984).

In determining whether any triable issues of fact exist, the trial court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 626 S.E.2d 1 (2006).

When reviewing a motion for summary judgment, the trial court must remain mindful of this admonition: The purpose of summary judgment is to expedite disposition of cases, which do not require the services of a fact finder. George v. Fabri, 345 S.C. 440, 548 S.E.2d 868 (2001). Bankers Trust of South Carolina v. Benson, 267 S.C. 152, 155, 226 S.E.2d 703, 704 (1976).

"A motion for summary judgment is akin to a motion for a directed verdict" because "[i]n each instance, one party must lose as a matter of law." Main, 281 S.C. at 526, 316 S.E.2d at 407; see also Baughman v. American

Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991) (holding standard for summary judgment "mirrors" standard for directed verdict).

On appeal, the Court of Appeals applies the same standard of review as the trial court when reviewing the grant of a summary judgment motion under Rule 56(c), SCRCP. Companion Prop. & Cas. Ins. Co. v. Airborne Exp., Inc., 369 S.C. 388, 390, 631 S.E.2d 915, 916 (Ct. App. 2006).

LAW/ANALYSIS

I. The Circuit Court's Decision to Charge the Jury with the Sophisticated User Doctrine as a Defense was Proper

In their appeal to this Court, Appellants seek reversal of the jury verdict, which found Respondents Trinity and Matrix not liable for their alleged injuries resulting from the June 1, 2004, explosion at Engelhard. Appellants bottom and premise their pursuit of this relief upon, inter alia, the assertion the trial judge erred by charging the jury with the Sophisticated User Doctrine as a defense to liability. Stated succinctly, Appellants aver:

- The Circuit Court erred by charging the Sophisticated User Doctrine because it is not the law in South Carolina;
- The Circuit Court erred by charging the Sophisticated User Doctrine as a defense to Appellants' negligence and implied warranty of merchantability claims; and
- The Circuit Court erred by charging the Sophisticated User Doctrine as a defense because application of this doctrine is preempted by OSHA.

Respectfully, Appellants' exceptions concerning the applicability of the Sophisticated User Doctrine in South Carolina and its use in the instant case are in error. To the contrary, review of the law and the evidence propounded in the trial of this case demonstrate:

- The Sophisticated User Doctrine is recognized a defense in South Carolina product liability cases;

- Sufficient evidence existed for the jury to determine the Sophisticated User Doctrine precluded recovery by Appellants from Respondents Trinity and Matrix;

- The circuit judge was the sole arbiter of what law was charged to the jury;

- The findings of fact regarding whether the Sophisticated User Doctrine applied as a defense was left to the province of the trial jury, rather than the trial judge or the reviewing appellate court; and

- The Sophisticated User Doctrine as a defense was not preempted by OSHA.

A. Sophisticated User Doctrine: A Primer

1. General Duty to Warn

In order to prevent a product from being unreasonably dangerous, the supplier may be required to give a warning on the product concerning its use. Anderson v. Green Bull, Inc., 322 S.C. 268, 471 S.E.2d 708 (Ct. App. 1996) (citing Restatement (Second) of Torts § 402A cmt j.).

2. An Exception to the Rule: Where the Product is Sold to a "Sophisticated User"

A product manufacturer or supplier, however, has no duty to warn of danger in using a product when the ultimate user or party at risk of injury

possesses special knowledge, sophistication, or expertise in relation to the product. 30 S.C. Jur. Products Liability § 46; 63A Am. Jur. 2d Products Liability § 1063; Allen E. Korpela, Annotation, Failure to Warn as Basis of Liability Under Doctrine of Strict Liability in Tort, 53 A.L.R.3d 239 (1973) ("Under the sophisticated user defense to a products liability claim, a product supplier has no duty to warn the ultimate user if it has reason to believe that the user will realize the product's dangerous condition.") (citing Gray v. Badger Min. Corp., 676 N.W.2d 268 (Minn. 2004)); see also Goodbar v. Whitehead Bros., 591 F.Supp. 552, 561 (W.D.Va. 1984) ("[W]hen the supplier has reason to believe that the purchaser of the product will recognize the dangers associated with the product, no warnings are mandated.").

A sophisticated user's knowledge of the dangers of a product is the equivalent of prior notice to the user of the dangers for purposes of the manufacturer's products liability. 63A Am. Jur. 2d Products Liability § 1063.

The Sophisticated User Doctrine relieves a manufacturer of liability for failing to warn of a product's latent characteristics or dangers when "the end user knows or reasonably should know of a product's dangers." Carrel v.

National Cord & Braid Corp., 852 N.E.2d 100, 108 (Mass. 2006) (quoting Hoffman v. Houghton Chem. Corp., 751 N.E.2d 848, 855 (Mass. 2001)).

The Sophisticated User Doctrine "applies where a warning will have little deterrent effect," and it "allows the fact finder to determine that no such duty [to warn] was owed." Id. at 109 (citation omitted).

The doctrine is derived from the Restatement (Second) of Torts § 388 (1965). It is a corollary of the "open and obvious" doctrine,[12] a theory that has been long recognized as a defense in products liability cases grounded on a claim of failure to warn.[13] Carrel, 852 N.E.2d 109.

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[12] Koken v. Black & Veatch Constr., Inc., 426 F.3d 39, 45-46 (1st Cir. 2005).

[13] The duties to warn are set forth in the Restatement (Second) of Torts § 388 (1965), which states:

> One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel ... if the supplier
>
> (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and
>
> (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and
>
> (c) fails to exercise reasonable care to inform them of its dangerous condition or of facts which make it likely to be dangerous.

3. The Manufacturer and/or Supplier's Right to Rely Upon the Purchaser

a. Purchaser's Expertise, Knowledge or Experience

Applying this precedent, a supplier may rely on the professional expertise of the user and tailor its warnings accordingly. 30 S.C. Jur. Products Liability § 46; 63A Am. Jur. 2d Products Liability § 1063. Where a knowledgeable or sophisticated user is involved, the manufacturer need not warn against dangers of which the user is either actually aware or should be aware. Id.; see also 7 Am. Jur. Proof of Facts 3d 305.

The sophisticated user may be presumed to know of product-related dangers because of the user's familiarity or extensive experience with the product. Id. In such a case, the duty to warn may be negated even if the user lacked actual knowledge of the danger, based on the determination that a user with such experience should have known of the danger. Id.; see also Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995) (recognizing evidence in a products liability action brought by an employee of an electrical contractor against a manufacturer of an aerial device warranted an instruction on the sophisticated user defense - evidence showed that the contractor

frequently used and was familiar with aerial devices and that its management was aware that conductive materials like conductive hoses should not be used on the buckets of such devices).

Ample case law abounds, which confirms that a supplier may reasonably rely on the employer when its experience and knowledge is substantial and equals the supplier's.

In Taylor v. Airco, Inc., 503 F.Supp.2d 432 (D.Mass 2007), the administrator of a decedent worker's estate pursued a products liability action, alleging the decedent's intrahepatic cholangiocarcinoma was caused by his exposure to the vinyl chloride. Suppliers and manufacturers of vinyl chloride filed motions for summary judgment on failure to warn, fraud, and conspiracy, which were granted. The court applied the Sophisticated User Doctrine as a basis for the grant of summary judgment, holding the suppliers and manufacturers were reasonable in relying on employer to provide adequate warnings to employee for purposes of the defense. Id. at 444-45.

In Fisher v. Monsanto Company, 863 F.Supp. 285 (W.D.Va. 1994), the trial court held the defendant supplier reasonably relied on the employer, who had "acquired its knowledge and expertise by developing the specifications for [the chemical], performing research and keeping abreast of public domain

research ..., participating in trade organizations, corresponding with [the defendant] and others, attending meetings, receiving various publications, and issuing its own publications." Id. at. 288-89.

In Smith v. Walter C. Best, Inc., 927 F.2d 736, 741 (3d Cir. 1990), the court found it reasonable for the manufacturer to assume that the employer knew of the dangers of silica "given the state of common medical knowledge at all relevant times ... and the fact that the employer was a member of the Industrial Health Foundation, a non-profit organization providing information to its members relative to occupations diseases and their prevention." Id. at. 741.

In Beale v. Hardy, 769 F.2d 213 (4th Cir. 1985), the court found the evidence that a foundry had extensive knowledge of the hazards associated with inhaling silica dust and the disease of silicosis, as well as proper dust control methods, negated a duty to warn foundry employees on part of the corporations which supplied the silica sand. Id. at 215.

b. Purchaser's Requirement to Adhere to OSHA Standard: An Additional Basis for Manufacturer/Supplier Reliance

Further, even where federal Occupational Safety and Health Act and state laws requiring employer to provide a safe workplace to its employees

exist, a supplier of an allegedly dangerous product has a reasonable basis to rely on the purchaser/employer's compliance with these statutory requirements. See 7 Am. Jur. Proof of Facts 3d 305 (citing Jodway v. Kennametal, Inc., 525 N.W.2d 883 (Mich. Ct. App. 1994)); Washington v. Department of Transp., 8 F.3d 296 (5th. 1993) (holding manufacturer has no duty to warn employees of sophisticated purchaser where employer/purchaser has knowledge of dangers at issue and duty under federal regulations to warn employees). As result, the supplier can avail itself of the Sophisticated User Doctrine as a defense and reasonably rely on purchaser/employer to warn its employees of dangers associated with supplier's products. Id.

4. Determining Who the End "User" Is for Purposes of Applying the Sophisticated User Doctrine: Employer or Employee

An issue that arises in disputes such as the one at bar is who in the equation is the "user" for purposes of analyzing the applicability of the Sophisticated User Doctrine as a defense. Review of the case law reveals that the purchaser employer – rather than the employee – is considered the end "user."

In Taylor v. Airco, Inc., 503 F.Supp.2d 432 (D.Mass 2007), which was action brought by the administrator of a decedent worker's estate who

pursued a products liability action, alleging the decedent's cancer was caused by his exposure to vinyl chloride that was purchased by the decedent's employer from the defendant supplier and manufacturers. The suppliers and manufacturers of the vinyl chloride sought summary judgment, asserting the defense afforded by the Sophisticated User Doctrine.

In applying the Sophisticated User Doctrine as a basis for the grant of summary judgment, the court unequivocally held the decedent's employer was the end (or "relevant") user for purposes of the defense. Id. at 443 (citing Marques v. Bellofram Corp., 550 N.E.2d 145 (Mass. 1990) (where employee was injured using die casting machine, employer corporation considered to be user of product for purposes of comparing skill, knowledge, and experience level of user with that of supplier of machine); Morgan v. Brush Wellman, Inc., 165 F.Supp.2d 704, 718 (E.D.Tenn. 2001) (holding that where employees of government contractors at nuclear armament were injured by exposure to beryllium oxide, United States government considered to be user of beryllium oxide for purposes of sophisticated user doctrine); Goodbar v. Whitehead Bros., 591 F.Supp. 552, 566 (W.D.Va. 1984), (determining that where employee contracted silicosis from on-the-job work with products containing silica, employer foundry's sophistication analyzed

to determine supplier's duty to warn; employer in best and often only position adequately to warn and provide safety for employees).

As a corollary to this theme, Respondents note the case of Bearup v. General Motors Corporation, 2009 WL 249456 (Mich. Ct. App. 2009), where in injured employees of a GM plant protested the trial court's extension of their employer's status as a "sophisticated user" label to them. Specifically, the Michigan Court of Appeals held the legal efficacy of the Sophisticated User Doctrine as a defense proved operable even where argued the former employees themselves were not sophisticated users. Id. The Bearup Court further concluded the employer – rather than any other entity – was in the best position to warn its employees of the dangers associated with chemical compounds, rather than the compound:

> The rationale for the sophisticated user doctrine also undermines plaintiffs' argument that the sophisticated user defense does not apply unless plaintiffs, employees of GM and the ultimate users of the draw compounds, were sophisticated users. The rationale behind the sophisticated user doctrine is that "where a purchaser is a 'sophisticated user' of a manufacturer' product, the purchaser is in the best position to warn the ultimate user of the dangers associated with the product, thereby relieving the sellers and manufacturers from the duty to warn the ultimate user." Portelli v. IR Constr. Products Co., Inc., 218 Mich.App. 591, 599, 554 N.W.2d 591 (1996). Thus, the manufacturer markets a particular product to professionals that are presumed to have experience in using and handling the product, and because of this special

> knowledge, the sophisticated user will be relied upon by the manufacturer to disseminate information to the ultimate users regarding the dangers associated with the product. Id. at 601, 554 N.W.2d 591. Hence, the manufacturer is relieved of the duty to warn. Id. Because GM was a sophisticated user and plaintiffs, as GM's employees, were the ultimate users of the draw compounds, GM was in the best position to disseminate information to plaintiffs, the ultimate users of the draw compounds, of the dangers associated with the use of the draw compounds. The status of GM's employees as sophisticated users or not does not impact whether GM itself is a sophisticated user. Therefore, whether plaintiffs are sophisticated users is irrelevant to whether GM is a sophisticated user and to whether summary disposition is appropriate under the sophisticated user doctrine.

Id. at *10 (emphasis added).

Therefore, applying Taylor v. Airco and Bearup v. General Motors Corporation, Respondents Trinity and Matrix maintain Appellants are unable to escape application via use of the argument that they were the "end" users of the sodium bromate or that they were "unsophisticated" users. Englehard was the "end" user and Englehard was an undeniably sophisticated user of sodium bromate. Those conclusions control the analysis.

5. Parameters of Doctrinal Application

The Sophisticated User Doctrine as a defense originated in cases involving alleged negligent failure to warn. Russo v. Abex Corp., 670

F.Supp. 206, 207 (E.D. Mich. 1987); Restatement of Torts (Second) § 388. See also, e.g., Goodbar v. Whitehead Bros., 591 F.Supp. 552 (W.D.Va.1984).

The defense is therefore compatible with the concept of negligence because it relates to the issue of reasonableness. Put another way, if a supplier is aware of its purchaser's knowledge and sophistication with respect to the product, the supplier reasonably may choose not to issue warnings.

In practical terms, there is no difference between strict liability and negligence with respect to the law of warnings. Sharp v. Wyatt, Inc., 627 A.2d 1347 (Conn. Ct. App. 1993) (citing Smith v. Walter C. Best, Inc., 927 F.2d 736, 741 (3d Cir. 1990) (applying Ohio law); Higgins v. E.I. DuPont de Nemours, Inc., 671 F.Supp. 1055 (D. Md. 1987) (applying Maryland law)). Accordingly, the Sophisticated User Doctrine is a viable doctrine in actions for negligence and strict liability.

Application of the Sophisticated User Doctrine as a defense also extends to claims based upon alleged breach of the implied warranty of merchantability. See Lescs v. Dow Chemical Co., 976 F.Supp. 393 (W.D.Va. 1997) (stating that if it were not to grant summary judgment to defendants on implied warranty of merchantability claim on the basis that plaintiff failed to demonstrate products was of unreasonably dangerous

design, it would grant the relief sought by defendants via the Sophisticated User Doctrine); Jodway v. Kennametal, Inc., 525 N.W.2d 883 (Mich. Ct. App. 1994) (holding Sophisticated User Doctrine defense applied to action based on breach of implied warranty).

B. Application of the Sophisticated User Doctrine in South Carolina and the Fourth Circuit

As noted above, the Sophisticated User Doctrine has been adopted by numerous jurisdictions. See, e.g, Willis v. Raymark Indus., Inc., 905 F.2d 793 (4th Cir. 1990) (ruling the sophisticated user defense may be permitted in cases involving an employer who is aware of the inherent dangers of a product which the employer purchases for use in its business; if the employer/purchaser has "equal knowledge" of the product's dangers, then the manufacturer may be able to rely on the employer/purchaser to protect its own employees from harm); 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) (holding in failure to warn case brought by employees of foundry suffering from silicosis that because supplier had reason to believe the knowledgeable industrial purchaser of the product would recognize the dangers associated with the product, the supplier's reliance on the purchaser

to warn and protect the workers was reasonable, and the supplier was not mandated to give warnings directly to the employees).

South Carolina as well recognizes and applies the Sophisticated User Doctrine in products liability claims in both the state court and federal court venues. E.g., Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995); Sizemore v. Georgia-Pacific Corp., 1996 WL 498410 (D.S.C. 1996); see also Ralph King Anderson, Jr., South Carolina Requests to Charge – Civil, 2002 § 32-8.[14]

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[14] Judge Anderson's charge reads:

> Under South Carolina law, a manufacturer has no duty to warn of potential risks or dangers inherent in a product is 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 employer purchased for use in his business. Such an employer has a duty to warn his employees of the dangers of the product.
>
> It is not specific knowledge of the intermediary that is relevant. Rather, the question is whether the supplier acted reasonably in assuming that the intermediary would recognize the danger and take precautions to protect its employees.

According to this doctrine as applied in South Carolina courts, the distribution of a product to a sophisticated user "obviate[s] any purported duty on the part of [the distributor] to warn the public" or the product purchaser's employees about the product's dangers. Sizemore, 1996 WL 498410, *6.

Further, according to the Bragg Court, the Sophisticated User Doctrine as a defense is "permitted in cases involving an employer who was aware of the inherent dangers of a product which the employer purchased for use in his business. Bragg, 319 S.C. at 549, 462 S.E.2d at 331. Pursuant to this defense, the employer's "familiarity or extensive experience with the product" permits the product supplier to rely on the employer for warnings to its employees about the product's dangers. Id. Thus, under the Sophisticated User Doctrine defense, a product distributor has no duty to warn of a product's dangers if the purchaser of the product has "special knowledge, sophistication, or expertise in relation to the product" and is aware or should have been aware of the product's dangers. 30 S.C. Jur. Products Liability § 46 (Sophisticated User Defense).

(citing Willis v. Raymark Indus., Inc., 905 F.2d 793 (4th Cir. 1990) and Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995).

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

Applying the Sophisticated User Doctrine as a defense, both South Carolina appellate courts and the Fourth Circuit have time and again determined that manufacturers and suppliers of a product have no duty to warn a sophisticated user's employees of a product's hazards, including those involving personal injury.

As noted above, in Bragg, the Court of Appeals approved the application of the Sophisticated User Doctrine as a defense because the purchaser of the product was a large company, which "frequently used and was familiar with" the product and its dangers. Id. at 551, 462 S.E.2d at 332. The plaintiff, an employee of a large electrical contractor, died when the aerial bucket devices in which he was working on an electrical pole, caught on fire. The fire started because the plaintiff's conductive hose came into contact with an energized power line. The Bragg Court held that the defendant manufacturer of the aerial bucket device was entitled to assert the

sophisticated user doctrine as a defense on plaintiff's failure to warn claim because the plaintiff's employer "frequently used" aerial devises and was "well aware that conductive materials like conductive hoses should not be used in the buckets of aerial devises." Id. at 551, 462 S.E.2d at 332.

In Beale v. Hardy, 769 F.2d 213 (4th Cir. 1985), the Fourth Circuit held that a supplier of silica sand had no duty to warn the plaintiffs of the hazards associated with the product because the plaintiff's employers – the purchaser of the silica sand – had "extensive knowledge" of the product's risks. Id. at 214-15 (applying Restatement (Second) of Torts § 338, which sets forth the principles upon which the sophisticated user doctrine is based).

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

In Emory v. McDonnell Douglas Corporation, 148 F.3d 347, 352 (4th Cir. 1998), the Fourth Circuit emphasized that under the Sophisticated User Doctrine, "a supplier is not negligent when it relies on an intermediary [who

is] 'already well aware of the [product's] danger' to relay any necessary warning." (internal citation omitted).

In Brooks v. Metronic, Inc., 750 F.2d 1227 (4th Cir. 1984), the Fourth Circuit applied South Carolina law to determine that a drug manufacturer has no duty to warn a drug consumer of the drug's risks if the consumer's doctor has received "adequate notice of [the drug's] possible complications." The court reasoned the drug manufacturer's duty to warn was obviated because the doctor constituted a "'learned intermediary' between the manufacturer and the consumer," and the doctor was responsible for relaying the drug's risks to the consumer. Id. at 1231; see also Odom v. G.D. Searle & Co., 979 F.2d 1001 (4th Cir. 1992) (applying South Carolina law that a drug manufacturer is not liable under a failure to warn theory if the plaintiff's doctor knew of the drug's risks).

Thus, Respondents Trinity and Matrix assert there can be no question the Sophisticated User Doctrine is a recognized legal doctrine in South Carolina, which can be successfully employed by defendants in products liability claims. Moreover, Respondents Trinity and Matrix maintain application of this doctrine as a defense is viable in South Carolina in response to whatever products liability-based theory of recovery employed by

a plaintiff, whether the plaintiff's claim sounds in negligence, breach of implied warranty, or strict liability.

C. Application of Sophisticated User Doctrine to Facts of Case Sub Judice

Respondents Trinity and Matrix are protected from liability in the case at bar via the Sophisticated User Doctrine. The evidence propounded at trial was legion in demonstrating the following:

- Englehard was a sophisticated user of sodium bromate, as evinced time and again within the trial record.

- Specifically, Englehard **frequently** purchased sodium bromate for use in its plant. Moreover, it was a substantial consumer of this product. This is because sodium bromate was essential for this entity to perform its refining activities at Englehard. The record reveals Englehard purchased approximately **120 tons** of sodium bromate **per year** for use at the facility.

- The sodium bromate shipped to Englehard was in packaging that complied with DOT regulations, OSHA HazCom standards, and United Nations protocols.

- Englehard followed an express procedure for receiving, inspecting, and verifying materials delivered to its Seneca facility.

- Englehard inspected, verified, and accepted the shipment of sodium bromate without question or exception.

- Notwithstanding its experience with sodium bromate, Englehard was historically provided with all information needed concerning the chemical's properties and dangers via, inter alia, the material safety data sheet.

- OSHA regulations mandated that Engelhard have knowledge of the sodium bromate hazards.

- Moreover, OSHA required that Englehard protect its employees – including Respondent/Appellants – from the chemical's dangers.

Englehard's undeniable status as a sophisticated user of sodium bromate negated any purported common law or statutory duty Respondents Trinity and Matrix may have possessed in this case.

II. The Sophisticated User Doctrine, as Recognized within the South Carolina Common Law, is Not Preempted by Federal Law

Appellants assert the application of the Sophisticated User Doctrine as a defense in the instant case was improper because this doctrine is preempted by federal and state occupational safety regulations. Specifically, Appellants assert the Sophisticated User Doctrine was inapplicable to the instant case and should not have been charged to the jury because:

- It is prohibited by the conflicts preemption doctrine arising under the Supremacy Clause of the United States Constitution (U.S. Const. art. VI); and

- The Sophisticated User Doctrine cannot override or relieve one of the duties and/or requirements legislatively imposed by valid statutes and regulations.

Respectfully, Appellants preemption argument is without merit.

A. Preemption of State Law Under the Supremacy Clause

The case of Burt v. Fumigation Service and Supply, Inc., 926 F.Supp. 624 (W.D.Mich. 1996), provides a comprehensive outline of the jurisprudence as it pertains to the Supremacy Clause and preemption of state law:

> The doctrine of federal pre-emption is founded on the Supremacy Clause, United States Constitution art. VI, cl. 2. Federal laws are the supreme law of the land; thus, any "state law that conflicts with federal law is 'without effect.'" See Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516, 112 S. Ct. 2608, 2617, 120 L. Ed. 2d 407, 422 (1992) (citation omitted).
>
> A state law is pre-empted when: 1) Congress expresses a clear intent to preempt state law; 2) when there is outright or actual conflict between the federal and the state law; 3) when compliance with federal and state law is effectively impossible; 4) where there is an implicit federal barrier to state regulation; 5) where Congress has occupied the entire field of regulation; 6) where state law "stands as an obstacle" to the objectives of Congress. Louisiana Public Serv. Comm'n v. Federal Communications Comm'n, 476 U.S. 355, 368-69, 106 S. Ct. 1890, 1898-99, 90 L. Ed .2d 369 (1986) (citations omitted). The key question is whether Congress intended to pre-empt state law. Congressional intent may be express or implied:

> Congress' intent may be explicitly stated in the statute's language or implicitly contained in its structure and purpose.... In the absence of an express congressional command, state law is preempted if that law actually conflicts with federal law ..., or of federal law so thoroughly occupies a legislative field " 'as to make reasonable the inference that Congress left no room for the States to supplement it.' "
>
> Cipollone, 505 U.S. at 516, 112 S. Ct. at 2617. **"Absent express pre-emption, courts are not to infer pre-emption lightly, particularly in areas traditionally of core concern to the states such as tort law."** Burke v. Dow Chemical Co., 797 F.Supp. 1128, 1136 (S.D.N.Y.1992) (citing Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 144, 83 S.Ct. 1210, 1218, 10 L.Ed.2d 248 (1963); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947)). This is because the pre-emption doctrine presumes that police powers historically left to the states are not supplanted by federal law. Cipollone, 505 U.S. at 516, 112 S.Ct. at 2617.

Id. at 628 (emphasis added).

B. The Lack of Preemption of Tort Claims (or Their Defenses) via OSHA

The First Circuit's 1991 opinion in Pedraza v. Shell Oil Company, 942 F.2d 48, edifies with regard to the interplay (or lack thereof) between the doctrine of preemption and Occupational Safety and Health Act ("OSHA").

In Pedraza, a former worker asserted an assortment of tort and warranty claims against chemical manufacturer to recover damages for injuries arising from respiratory ailments he allegedly developed from workplace exposure to

Epichlorohydrin, a toxic chemical. The district court dismissed the worker's case on preemption grounds. The court of appeals reversed, holding OSHA did not preempt state law tort provisions like those invoked by the plaintiff:

> The Supremacy Clause of the United States Constitution operates to preempt state laws which unduly interfere with federal law or policy. U.S. Const. art. VI, cl. 2. See also Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211, 6 L.Ed. 23, 73 (1824); Securities Industry Ass'n v. Connolly, 883 F.2d 1114 (1st Cir.1989), cert. denied, 495 U.S. 956, 110 S. Ct. 2559, 109 L. Ed. 2d 742 (1990). As we were reminded again recently, however, our preemption analysis begins with "'the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 111 S. Ct. 2476, 115 L. Ed. 2d 532 (1991) (quoting Rice v. Santa Fe Elevator Co., 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947)) .... [W]e will not find federal preemption in the present case unless there is "an unambiguous congressional mandate to that effect." Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146, 83 S. Ct. 1210, 1219, 10 L. Ed. 2d 248 (1963). See also Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 715, 105 S. Ct. 2371, 2376, 85 L. Ed. 2d 714 (1985); Jones v. Rath Packing Co., 430 U.S. 519, 525, 97 S. Ct. 1305, 1309, 51 L. Ed. 2d 604 (1977).
>
> Preemption "always boils down to a matter of congressional intent." Connolly, 883 F.2d at 1115. See also Louisiana Public Service Comm'n v. FCC, 476 U.S. 355, 369, 106 S. Ct. 1890, 1899, 90 L. Ed. 2d 369 (1986) ("The critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law."); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 747, 105 S. Ct. 2380, 2393, 85 L. Ed. 2d 728 (1985) ("in any pre-emption analysis, '[t]he purpose of Congress is the ultimate

touchstone.'") (citations omitted); Associated Industries of Massachusetts v. Snow, 898 F.2d 274, 278 (1st Cir. 1990) (same). The task of interpretation is simplified substantially, of course, whenever "Congress has made its intent known through explicit statutory language." English v. General Electric Co., 496 U.S. 72, 110 S. Ct. 2270, 2275, 110 L. Ed. 2d 65 (1990).

Absent express preemption, the challenged state law must yield when it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a 'scheme of federal regulation ... so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' or where an Act of Congress 'touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.' English, 110 S.Ct. at 2275 (citations omitted).

Finally, preemption will be inferred where the state law "actually conflicts with federal law." Id. Such a conflict arises where it is physically impossible to comply with both the federal and the state law or where "state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Id. (citation omitted). See also International Paper Co., 479 U.S. at 491-92, 107 S.Ct. at 811; Louisiana Public Service Comm'n, 476 U.S. at 368-69, 106 S. Ct. at 1898-99; Hillsborough County, 471 U.S. at 713, 105 S. Ct. at 2375.

[A] sound statutory interpretation must encompass the relevant text as well as the structure and context of the enactment. We will "'not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law....'" Philbrook v. Glodgett, 421 U.S. 707, 713, 95 S. Ct. 1893, 1898, 44 L.Ed.2d 525 (1975) (quoting United States v. Heirs of Boisdore, 49 U.S. (8 How.) 113, 122, 12 L.Ed. 1009 (1849)). See also Richards v. United States, 369 U.S. 1, 11, 82 S. Ct. 585, 591-92, 7 L. Ed. 2d

492 (1962) ("a section of a statute should not be read in isolation from the context of the whole Act.").

The scope of OSHA preemption is outlined in two sections: (i) section 18, which represents a general statement of preemptive intent, and (ii) section 4(b)(4), the "savings clause," which excepts from preemption a spectrum of state laws.

At its outer reaches[,] section 18 preemption does not obtain unless there is an unapproved assertion of "jurisdiction under State law over any occupational safety or health issue" as to which a federal "standard" is already in place. See 29 C.F.R. 1901.2 ("Section 18(a) of the Act is read as preventing any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which a Federal standard has been issued under section 6 of the Act.") (emphasis added); Associated Industries of Massachusetts, 898 F.2d at 278 (Section 18 "provides that if a federal standard on an occupational safety or health issue is in effect, a state cannot promulgate an occupational safety or health standard relating to that issue, unless it first submits the state plan to OSHA for approval."). See also Puffer's Hardware Inc. v. Donovan, 742 F.2d 12, 16 (1st Cir.1984); National Solid Wastes Management Ass'n v. Killian, 918 F.2d 671, 677-78 (7th Cir. 1990).

Section 3 in turn defines an occupational safety and health "standard" as one which "requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. § 652(8) (1982); see also People v. Chicago Magnet Wire Corp., 126 Ill.2d 356, 128 Ill.Dec. 517, 520, 534 N.E.2d 962, 965 (§ 18 precludes "a State's development and enforcement of 'occupational health and safety standards.'") (discussing OSHA preemption of State criminal laws) (citations omitted), cert. denied, 493 U.S. 809, 110 S.Ct. 52, 107 L.Ed.2d 21 (1989). Thus, it is not surprising that substantial authority exists for the view

that section 18 preempts the unapproved establishment of state standards and regulatory schemes in competition with OSHA, see, e.g., Environmental Encapsulating Corp. v. City of New York, 855 F.2d 48, 55 (2d Cir. 1988); New Jersey State Chamber of Commerce v. Hughey, 774 F.2d 587, 592-93 (3d Cir.1985), appeal after remand, 868 F.2d 621 (3d Cir.), cert. denied, 492 U.S. 920, 109 S. Ct. 3246, 106 L. Ed. 2d 593 (1989), but that there is no authority for the view that OSHA preempts provisions of state law of the sort relied on by Pedraza.

Id. at 50-52 (footnotes omitted).

Importantly, the Pedraza Court recognized OSHA does not operate to preempt state tort law:

> We are aware of no case which holds that OSHA preempts state tort law. Rather, most courts have been concerned with how OSHA affects tort actions, not with whether it preempts state tort law. Thus, every court faced with the issue has held that OSHA creates no private right of action. See, e.g., Pratico v. Portland Terminal Co., 783 F.2d 255, 266 (1st Cir.1985) ("The legislative history of § 653(b)(4) shows that the intent of the provision was merely to ensure that OSHA was not read to create a private right of action for injured workers which would allow them to bypass the otherwise exclusive remedy of workers' compensation."). We have embraced the majority view that the regulations promulgated under OSHA prescribe standards of care relevant in common law negligence actions. Id. at 263-65; see also Albrecht v. Baltimore & Ohio R.R. Co., 808 F.2d 329, 332 (4th Cir. 1987); but see Minichello v. U.S. Industries, Inc., 756 F.2d 26, 29 (6th Cir. 1985) ("To use OSHA regulations to establish whether a product is unreasonably dangerous is ... improper.") (product liability action brought by employer against product supplier).
>
> While we discern in OSHA's language, structure and context a clear congressional signal that section 18 preempts unapproved

assertions of state jurisdiction in the development and enforcement of standards relating to occupational health and safety issues in competition with federal standards, we find no warrant whatever for an interpretation which would preempt enforcement in the workplace of private rights and remedies traditionally afforded by state laws of general application. Connecticut's accustomed maintenance of judicial fora for the enforcement of private rights in the workplace, under State laws of general application, seems to us a function far less prophylactic than reactive; less normative than compensatory; and less an arrogation of regulatory jurisdiction over an "occupational safety or health issue" than a neutral forum for the orderly adjustment of private disputes between, among others, the users and suppliers of toxic substances.

We are persuaded that Congress, by its enactment of the "savings clause," further evinced its intention to spare these provisions of State law from preemption.

> Nothing in this Act shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

29 U.S.C. § 653(b)(4) (1982) (emphasis added). There is a solid consensus that section 4(b)(4) operates to save state tort rules from preemption. See, e.g., National Solid Wastes Management Ass'n, 918 F.2d at 680 n.9 (collecting cases). See also Atlas Roofing Co. v. Occupational Safety Comm'n, 430 U.S. 442, 445, 97 S.Ct. 1261, 1264, 51 L.Ed.2d 464 (1976) (noting that OSHA establishes a new statutory duty on the part of employers and creates new remedies; and stating: "Each remedy exists whether or not an employee is actually injured or killed as a result of the

> [unsafe or unhealthful] condition, and existing state statutory and common-law remedies for actual injury and death remain unaffected." (dictum)); Chicago Magnet Wire Corp., 128 Ill.Dec. at 523, 534 N.E.2d at 968 ("Congress expressly stated that OSHA was not intended to preempt two bases of liability that, like criminal law, operate to regulate workplace conduct and implicitly set safety standards-State worker's compensation and tort law.") (criminal laws). See generally, Note, The Extent of OSHA Preemption of State Hazard Reporting Requirements, 88 Colum.L.Rev. 630, 641 (1988) (§ 4(b)(4) reveals "Congress' explicit recognition of the continued validity of state worker compensation and tort remedies...."); Note, Getting away with Murder: Federal OSHA Preemption of State Criminal Prosecutions for Industrial Accidents, 101 Harv.L.Rev. 535, 543 (1987) ("Indeed, section 4(b)(4) saves from preemption two forms of liability that, like criminal law, regulate workplace conduct and set implicit standards-state workers' compensation and tort law.").
>
> . . . .
>
> Thus, we are unpersuaded that the provisions of Connecticut law undergirding Pedraza's claims against Shell are eclipsed by OSHA.

Id. at 52-54 (footnotes omitted).

In footnote 6, the court directly addressed the argument raised by the defendant that the savings clause found within 29 U.S.C. § 653(b)(4) was reserved to save only for workers' compensation claims from preemption.

As explicated below, the court established that both workers' compensation claims and claims sounding in tort were excised from preemption:

> We are unpersuaded by Shell's ejusdem generis argument, which would render § 4(b)(4) inapposite to the provisions of Connecticut law on which Pedraza relies. Shell argues that only those state laws which are in the nature of workers' compensation laws come within the scope of the savings clause. Its argument implicitly assumes that though traditional private rights and remedies between employer and employee arising under state law are expressly saved from preemption by § 4(b)(4), those private rights and remedies which have a much less direct connection with the workplace were meant, for some unarticulated reason, to be preempted. We are unable either to ascribe a plausible reason for such a result or to discern such a congressional intent. **Having seen no reason to preempt existing state law rights and remedies between employer and employee-the principal participants in the workplace, and the only parties whose relationship is regulated by OSHA, McKinnon v. Skil Corp., 638 F.2d 270, 275 (1st Cir.1981) (OSHA's "terms apply only to employers") (citations omitted)-Congress almost certainly did not intend to preempt, *sub silentio*, the right of an employee to bring an action for damages against a third-party supplier of products used in the workplace.** See infra note 7. We would be very reluctant to infer preemptive intent absent some indication that the state law could have a significant adverse regulatory impact on OSHA's mission in the workplace. Section 4(b)(4) plainly expresses Congress' intention to preserve workers' compensation laws and the rights and duties of employers and employees under state laws relating to injuries, disease or death arising in the course of employment. Nevertheless, notwithstanding that Connecticut statutory law preserves Pedraza's right to sue Shell in these circumstances, see Conn.Gen.Stat.Ann. § 31-293(a), under Shell's view Pedraza's right to seek private redress for workplace injury or disease allegedly caused by the employer's ECH supplier would be

> preempted. Shell cannot insist simultaneously that § 4(b)(4)'s reference to workers' compensation laws modifies the scope of the savings clause and does so more restrictively than the workers' compensation law itself.

Id. at 54 n.6 (emphasis added).

Footnote 8 continues the analysis that Congress did not intend to preempt state law with its enactment of OSHA:

> What little legislative history we have discovered leaves even less doubt that § 4(b)(4) evinces a congressional intent to preserve state tort law from preemption. In a letter to the Chairman of the House Subcommittee on Labor, the Solicitor of Labor explained that OSHA "would in no way affect the present status of the law with regard to workmen's compensation legislation or private tort actions." Pratico, 783 F.2d at 266 (quoting Occupational Health and Safety Act of 1969: Hearings on H.R. 843, H.R. 3809, H.R. 4294, and H.R. 13373 before Select Subcomm. on Education and Labor, 91st Cong., 1st Sess., Pt. 2, at 1592-93 (letter of L.H. Silberman, Solicitor of Labor) (emphasis added)).

Id. at 54 n.8.

Respondents assert that since Congress did not intend to preempt the prosecution of tort-based claims against third party suppliers such as Respondents Trinity and Matrix and Univar, the common law defenses to these claims that available to these suppliers survive as well. The Sophisticated User Doctrine was a cognizable defense to Respondents'

negligence and implied warranty claims. OSHA did not preempt its application in the instant case.

C. Sophisticated User Doctrine Remains Operative Even Where Preemption Argument Proves Viable

In Lescs v. Dow Chemical Company, 976 F.Supp. 393 (W.D.Va. 1997), the Western District of Virginia disposed of a homeowner's breach of implied warranty of merchantability claims against a chemical manufacturer. An issue that arose was whether the homeowner's claims were preempted by federal law via the Federal Insecticide, Fungidicide and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136 et seq.

As to the implied warranty of merchantiability claim, the court determined the plaintiff failed to demonstrate the chemical product in question was defective in assembly or manufacture, unreasonably dangerous in design, or unaccompanied by adequate warnings concerning the hazardous properties. Additionally, the court articulated the following concerning the Sophisticated User Doctrine:

> **Furthermore, even if the court did not grant Defendants' motion for summary judgment for the reasons set forth in this section, the court would nonetheless grant the motion based on Virginia's sophisticated user doctrine**. "When a skilled purchaser ... knows or reasonably should be expected to know of the dangerous propensities or characteristics of a

> product, no implied warranty of merchantability arises." Goodbar v. Whitehead Bros., 591 F.Supp. 552, 567 (W.D.Va. 1984). In this case, Dursban is an insecticide, which is inherently poisonous to insects, and, in inappropriate doses, to humans. Dow sold Dursban to the Hughes Defendants, who were in the business of extermination. Hughes certainly had knowledge of the dangerous propensities or characteristics of Dursban, as described by the label attached to the Dursban. **Since Hughes was a sophisticated user of Dursban, Dow would prevail on this claim regardless of whether or not the claim was dismissed based on preemption and a lack of substantive evidence as set forth in this section.** Id.

Id. at 399 n.3 (emphasis added).

III. The Circuit Court Properly Granted Summary Judgment to Respondents Trinity and Matrix on Appellants' Strict Liability Claims

Prior to trial, Respondents Trinity and Matrix and Univar moved for summary judgment, seeking dismissal of Appellants' strict liability cause of action.

Following a review of the parties' briefing and oral argument, the Circuit Court granted the motion.

On appeal, Appellants seek reversal, maintaining the Circuit Court's decision to grant summary judgment on Appellants' strict liability cause of action was in error. Specifically, Appellants aver the injured workers in the case at bar were "users" and/or "consumers" of the sodium bromate. Thus, they asseverate they should have been entitled to pursue their strict liability

claims at trial pursuant to S.C. Code Ann. 15-73-10 and Restatement (Second) of Torts § 402A.

Respectfully, notwithstanding their arguments, Appellants are in error. The trial court properly granted summary judgment on the strict liability count. As evinced within the authorities, most notably Bray v. Marathon Corporation, 356 S.C. 111, 588 S.E.2d 93 (2003), Appellants were not "users" or "consumers" of the sodium bromate. Moreover, there is no current mechanism in place in our case law that permits their recovery under a bystander theory. Based on the precedent established by the Bray Court, which recognized its limitations to fashion remedies outside of what was delineated by the General Assembly within S.C. Code Ann. 15-73-10 et seq., Respondents Trinity and Matrix respectfully assert this Court is constrained as well from crafting the analytical fix sought by Appellants in this case. See State v. Elmore, 368 S.C. 230, 628 S.E.2d 271 (Ct. App. 2006) (holding that as an "error correction" court, the Court of Appeals would "leave it to the Supreme Court" to determine if a departure from the currently-applied case law established by the Supreme Court was warranted).

Respondents Trinity and Maxtrix bottom and premise their assertion that summary judgment was warranted and properly granted upon the following assertions.

A. The Law of Strict Liability in South Carolina

South Carolina Jurisprudence outlines the law of strict liability in exhaustive detail:

> Under the South Carolina Defective Products Act (DPA), one who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his or her property is subject to liability for physical harm caused to the ultimate **user or consumer**, or to his or her property, if the following apply:
>
> - the seller is engaged in the business of selling such a product
> - it is expected to and does reach the **user or consumer** without substantial change in the condition in which it is sold
>
> This rule applies although the seller has exercised all possible care in the preparation and sale of his or her product, and the user or consumer has not bought the product from or entered into any contractual relation with the seller.
>
> Recovery under the strict products liability law does not rest upon any rights or duties framed by some transaction, as is the case in a suit for breach of warranty. However, although one of the purposes of strict products liability is to restrict the degree to which manufacturers may define their own legal responsibility by means of the commercial law of warranties, strict products liability has not completely displaced warranty theory. Thus, the strict products liability law renders irrelevant the concept of duty in the traditional setting of tort liability, for recovery may be had even though a seller has exercised all possible care in the

preparation and sale of his or her product. Accordingly, neither conduct nor obligation underlie recovery in strict products liability, but, rather, a combination of a defective product with the instance of a causally related injury. Thus, whether a manufacturer sells products "off the rack" or according to specifications has no bearing on whether the policies of strict products liability attach to the product. Relative bargaining power is likewise irrelevant, with the possible exception of situations in which the seller is able to impose an adhesion contract.

Thus, to recover under a strict liability theory, a plaintiff must establish:

- the defendant's product was in a defective condition unreasonably dangerous for its intended use
- the defect existed when the product left the defendant's control
- the defect was a proximate cause of the injury sustained

In other words, the plaintiff must show that the product, as designed, was unreasonably dangerous in its failure to conform to ordinary users' expectations. The focus is on the condition of the product without regard to any action of the seller or manufacturer. It is the nature of the risk that caused the injury, rather than the nature of the party, which is finally determinative of the application of the policy of strict products liability. While a plaintiff is relieved from proving fault by a manufacturer, the manufacturer is not held as an insurer against all losses caused by a product, but rather is to be held responsible only for damages attributable to some failure of the product to perform with reasonable safety in its normal environment. Thus, manufacturers are not treated as insurers of the risk that their products will prove ineffective, as opposed to unsafe.

30 S.C. Jur. Products Liability § 18 (footnotes omitted) (emphasis added).

B. Application of the Law of Strict Liability in South Carolina Limited Solely to Intended "Users" or "Consumers"

As evinced above, our appellate courts have held that in South Carolina, strict liability claims are legally cognizable only where the alleged injury is to a "user" and/or "consumer." Liability does not extend to "casual bystanders" or any other non "user" or "consumer" such as Appellants. Based on this oft-repeated proposition, Respondents Trinity and Matrix, along with Univar, was entitled to summary judgment.

As noted above, South Carolina imposes strict liability on a seller for selling "any product in a defective condition unreasonably dangerous to the user or consumer or his property. S.C. Code Ann. § 15-73-10. Importantly, the General Assembly expressly adopted § 402A of the Restatement (Second) of Torts and all of the corresponding comments to § 402A as the legislative intent of Title 15, Chapter 13. S.C. Code Ann. §§ 15-73-10 to -30; Branham v. Ford Motor Company, 2010 WL 3219499 (2010); Curcio v. Caterpillar, Inc., 355 S.C. 316, 585 S.E.2d 272 (2003); Bray v. Marathon Corporation, 356 S.C. 111, 588 S.E.2d 93 (2003); Schall v. Strum, Ruger Co., Inc., 278 S.C. 646, 300 S.E.2d 735 (1983); Claytor v. General Motors Corp., 277 S.C.

259, 286 S.E.2d 129 (1982); Anderson v. Green Bull, Inc., 322 S.C. 268, 471 S.E.2d 708 (Ct. App. 1996).

Restatement (Second) of Torts § 402A 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
>
> (a) the seller is engaged in the business of selling such a product, and
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

A "consumer" is a "person who buys goods or services for personal, family, or household use, with no intention of resale; a natural person who used products for personal rather than business purposes." "User" is defined as "[s]omeone who uses a thing." Black's Law Dictionary 265 & 1289 (8th ed. 2005).

Comment *l* to the Restatement discusses the intended meaning of "user" and "consumer." The comment states that "consumption includes all ultimate uses for which the product is intended" and "user includes those who are passively enjoying the benefit of the product." Restatement (Second) of Torts § 402A cmt. *l*.[15]

Comment *o* to the Restatement discusses the intended extent of liability for non-users and non-consumers, stating that courts – in applying the rule stated in § 402A, "have not gone beyond allowing recovery to suers and consumers, as those terms are defined in comment l." Restatement (Second) of Torts § 402A cmt. *o*.[16] The comment expressly states that "casual

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[15] 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.

16 Comment *o* of Restatement (Second) of Torts § 402A states:

bystanders, and other who may come in contact with the product .... [h]ave been denied recovery." Id.

Moreover, the American Law Institute expresses no opinion as to the expansion of the rule to permit bystander recovery, thus further emphasizing the Restatement does not recognize bystander recovery under a § 402A theory of recovery. Id.; see also Lightner v. Duke Power Company, 719 F.Supp. 1310, 1314 (D.S.C. 1989) (holding that "only a 'user or consumer' of a defective product can base a cause of action on strict liability.").

Bray v. Marathon Corporation, 356 S.C. 111, 588 S.E.2d 93 (2003), is a Supreme Court decision involving the strict liability and negligence claims

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> 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 into 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 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.

of a worker who was operating a trash compactor when her co-worker was crushed to death while in it due to a manufacturing defect. At issue on appeal was, inter alia, whether the claimant was a "user" for purposes of prosecuting her claims sounding in strict liability.

The Bray Court found the determination of whether an individual is a "user" or "consumer" is not based on a forseeability standard, but is instead premised upon the finding of whether the individual's injury was a result of the individual's **direct** use or consumption of the allegedly dangerous product. Id. at 117, 588 S.E.2d at 95. The Court determined in Bray the claimant was a "user" because she was actually operating the controls of the defective trash compactor (i.e., **using** the product) at the time her co-worker was killed while in it.

Additionally, the Bray Court held that it lacked authority to modify § 15-73-10 and its effect where the General Assembly had already spoken by passing the statute. Id. at 117 n.6, 588 S.E.2d at 96 n6.

Specifically, the Bray Court stated the following concerning the constraints of its purview to fashion a remedy for persons alleging bystander claims under a strict liability theory via § 15-73-10:

> [W]e are without authority to graft the Kinard [v. Augusta Sash & Door Co., 286 S.C. 579, 336 S.E.2d 465 (1985)] bystander analysis on § 15-73-10. 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 93, 96 n.6 (2003).

Thus, applying the holdings of Bray, this Court cannot extend the right to recovery via strict liability to any person other than a direct "user" and/or "consumer."

C. Citation from Other Jurisdictions Limiting Recovery in Strict Liability Claims to Only Those Persons Demonstrated to be the Intended "Users" or "Consumers"

In addition to the limitation on bystander recovery noted above, the case law is extensive as it pertains to the limitation of recovery to injured persons who are not demonstrated to be the "intended" users of a product in question. Those cases include the following decisions.

In Van Buskirk v. West Bend Company, 100 F. Supp. 2d 281 (E.D.Pa. 1999), the federal district court denied strict liability recovery to a toddler who suffered severe burns after he pulled a portable deep fryer kitchen appliance on top of his head and upper torso. The court rejected the plaintiff's argument the child was a "user" and "passive beneficiary" of the "benefits of the deep fryer." Id. at 284. Specifically, the court analyzed:

> **In order for section 402A strict liability to apply in this case, [the plaintiff] has to be an intended user of the [allegedly dangerous product].** "In strict liability, the focus is on a defect in the product, regardless of fault, and that defect is determined in relation to a particular subset of the general population: the intended user who puts the product to its intended use." Griggs v. BIC Corp., 981 F.2d 1429, 1438 (3d Cir. 1992) (citation omitted).

Id. at 284 (emphasis added).

The court determined the toddler was not the intended user of the deep fryer; thus, applying comment *l*, the court deemed him a "bystander." Accordingly, the court concluded the toddler was barred from recovering under § 402A. Id. at 284-85.

In Riley v. Warren Manufacturing, Inc., 688 A.2d 221 (Pa. Super. Ct. 1997), the court denied strict liability to a child bystander after the child stuck his hand into a bulk feed trailer, which severed his fingers. The court – emphasizing that only users and consumers can recover under strict liability –

determined the child was not a "user of the trailer merely 'by coming into contact with the trailer and being injured while in its proximity.'" Id. at 227 (internal citations omitted).

In In re Voluntary Purchasing Groups Litigation, 2003 WL 21499262 (N.D.Tex. June 24, 2003), the federal district court denied strict liability recovery to communities with environments contaminated with arsenic due to the defendant arsenic company's leakages and spills of the product, holding the communities were not "users" or "consumers" of the arsenic.

In Griggs v. BIC Corporation, 981 F.2d 1429 (3rd Cir. 1992), the Third Circuit held that a child could not recover under Pennsylvania products liability law under a strict liability cause of action for injuries caused by a lighter, which was not defective because children were not intended users of the lighter. The court based its holding upon Azzarello v. Black Brothers Co., Inc., 391 A.2d 1020 (Pa. 1978), where the Pennsylvania Supreme Court stated that a product is defective when it leaves "the supplier's [or manufacturer's] control lacking any element necessary to make it safe for its intended use or possessing any feature that renders it unsafe for the intended use." Id. at 559, 391 A.2d at 1027 (emphasis added). The Third Circuit Court held that this concept of "intended use" included the demonstration of

the participation of an "intended user" using a product for its "intended use." Griggs, at 1433.

The Pennsylvania Supreme Court addressed the identical issue in Phillips v. Cricket Lighters, 841 A.2d 1000 (Pa. 2003). There, a majority of the court held that a product must be made safe only for its intended user.

In Phillips, a two-year-old child accidentally started a fire after removing a butane lighter from his mother's purse and setting fire to some linens. The fire spread throughout the family's apartment, and resulted in the deaths of the two-year old child, his mother, and another minor. Id. at 1002-03. One child managed to escape through an open window and survived. Id. at 1003. The administrator of the decedents' estates, who was also the guardian of the child who survived, sued the manufacturer and distributor of the lighter, alleging, inter alia, strict liability for a defective design under Section 402A, as well as negligent design, because the lighter was not equipped with "childproof features." Id. The trial court granted summary judgment to the manufacturer on the Section 402A claim because the manufacturer only intended its lighter to be used by adults, and it was perfectly safe for use by adults. Id.

The Superior Court reversed based on its belief that a product must be safe for anyone who uses it. Id. at 1004. The court concluded that Cricket's lighter was defective because it was not equipped with a child safety feature that would have prevented a child from starting a fire. In the Superior Court's view, that defect exposed intended users to grave risk of harm. Id. The Supreme Court granted allocatur and reversed because it agreed with the trial court.

The majority in Phillips began by observing that Azzarello "did not answer ... whether the 'intended use' doctrine necessarily encompasses the requirement that the product need be made safe only for its 'intended user.'" Id. at 1005. The majority explained that, although it had never faced that question in a strict liability design defect case, it had faced it in Mackowick v. Westinghouse Electric Corp., 575 A.2d 100 (Pa. 1990), a case alleging strict liability for failure to warn. Phillips, 841 A.2d at 1005.

In Mackowick, an electrician had sued to recover injuries caused by arcing electricity in a high voltage capacitor. He alleged that the capacitor was defective because it did not warn of the dangers of exposed electrical wires. The Mackowick Court "rejected that argument ... [,] reason[ing] that a

product need only be made safe for its intended user." Phillips, 841 A.2d at 1005 (citing Mackowick, 575 A.2d at 102, 103). The "electrical capacitor was intended to be accessed and used only by qualified electricians, and not general members of the public. As experienced electricians are aware of the dangers of live exposed electrical wires, [the Mackowick court] concluded that the product was safe for its intended user even absent a [specific] warning." Id. at 1005.

In applying the holding of Mackowick, the majority in Phillips reasoned:

> While Mackowick was a failure to warn case, ... we cannot perceive how it could be confined exclusively to the failure to warn context. Mackowick stands for the proposition that a product is not defective so long as it is safe for its intended user. Whether the product is allegedly defective due to a lack of warnings, or because it was ill-conceived, the standard that the product need be made safe only for the intended user appears to be equally applicable.

Id.

The administrator in Phillips argued the lighter's design was defective because it was reasonably foreseeable that a child might play with it, and therefore the manufacturer should be liable under Section 402A whether the user was the intended adult or the foreseeable child. Although the majority

conceded that the argument had "some visceral appeal," it noted that the visceral appeal "has been memorialized in our tort law as a negligence cause of action." Id. at 1006.

By the time Phillips was decided, the Pennsylvania Supreme Court had drawn a clear distinction between negligence actions based on notions of foreseeability and a cause of action based on a theory of strict liability. The court declared that "negligence concepts have no place in a case based on strict liability." Id. (quoting Lewis v. Coffing Hoist Div., Duff-Norton Co., Inc., 528 A.2d 590, 593 (Pa. 1987)).

D. Application of the Governing and Guiding Law to the Facts of the Case Sub Judice

Applying § 15-73-10 and the common law and Restatement-based principles enunciated above to the facts of the case sub judice, Appellants were not "users" or "consumers" of sodium bromate. Moreover, Appellants were not using the sodium bromate for its intended use. Thus, they were not entitled to recovery at trial under a strict liability theory.

Appellants were not "users" of the sodium because they were not "enjoying the benefit of the product." Restatement (Second) of Torts § 402A cmt. l. Appellants were not using sodium bromate in their work. Instead, the

only connection they had with the product was that they were in the product's vicinity.

Appellants were not "consumers" of the sodium because they were not using the product as it was intended to be used. Id. The record is clear the Appellants' welding did not involve the consumption or use of sodium bromate.

Though strict liability does not lie for an injured employee who was not using the product in question at the time of injury in South Carolina, this employee is not without remedy. Specifically, the employee may pursue recovery from the product manufacturer, distributor, and seller via a theory of negligence. 30 S.C. Jur. Products Liability § 15. Unlike strict liability, 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 and 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, Appellants pled and prosecuted negligence-based claims against Respondents Trinity and Matrix and Univar. 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 Trinity and Matrix and Univar. Though they ultimately did not obtain a verdict from Respondents Trinity and Matrix, Appellants nevertheless were afforded due process and the opportunity to pursue recovery for their alleged damages. Thus, Respondents Trinity and Matrix implore this tribunal to not deviate from the holdings of Bray and fashion a strict liability-based approach/remedy in this case, which has no current basis in South Carolina law.

CONCLUSION

In their appeal to this Court, Appellants seek reversal of the jury verdict, which found Respondents Trinity and Matrix not liable for their alleged injuries resulting from the June 1, 2004, explosion at Engelhard. Appellants sought this relief upon, inter alia, the assertions that:

- The Circuit Court erred by charging the Sophisticated User Doctrine because it is not the law in South Carolina;
- The Circuit Court erred by charging the Sophisticated User Doctrine as a defense to Appellants' negligence and implied warranty of merchantability claims; and
- The Circuit Court erred by charging the Sophisticated User Doctrine as a defense because application of this doctrine is preempted by OSHA.

Contrary to Appellants arguments, review of the law and the evidence propounded in the trial of this case demonstrate:

- The Sophisticated User Doctrine is recognized a defense in South Carolina product liability cases;
- Sufficient evidence existed for the jury to determine the Sophisticated User Doctrine precluded recovery by Appellants from Respondents Trinity and Matrix; and
- The Sophisticated User Doctrine as a defense is not preempted by OSHA.

Additionally, as explicated above, summary judgment on Appellants' strict liability cause of action was proper because Appellants were not the direct and intended "users" and/or "consumers" of the sodium bromate, nor were they using this product for its intended purpose at the time of their accident. Our jurisprudence does not allow for recovery on a strict liability theory of recovery in instances where the plaintiff is someone other than a "user" or "consumer" of the product in question.

For the reasons outlined within this brief, Respondents Trinity and Matrix respectfully request this Court affirm the judgment of the Circuit Court as it pertains to the pre-trial grant of summary judgment on the strict liability count and the jury's verdicts in the negligence and implied warranty of merchantability claims.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,
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ATTORNEYS FOR RESPONDENTS TRINITY MANUFACTURING, INC. AND MATRIX OUTSOURCING, LLC

Columbia, South Carolina
February 8, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

2006-CP-37-0030

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

v.

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

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

CERTIFICATE OF COUNSEL

The undersigned certifies that Respondents Trinity Manufacturing, Inc. and Matrix Outsourcing, LLC's Final Brief complies with Rule 211(b), SCACR and the August 13, 2007 Order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Identifiers and Other Sensitive Information in the Appellate Court Filings."

[SIGNATURE PAGE TO FOLLOW]

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PROOF OF SERVICE

Counsel for Respondents Trinity Manufacturing, Inc. and Matrix Outsourcing, LLC certifies it has served the Respondent Trinity Manufacturing, Inc. and Matrix Outsourcing, LLC's Final Brief on all parties by depositing a copy of it in the United States Mail, postage prepaid, on February 8, 2013, addressed to the following attorneys of record:

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