IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Perry M. Buckner, Circuit Court Judge

Case No. 2015-001947

Alice Hazel, as GAL for Jacob N., Respondent,

v.

Blitz U.S.A., Inc., Fred's Inc., Tiger Express Varnville, LLC & James Nix, Defendants,

OF WHOM:
Fred's Inc. is the Appellant.

INITIAL BRIEF OF APPELLANT

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TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in denying Appellant's Motion for Permanent Injunction?

2. Did the trial court err in denying Appellant's Motion for Reconsideration?

STATEMENT OF THE CASE

On November 5, 2013 Respondent, Alice Hazel as Guardian *ad Litem* of Jacob N., filed suit alleging three causes of action relative to Appellant Fred's including negligence, strict liability, and breach of warranty as a result of an alleged explosion involving a gas can purportedly purchased from Appellant Fred's store in Varnville, South Carolina. Appellant filed a timely answer to the Complaint denying liability and alleging indemnification by Defendant, Blitz pursuant to the Vendor's Hold Harmless and Indemnity Agreement. Appellant, on September 15, 2014, filed a Motion to Permanently Enjoin or Alternatively to Stay Proceedings, which was heard by The Honorable Perry M. Buckner on October 27, 2014 in Hampton, South Carolina. After hearing oral arguments and taking the matter under advisement Judge Buckner issued an Order Denying Appellant's Motion. Of significance, at the aforementioned hearing Plaintiff filed an oral motion with the Court to Amend the Complaint to eliminate or otherwise remove any "products liability" causes of action. The foregoing Motion to Amend the Complaint was granted in the Order signed by Judge Buckner and filed November 18, 2014. In response to the filing of the aforementioned Order Appellant's subsequently, pursuant to Rule 59(e), SCRCP, filed a Motion for Reconsideration. Judge Buckner heard Appellant's Motion for Reconsideration on June 15, 2015 with an Order denying said motion filed July 9, 2015.

FACTS

On or about November 5, 2010, Respondent's minor nephew, Jacob N., reportedly sustained significant and severe burns when a gasoline container exploded as it was being

utilized to reignite a fire. Respondent alleges that the container in question was purchased at Appellant's store and was manufactured by Defendant, Blitz U.S.A., Inc. Defendant Blitz filed for Chapter 11 Bankruptcy in United States Bankruptcy Court for the District of Delaware on November 19, 2011. At some point following Plaintiff becoming aware of the application for bankruptcy a claim was filed on behalf of her minor son for his injuries. It is uncontroverted that Plaintiff's minor son, by and through Alice B. Hazel, his *Guardian ad Litem*, is a Participating Claimant presenting a Blitz Personal Injury Claim as established in line with the requirements of Defendant Blitz's bankruptcy Plan. Throughout the process for bankruptcy the Chapter 11 filing was eventually transitioned to a Chapter 7 filing.

Ultimately a Confirmation Hearing was held on January 28, 2014 to address the Debtors' and Official Committee of Unsecured Creditor's First Amended Joint Plan of Liquidation, which eventually resulted in the filing of Finding's of Fact, Conclusions of Law and Order Confirming Debtors' and Official Committee of Unsecured Creditor's First Amended Joint Plan of Liquidation ("Confirmation Order"), which was addressing the Debtors' and Official Committee of Unsecured Creditors' First Amended Joint Plan of Liquidation dated December 18, 2013 ("Plan"). It is this plan that forms the basis for Appellant having pursued the drastic course of seeking a permanent injunction from the trial court. Specifically, the Blitz Personal Injury Trust was created subject to Section 4.3 of Article IV of The Plan "to assume the liability for all Blitz Personal Injury Trust Claims; shall administer, process, settle, resolve and liquidate such Blitz Personal Injury Trust Claims ...." *Plan,* P. 17. Additionally, a "Blitz Personal Injury Claim" is defined as "[a]ll Claims for damages or other relief for, based upon, arising out of, relating to or in any way involving bodily injury ... that occurred on or before 12:01 AM CST on July 12,

2012, and shall include asserted claims whether known or unknown, based upon arising out of, or *in any way involving the products* ...." *(Emphasis added) Plan,* P. 8; Exhibit 1: Definitions.

The Imposition of Channeling Injunction was set forth in Section 4.3.3 of Article IV of The Plan indicating "[f]rom and after the Effective Date, (i) all Blitz Personal Injury Trust Claims will be subject to the Channeling Injunction pursuant to section 105(a) [and 363(f) of the Bankruptcy Code and the provisions of the Plan and the Confirmation Order and (ii) Protected Parties shall have no obligation to pay any liability of any nature or description arising out of, relating to, or in connection with any Blitz Personal Injury Trust Claim ...." *Plan,* P. 22, attached hereto and incorporated herein. The Terms of the Channeling Injunction were further set forth in Section 4.3.3.1 of Article IV of The Plan stating

> all Entities that have held or asserted or that hold or assert any Blitz Personal Injury Trust Claim against the Protected Parties, or any of them shall be permanently stayed, restrained and enjoined from taking any action for the purpose of directly or indirectly collecting, recovering, or receiving payments satisfaction, or recovery from any such Protected Party with respect to any such Blitz Personal Injury Trust Claim .... *Plan,* P. 23.

Applicable to the Channeling Injunction, which is noted to include and bar any action against the "Protected Parties" it is noted that a list of said parties includes, but is not limited to, "(e) Vendors; (f) Any holder of Co-Defendant Claim ...." *Confirmed Order,* P. 22; Exhibit 1: Definitions. A Vendor is defined by The Plan as being "[a]ny Entity that, prior to the Effective Date, sold or distributed any product manufactured, sold, distribute or otherwise produced by the Debtors." *Plan,* P. 25; Exhibit 1: Definitions.

Moreover, the Channeling Injunction was established and "(i) permanently enjoins and channels to the Plan Trust all Blitz Personal Injury Claims, and (ii) permanently enjoins the prosecution of all Blitz Personal Injury Claims against any Released Party." *Plan,* P. 2, Section (e); Term Sheet. The Plan further provided a definition to establish the term "Released Parties," which includes "Debtors, Participating Insurers, Wal-Mart, and any other person or entity insured under the Subject Policies, including, but not limited to (i) any distributor or retailer of Debtors' products...." *Plan,* P. 3, Section (s); Term Sheet. Appellant was, at all applicable times, an additional insured under two participating insurers policies and was undisputedly a distributor/retailer of Debtors' products. *Confirmed Order,* P. 30; Exhibit 2: Participating Insurers - Subject Policies.

ARGUMENT

1. The premise of the issue presented to this Honorable Court is predicated on the original motion of Appellant seeking a permanent injunction as to the claims being brought against it by Respondent. Appellants contention is that it is entitled to a permanent injunction on account of the Respondent's minor son qualifying as a Participating Claimant in the personal injury trust established during the bankruptcy proceedings for Defendant, Blitz U.S.A., Inc. It is undisputed that the minor child, Jacob N. is a "Participating Claimant" and has presented a "Blitz Personal Injury Claim," which has been channeled into the "Personal Injury Trust" established during the bankruptcy proceedings and in the Debtors' and Official Committee of Unsecured Creditor's First Amended Joint Plan of Liquidation as confirmed by the United States Bankruptcy Court for the District of Delaware.

Appellant submits that the original claims, and those set forth in the Amended Complaint, as granted by the trial court are subjected to the channeling injunction, not only for Blitz U.S.A.,

Inc. but also for Appellant. The removal by Respondent during the hearing that occurred on October 27, 2014 of the products liability causes of action against Appellant amounts to a tacit acknowledgment that the Channeling Injunction was intended, at least in some capacity, to include claims against Appellant. However, in an attempt to usurp the intended effect of the Channeling Injunction Respondent sought to, and was granted the ability, to amend her Complaint to pursue, what has been fashioned as a general negligence claim. The simple assertions now being advanced by Respondent is that Appellant did continue to sell a product it knew or should have known to be defective and unreasonably dangerous to its consumers.

In its original Order Denying the Motion for Permanent Injunction the trial court formulated its opinion based upon three fundamental conclusions, which were in direct response to the decision to grant the Respondent's Motion to Amend. First, the Court held the negligence cause of action is outside the scope of the channeling injunction and release. Second, the Court held the negligence claim does not trigger the rights of indemnification in accordance with the Vendor's Hold Harmless and Indemnity Agreement. Finally, the Court held the negligence claim falls under an exception to the channeling injunction. (*Order Denying Motion for Permanent Injunction*). Appellant directs this court simply back to the definition of a Blitz Personal Injury Claim, which clearly and succinctly contemplates "claims, whether known or unknown, based upon, arising out of, or in any way involving the products..." *Plan*, P. 8; Section 1: Definitions. Regardless of the arguments by Respondent this case relates to and involves the products and affects a protected party and as such fits within the confines of the channeling injunction.

The initial holding of the Court sought to interpret the release contained within the Finding's of Fact, Conclusions of Law and Order Confirming Debtors' and Official Committee

of Unsecured Creditor's First Amended Joint Plan of Liquidation, which approved the "First Amended Joint Plan of Liquidation." In so interpreting the aforementioned bankruptcy pleading the court confirmed that Appellant was to be released, but only was to be those relating to the bankruptcy debtor. (*Order Denying Motion for Permanent Injunction,* P. 6). However, incorrectly the trial court concluded that the general negligence claim now being asserted does not pertain to any conduct or liability of Defendant Blitz U.S.A., Inc. Without the production and manufacturing of an allegedly dangerous product, which is asserted within the general negligence claim. Through this flawed reasoning and logic it was determined that Appellant was no longer to be afforded the protections of the Finding's of Fact, Conclusions of Law and Order Confirming Debtors' and Official Committee of Unsecured Creditor's First Amended Joint Plan of Liquidation because vendors were only to be protected by claims "covered by the Participating Insurance Policies." (*Order Denying Motion for Permanent Injunction*, P. 7). However, the entirety of this conclusion hinges on the erroneous finding that the negligence claim being advanced does not have its origin in products liability.

Appellant submitted, to the trial court, a contention that the negligence claim being brought by Respondent, by and through an Amended Complaint, was still to be included in the claims channeled to the Personal Injury Trust on account of their entitlement to indemnification. Specifically, Appellant directed the court to the Vendor Hold Harmless and Indemnity Agreement, which states Defendant Blitz was required to hold harmless and indemnify for any and all claims including those involving the "use or sale of said Products." (*Vendor Hold Harmless Indemnity Agreement*, P. 1 ¶ 3). In conjunction with the foregoing document the Confirmation Order also indicated that vendors may be entitled to coverage under certain policies of Participating Insurers such that they could tender an Personal Injury Claim for

defense and indemnification. (*Confirmation Order*, P. 12 ¶ I(7)). However, as was the case with the initial basis of the trial court it was again indicated that no indemnification applied to the negligence claim on account of a *Fed. Pac. Elec. v. Carolina Prod. Enters.*, 298 S.C. 23, 378 S.E.2d 56, 57 (Ct.App. 1989), which it was noted that no contractual indemnity exists for ones own negligence unless it is expressly called for within the agreement. In concluding the contract does not apply the trial court clearly has overlooked the plain language of the Vendor Hold Harmless and Indemnity Agreement as it expressly called for indemnification for "any and all claims ... arising out of ... the sale of the product." (*Vendor Hold Harmless Indemnity Agreement*, P. 1 ¶ 3). The plain language of the foregoing agreement clearly supports a holding that the negligence claim being advanced by Respondent was contemplated and as such entitled Appellant to the benefits of contractual indemnification.

In the case of *A.H. Robins Co., Inc. v. Piccinin*, it was established by the Fourth Circuit that a non-debtor might, under "unusual circumstances," be afforded the protections of an injunction or release. 788 F.2d 994, 999 (Ct.App. 4th Cir. 1986). To find such "unusual circumstances" exist it was noted that there must be "such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor." *Id.* The Court further went on to show, by way of illustration, "such a situation would be a suit against a third-party who is entitled to absolute indemnity by the debtor on account of any judgment that might result against them in the case." *Id.* The evidence on the record in this case, through application of the "unusual circumstances" analysis establish such a interrelatedness between Appellant and Defendant Blitz, which would permit an injunction as to Appellant. In fact, contained within the Findings of Fact, Conclusions of Law and Order

Confirming Debtors' Official Committee of Unsecured Creditors' First Amended Joint Plan of Liquidation it was noted that "[a]n identity of interests exists between the Debtors and the non-debtor protected Parties such that a Claim asserted against any non-debtor Protected Party gives rise to a claim against the Debtors by contract and/or operation of the law of indemnity and/or contribution." *Confirmed Order*, P. 21 ¶ 8.

Finally, the trial court explored the exemption, from the injunction, claims against a "Non-Participating Insurer." Respondent does not refute that a channeling injunction exists within the construct of the Confirmed Order, nor do they refute that Appellant is entitled to an injunction and/or release as to products liability causes of action. In accepting the existence of an exemption for claims against insurers that did not actively participate in the bankruptcy process the trial court incorrectly inferred that the plan must certainly have also intended for claims such as this to proceed as it would involve "non-participating, non-Blitz insurers." (*Order Denying Motion for Permanent Injunction*, P. 11). As was the case in the other holdings of the trial court this was again predicated on the conclusion that the negligence claim being pursued is exclusive of any tangible connection to products liability. It is uncontroverted that certain insurers of Defendant Blitz U.S.A., Inc. did not participate in the underlying bankruptcy plan and as such were not afforded the same protections that were established for Participating Insurers. However, the policies that would apply to Appellant did participate and as such this holding is both misguided and misplaced. Simply finding that because certain entities are not included does not formulate a cogent basis for concluding this Appellant must also remain exposed as there are certainly possible claims against Defendant Blitz that may not relate directly back to the product. However, for purposes of this analysis the Appellant submits the instant case being

advanced by Respondent, even as amended, relates back to the product thus is not excepted from the channeling injunction.

2. The crux of the denial by the trial court, as to Appellant's Motion for Reconsideration can be summed up in one conclusion, which was that the negligence claim being asserted by Respondent is not a derivative of a products liability claim. However, this matter, at its very origin, is a products liability lawsuit arising out of a purportedly dangerous and defective gasoline container, which was reportedly purchased at the store owned by Appellant. Respondent, during the original motion hearing, sought to amend her Complaint and in so doing she effectively withdrew those claims she contended to be born from a products liability theory, which were confined to the strict liability and breach of warranty causes of action. Respondent subsequently alleged simply a claim for negligence premised on the assertion that Appellant "continued to knowingly sell gas cans, even though Fred's allegedly knew the product was dangerous." (*Order Denying Motion to Reconsider*, P. 2). Under this premise Respondent contended, and the trial court agreed, that such a claim falls under an exception to the Channeling Injunction and/or is otherwise outside the scope of the Channeling Injunction. The trial court further held the simple negligence claim now being pursued by Respondent is not a derivative claim from a products liability action. The premise of the trial court's ruling is simply that the elements of a negligence claim are simply different from those of a product's liability action.

It is well settled in South Carolina that one bringing a products liability case can pursue such a claim under several different theories, which include negligence, strict liability, and warranty. *Rife v. Hitachi Const. Machinery Co., Ltd.*, 363 S.C. 209, 609 S.E.2d 565 (Ct.App. 2005) (*see also Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 494 S.E.2d 835 (Ct.App. 1997);

Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 462 S.E.2d 321 (Ct.App. 1995)). Irrespective of the theory one seeks to recover under there are three required elements that must be satisfied by the party, which are that: "(1) he was injured by the product; (2) the injury occurred because the product was in a defective condition, unreasonably dangerous to the user; (3) the product, at the time of the accident, was in essentially the same condition as when it left the hands of the defendant." *Id.* at S.C. 215. In fact, one who

> "sells a product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm caused to the ultimate user or consumer, or to his property, if: (a) [t]he seller is engaged in the business of selling such a product, and (b) [i]t is expected to and does reach the user without substantial change in the condition in which it is sold."

S.C. Code Ann. § 15-73-10.

The Respondent now intends to bring, by and through the Amended Complaint, is that of negligence on the part of Appellant on account of their sale of the allegedly defective and/or otherwise dangerous gasoline container. However, the fundamental flaw in their position is that at its very origin this case, be it under a theory of negligence or otherwise, ties directly to and is inseparable from its relation back to an alleged dangerous and/or defective product. In ruling this amended negligence claim is not subject to the Channeling Injunction as it is not a products liability claim the trial court addressed a perceived difference in the "elements of proof" between a general negligence claim and a product liability negligence claim. In fact the trial court addresses the standard elements of a general negligence claim to include "(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). (*Order Denying Motion to Reconsider*, P. 2). In their erroneous attempt to distinguish this amended general negligence claim from that of a products liability claim the trial court sets forth the product liability negligence elements 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). The obvious origin of this lawsuit centers exclusively on a product, which Respondent contends was both dangerous and defective and that said Appellant, as a seller, knew the condition of the product and that despite such knowledge continued to sell the product. The mere fact that certain elements of proof between general negligence claims and "product liability negligence" claims utilize different verbiage is not the test of whether or not a claim is based under a particular theory.

"An essential element in a negligence cause of action is the existence of a legal duty of care owed by the defendant to the plaintiff." *McKnight v. South Carolina Dept. of Corrections*, 385 S.C. 380, 390-91, 684 S.E.2d 566, 571 (Ct.App. 2009) (*quoting Pratt v. CSX Transp., Inc.*, 379 S.C. 249, 258, 665 S.E.2d 631, 635 (Ct.App. 2008)). "Without such a duty, a plaintiff cannot establish negligence." *Id.* Though there is no common law duty to act "an affirmative legal duty may be created by statute, contract relationship, status, property interest, or some other special circumstance." *Pratt v. CSX Transp., Inc.*, 379 S.C. 249, 258, 665 S.E.2d 631, 636 (Ct.App. 2008). Appellant contends the impetus of an affirmative legal duty is set forth in the aforementioned S.C. Code Ann. § 15-73-10, which is simply referred to as "[s]ellers of defective products." The legal duty was then codified in the ruling in *Bragg* where there was a noted reference to the "exercise of due care." 319 S.C. at 539.

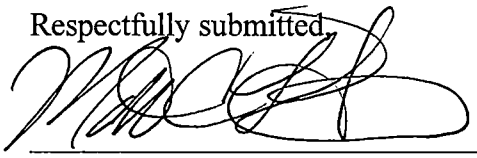
The trial court, in its attempt to draw a distinction between general negligence and products liability negligence cites the case under which Appellant's duty would be

established based upon the particular factual scenario forming the basis for this litigation. It is noted in *Bragg* that the defendant, whether that defendant be the seller or the manufacturer, has a duty to "exercise due care" as well as the breach when notes said defendant "failed to exercise due care in some respect." *Id.* Moreover, the two cases cited by the trial court, in an attempt to establish a distinction between general negligence and product liability negligence, share other common components in that each require an injury. It is readily apparent that the case being advanced by Respondent is not that her minor son was injured solely as a result of the act of Appellant in selling a product as it would be irrational and illogical to accept injury could be proximately caused by the simple act of selling a product. Rather the case Respondent seeks to advance is as a result of a purported defect in the product leaving it in a condition causing it to be unreasonably dangerous to the user, thus placing it solely and squarely within the confines of a products liability claim, even as asserted only as "general" negligence. Therefore, as acknowledged by Respondent through her voluntary withdrawal of the products liability causes of action, this negligence claim, being based in products liability, is also one that must be channeled into the Personal Injury Trust as to Appellant.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court and grant Appellant the Permanent Injunction to which they are entitled based upon the facts of this case and the applicable sections and definitions of the confirmed Debtors' and Official Committee of Unsecured Creditors' First Amended Joint Plan of Liquidation.

Respectfully submitted,



January 4, 2016

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Fred's Inc. is the

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PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant by depositing a copy of it in the United States Mail, postage prepaid, on January 4, 2016, addressed to the attorneys of record, Mark D. Ball, Post Office Box 457, Hampton, South Carolina 29924, and Karl S. Brehmer, Brown & Brehmer, P.O. Box 7966, Columbia, SC 29202

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RE: Alice Hazel, as GAL for Jacob N. v. Blitz, U.S.A., Inc., Fred's, Inc., Tiger Express Varnville, LLC, and James Nix
Case No. 2015-001947
Claim No. B460900206-0001-01

Dear Ms. Kitchings:

Please find enclosed for filing an original and one copy of the Initial Brief of Appellant and Proof of Service in the above-captioned matter. Also enclosed please find an original and one copy of the Designation of Matter to be Included in the Record on Appeal and Proof of Service. Once filing is complete of these documents, please return the clocked copy to us in the enclosed self-addressed, stamped envelope.

By copy of this correspondence to the attorneys of record, I am hereby serving a copy of the Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal upon Mr. Ball and Mr. Brehmer.

Sincerely yours,

Denise M. Brockwell

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Paralegal to Matthew C. LaFave

/dmb
Enclosures

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Karl Brehmer, Esquire
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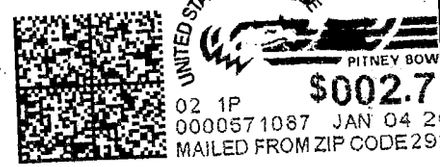

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