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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 and James Nix, — Defendants,

Of Whom Fred's Inc. is the — Appellant.

And

Melinda Cook, — Respondent,

v.

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

Of Whom Fred's Inc. is the — Appellant.

APPELLANT'S PETITION FOR REHEARING AND MEMORANDUM IN SUPPORT

Pursuant to Rule 221(a) and Rule 240(i), SCACR, Appellant Fred's Inc. ("Appellant") respectfully petitions this Court for a rehearing of Opinion No. 5604, filed November 7, 2018. Rehearing is appropriate where, as here, the Court has overlooked or misapprehended an

argument. *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001). The Petition for Rehearing should be granted because the Court's Opinion misapprehends the argument being made by Appellant. Appellant hereby incorporates by reference its previously filed briefs and the Record on Appeal for a substantive review of the facts and procedural history relevant to this matter.

I. Background Facts.

On or about November 5, 2010, Respondent Alice Hazel's minor nephew, Jacob N., reportedly sustained injuries when a gasoline container, used to reignite a fire, exploded. Respondents allege 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 Respondent Melinda Cook becoming aware of the application for bankruptcy a claim was filed on behalf of her minor son for his injuries. It is uncontroverted that Respondent Melinda Cook's minor son, by and through Respondent 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 (R. pp. 337-620), which eventually resulted in the filing of Findings of Fact, Conclusions of Law and Order Confirming Debtors' and Official Committee of Unsecured Creditor's First Amended Joint Plan of Liquidation ("Confirmation Order") (R. pp. 284-336), which was addressing the Debtors' and Official Committee of Unsecured Creditors' First Amended Joint Plan of

Liquidation dated December 18, 2013 ("Plan") (R. pp. 337-620). The Plan forms the basis for Appellant's pursuit of a permanent injunction. The Blitz Personal Injury Trust was created subject to Section 4.3 of Article IV of The Plan (R. pp. 359-367) "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,* (R. p. 359). 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,* (R. p. 436); Exhibit 1: Definitions.

The Imposition of Channeling Injunction set forth in Section 4.3.3 of Article IV of The Plan stated "[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,* (R. p. 364), attached hereto and incorporated herein. The Terms of the Channeling Injunction were further defined 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,* (R. p. 365).

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,* (R. p. 450); 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,* (R. p. 453); 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,* (R. p. 550), 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,* (R. p. 551), Section (s); Term Sheet. It is uncontested that Appellant was, at all applicable times, an additional insured under two participating insurers policies and was a distributor/retailer of Debtors' products. *Confirmed Order,* (R. p. 595); Exhibit 2: Participating Insurers - Subject Policies.

II. Procedural Posture.

On November 5, 2013 Respondents, Alice Hazel as Guardian *ad Litem* of Jacob N. and Melinda Cook, filed lawsuits alleging three causes of action relative to Appellant Fred's including negligence, strict liability, and breach of warranty for injuries caused by a Blitz gas can purportedly purchased from Appellant Fred's store in Varnville, South Carolina. Appellant filed a timely answer to the Complaints denying liability and alleging indemnification by Defendant Blitz pursuant to the Vendor's Hold Harmless and Indemnity Agreement (R. pp. 625-626). Appellant, on September 15, 2014, filed a Motion to Permanently Enjoin or Alternatively to Stay Proceedings (R. pp. 56-269), 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 (R. pp. 2-6). At the aforementioned hearing Respondents made an oral motion with the Court to Amend the Complaint to eliminate or otherwise strike any "product liability" causes of action. Judge Buckner granted Respondents' Motion to Amend the Complaint in the Order signed by Judge Buckner and filed November 18, 2014. Appellant subsequently filed, pursuant to Rule 59(e), SCRCP, a Motion for Reconsideration (R. pp. 621-632). Judge Buckner heard Appellant's Motion for Reconsideration on June 15, 2015 with an Order denying said motion filed July 9, 2015 (R. pp. 7-12). The instant appeal followed.

III. The Court of Appeals Misapprehended the Legal Duty of Appellant Resulting in a Misapplication of the Law as Pertaining to the Negligence Presented by Respondents.

In affirming the decision of the lower court to deny the permanent injunction as required by the Blitz Bankruptcy Plan the Court of Appeals misapprehended the duty owed by Appellant, as a seller, to a customer. Respondents' claims, regardless of their re-characterization are grounded in product liability law, as was the chief argument of Appellant. The Plan provides for certain instances where claims may still be pursued outside of the Channeling Injunction. However, the Court's conclusion in Opinion 5604 that the instant case meets an exception is in error.

To underscore the contention that not all claims are subjected to the Channeling Injunction the Court provided a misplaced analogy involving a gas can falling from a shelf in Appellant's store. The Court's analogy serves only to highlight the misapprehension of the legal duty owed by Appellant in the instant case and their resulting misapplication of the law as it pertains to Respondents' claims for negligence. Appellant acknowledged certain claims

involving the gas can may still be permitted to proceed outside of the channeling injunction. In fact, Appellant concedes a lawsuit with a fact pattern similar to the Court's analogy would likely not be subjected to the Channeling Injunction. However, a gas can falling from a shelf and the allegedly dangerous and defective product in the present case are clearly distinguishable. The key distinguishing component between the falling merchandise analogy and the instant claim is that each represents a ***distinctly*** different duty owed by Appellant. "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.*

Appellant, under the fact pattern involving a gas can falling from its store shelves, owes patrons of its store a duty to maintain the premises in a reasonably safe condition. Alternatively, there is no corresponding duty under premises liability law pertaining to a merchant's sale of products. Therefore, Appellant submits the duty owed in the present case is wholly different from the Court's example rendering the example inapplicable. Respondents were not injured nor did they sustain any damages attributable to Appellant's failure to maintain its premises thereby underscoring the Court's misapplication of the law and misapprehension of the legal argument of Appellant. The negligence claims presented by Respondents do not involve, nor is it akin to, negligently maintained premises thus the duty is in the Court's analogy is erroneously applied to Appellant's sale of an allegedly dangerous and defective product in the instant case.

Respondents ground their claim in the argument that Appellant breached a duty owed to them by continuing to sell a product it knew or should have known to be dangerous. Product liability law controls Respondents' negligence claims. Specifically, *Bragg v. Hi-Ranger, Inc.*,

presents this Court with more analogous fact pattern as it involved a suit where an individual sustained injuries from the use of a piece of equipment argued to be in a defective condition and unreasonably dangerous. 319 S.C. 531, 462 S.E.2d 321 (Ct.App. 1995). In *Bragg* the Court noted product liability cases may be brought under several theories, including negligence ...." 319 S.C. at 538. "Under a negligence theory, the plaintiff bears the additional burden of demonstrating the defendant (seller or manufacturer) failed to exercise due care in some respect." *Id.* 319 S.C. at 539. Aside from product liability statutes and case law connected thereto Respondents can point to no law in South Carolina that would place, or otherwise redefine the duty of a seller. Therefore, it was erroneous for the Court to fail to follow the precedent established in *Bragg*, which would unavoidably subject Respondents' claims, as product liability negligence claims, to the Channeling Injunction.

In an attempt to sidestep the threshold issue of any negligence claim, legal duty, Respondents have misdirected the Court to focus instead on an alleged breach. The sale of a product by a retailer can be re-characterized as a general negligence claim, but under *Bragg*, it remains grounded in product liability law. Any conclusion to the contrary by the Court runs afoul of established precedent. Respondents acknowledged in the original Motion hearing on October 27, 2014, that all product liability cases against Appellant were subject to the Channeling Injunction as Blitz Personal Injury Claims. Therefore, because the case against Appellant, regardless of its characterization as "general negligence", can only be a product liability claim subject to the Channeling Injunction.

IV. The Court of Appeals Misapprehended Appellant's Argument Regarding Indemnification and Identity of Interest.

Additionally, Appellant submits that the Court misapprehended their argument relative to an identity of interest by and between Appellant and Blitz USA. Respondents' claim

unequivocally relates to the sale of a Blitz product. Appellant included in the Record on Appeal a Vendor Agreement entered into between itself and Blitz. Contained within the Vendor Agreement was indemnification language that included the indemnification of Appellant by Blitz "from and against ***any and all*** claims, actions, liabilities, losses, ... , damages, costs and expenses, including attorneys fees ... arising out of ***any actual or alleged violation in the*** use ***or sale of said Products.***" (***emphasis added***). The foregoing terms represent clear and unequivocal language that show Blitz's intent to absolve Appellant from the consequences of ***any*** claim arising out of the sale of the product, which would include the instant claim. As is noted by the Court "there is no verbatim phrase that must be used to meet the clear and unequivocal standard." *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, No. 2016-000076, 2018 WL 374616, at 8 (Ct.App. 2018), *reh'g denied* (Oct. 18, 2018). Appellant submits that the language of the agreement clearly and unequivocally reflects the intention of Blitz to indemnify and defend Appellant against ***any and all claims*** arising out of the sale of the products.

In an effort to differentiate this matter from *A.H. Robins* the Court notes that Appellant is a separate entity and Blitz has "no statutory obligation to indemnify." Appellant acknowledges the absence of a statutory obligation but contends the contract for indemnification for lawsuits such as those filed by Respondents renders this, as in *A.H. Robins,* a case where Blitz the real party defendant. In light of their contractual obligation to defend and hold harmless Appellant from any and all claims involving the use and sale of the product there can be no conclusion other than one that finds Blitz as the real party defendant thus establishing the basis upon which the Channeling Injunction would apply to Appellant.

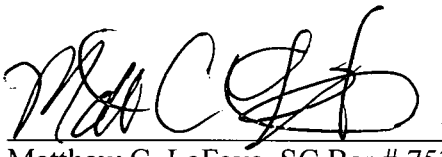
V. The Court Erroneously Addresses and Considers Policies not Included in the Record on Appeal.

The Court devoted two full paragraphs of Opinion 5604 to discussion on insurance policies that it noted were not in the Record on Appeal. The Court even noted that to attempt "to determine the exact coverage afforded under the policies would be a speculative exercise." Despite this acknowledgment the Court references the fact that a CGL policy, of which Fred's was a certificate holder, was a Non-Participating Insurer such that claims asserted against that policy would not avail Appellant to the release and injunction. However, the clear error arises in the conclusion of the Court that "Respondents' claim [sic] was asserted against, and only seeks to recover from, a Non-Participating Insurer." It was in reliance on this conclusion that the Court bases its agreement with the circuit court "that Respondents' negligence claim [sic] is outside the scope of the release and Channeling Injunction." Despite the Court's own acknowledgment that attempting to determine coverage on policies not included in the Record on Appeal would amount to a speculative exercise the Court nevertheless asserted an opinion that Respondents' claims would fall within the purview of the CGL policy of the Non-Participating Insurer thereby concluding the claim was not subject to the release and Channeling Injunction. This undertaking by the Court is clear error.

VI. Conclusion

The Court of Appeals misapprehended Appellant's arguments and the prevailing law of this State in rendering Opinion 5604. Therefore, the petition for rehearing should be granted reversing the Orders of the trial court enjoining Respondents from pursuing their negligence claims against Appellant for the injuries to Jacob N. and damages resulting therefrom.

Respectfully submitted,



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November 20, 2018
Columbia, South Carolina

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Perry M. Buckner, Circuit Court Judge

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PROOF OF SERVICE

I certify that I have served Appellant's Petition for Rehearing and Memorandum in Support on all counsel of record by depositing a copy of them in the United States Mail, postage prepaid, on November 20, 2018, addressed to Mark D. Ball, P.O. Box 457, Hampton, SC 29924; and Kathleen C. Barnes, P.O. Box 897, Hampton, SC 29924.

November 20, 2018

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November 20, 2018

Via Hand Delivery
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29211

RE: Alice Hazel, as GAL for Jacob N. v. Blitz, U.S.A., Inc., Fred's, Inc., Tiger Express Varnville, LLC, and James Nix
And
Melinda Cook 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 seven copies of Appellant's Petition for Rehearing and Memorandum in Support, along with an original and one copy of the Proof of Service, regarding the above-captioned matter. Also is a check in the amount of $50.00 representing the filing fee. Once filing is complete, please return the clocked copies to the individual presenting these documents for filing.

By copy of this correspondence to the attorneys of record, I am hereby serving a copy of Appellant's Petition for Rehearing and Memorandum in Support. Should you have any questions or concerns, please do not hesitate to contact me.

Sincerely yours,

Matthew C. LaFave

MCL/dmb
Enclosures

cc: Mark D. Ball, Esquire
Kathleen C. Barnes, Esquire
Jonathan Street, Fred's (via email only)
Shonda Sanders, Fred's (via email only)
Sherrie Johnson, Fred's (via email only)