

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

) **RECEIVED** MOTION TO RECONSIDER

) SEP 21 2015

) SC Court of Appeals

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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").

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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.

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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

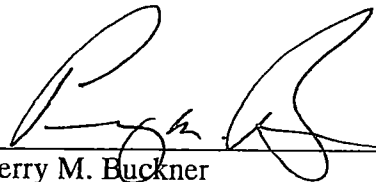
in any way involving the products." Article IV, Bankruptcy Order. Further, Fred's argues that because it satisfied the definition of a 'vendor', it should be included in the channeling injunction.

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.

AND IT IS SO ORDERED.

Dated: June 30, 2015
Walterboro, South Carolina



Perry M. Buckner
Circuit Court Judge

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