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9/4/15

STATE OF SOUTH CAROLINA
COUNTY OF HAMPTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2013CP2500352

FILED

Melinda Cook 2015 SEP -1 PM 1:41

Blitz Usa, Inc-Dismissed Fred'S Inc
Tiger Express Varnville, James Nix
Llc

MELINDA D. NETTLES
CLERK OF COURT
HAMPTON COUNTY, S.C.
BY _____

RECEIVED

SEP 10 2015

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: CLERK OF COURT

Attorney for Plaintiff/Defendant
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk: ORDER DENYING DEFENDANT FRED'S INC. MOTION TO RECONSIDER SIGNED BY JUDGE BUCKNER FILED 07-09-2015

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on , to attorneys of record or to parties (when appearing pro se) as follows:

Mark David Ball PO Box 457 101 Mulberry St. Hampton,
SC 29924

Karl Stephen Brehmer PO Box 7966 Columbia, SC 29202
Matthew Clark LaFave PO Box 1149 Columbia, SC 29202

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

My Linda D Nettles

Court Reporter

My Linda Nettles - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF HAMPTON)
)
 MELINDA COOK,)
)
 Plaintiff,)
)
 v.)
)
 BLITZ U.S.A., INC., FRED'S, INC.,)
 TIGER EXPRESS VARNVILLE, LLC,)
 AND JAMES NIX)
)
 Defendants.)
 _____)

IN THE COURT OF COMMON PLEAS
 FOURTEENTH JUDICIAL CIRCUIT
 CIVIL ACTION NO. 2013-CP-25-352

**ORDER DENYING DEFENDANT
 FRED'S INC.'S MOTION TO
 RECONSIDER**

FILED
 2015 JUL -9 PM 4:46
 CLERK OF COURT
 HAMPTON COUNTY, S.C.

This matter came before the Court on Defendant Fred's Inc.'s Motion for Reconsideration of the Court's November 18, 2014 Order denying Fred's Motion to Enjoin or Stay Proceedings. The Court heard the Motion on June 15, 2015. Present for Defendant was Matthew C. LaFave. Present for Plaintiff Melinda Cook was Mark D. Ball. E. Dale Lang appeared for Defendant Tiger Express Varnville but did not argue. After hearing and considering the parties' arguments, the Court denies Fred's Motion.

At the hearing, Fred's argued the Court should reconsider its ruling mainly because Cook's general negligence claim against Fred's is really a derivative claim from a product's liability action. In addition, Fred's argued that it was a "vendor" entitled to the protection envisioned by the channeling injunction. Finally, Fred's argued that the general negligence claim related to the product, so it should not be allowed to go forward, pursuant to Article IV of *Findings of Fact, Conclusions of Law and Order Confirming Debtors' and Official Committee of Unsecured Creditors' First Amended Joint Plan of Liquidation* ("Bankruptcy Order").

#1
 PNB

The Plaintiff amended its complaint to include a general negligence claim instead of a products liability claim. At the hearing, Fred's argued that the general negligence claim asserted in the Amended Complaint is a derivative claim of a product's liability action. The allegation made in the Amended Complaint is that Fred's continued to knowingly sell gas cans, even though Fred's allegedly knew the product was dangerous. Fred's argues that if the general negligence claim is a derivative claim of a product liability claim, then the general negligence claim is subject to the channeling injunction.

However, general negligence and product liability negligence have different elements of proof, so the general negligence claim is not derivative of a products liability claim. "Generally, the elements of negligence are (1) duty, (2) breach, (3) proximate cause, and (4) injury." Cody P. v. Bank of Am., N.A., 395 S.C. 611, 620, 720 S.E.2d 473, 478 (Ct. App. 2011). In contrast, the elements of a product liability negligence claim are

(1) [the plaintiff] was injured by the product; (2) the injury occurred because the product was in a defective condition, unreasonably dangerous to the user; and (3) that the product at the time of the accident was in essentially the same condition as when it left the hands of the defendant[, and] . . . [4] the defendant (seller or manufacturer) failed to exercise due care in some respect.

Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 539, 462 S.E.2d 321, 326 (Ct. App. 1995). These are distinct causes of action with different elements of proof. Therefore, the Plaintiff's claim that Fred's was negligent in continuing to sell a product it knew to be dangerous is not a "derivative" product liability claim but a general negligence claim based on Fred's conduct. Fred's argues that without the product defect, the claim would not exist. However, the claim is based on Fred's conduct in selling the product, in which Fred's alleged negligence is the focus.

#2
PMB
In support of its argument, Fred's cites the definition of a "Blitz Personal Injury Claim," which "shall include asserted claims whether known or unknown, based upon, arising out of, or

in any way involving the products." Article IV, Bankruptcy Order. Further, Fred's argues that because it satisfied the definition of a 'vendor', it should be included in the channeling injunction.

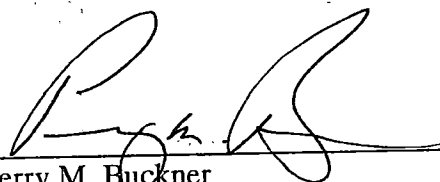
Rather, as this Court held previously, "the bankruptcy court intended for the injunction and release to apply to a third party vendor such as Fred's only as to claims covered by a Participating Insurer policy." (Order p. 5). The relevant question is not whether Fred's is a "vendor" but whether the Plaintiff's general negligence claim against Fred's falls within the claims intended to go to the channeling injunction. The general negligence claim against Fred's is not a claim intended to go to the channeling injunction. Additionally, this claim involves the conduct of Fred's, so it is not "based upon, arising out of, or in any way involving the product." The general negligence claim only considers the conduct of Fred's.

Finally, Fred's argues that the Vendor Agreement between Blitz USA and Fred's contemplates indemnification for any claim related to the "the sale" of the product. However, the Bankruptcy Order is clear that only claims covered by a Participating Insurer policy would get the protection of the channeling injunction. Since the claim for general negligence against Fred's is outside of scope of the channeling injunction as set forth in the Bankruptcy Order, the Vendor Agreement does not give Fred's the protection of the channeling injunction. Therefore, the Motion for Reconsideration is respectfully denied. The case shall proceed against Fred's as stated in the Amended Complaint.

#3

AND IT IS SO ORDERED.

Dated: June 30, 2015
Walterboro, South Carolina


Perry M. Buckner
Circuit Court Judge