

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM HAMPTON COUNTY  
Court of Common Pleas  
The Honorable Perry M. Buckner, III

Case No. 2015-001947

RECEIVED  
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SC Court of Appeals

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.

RESPONDENTS' RETURN TO APPELLANT'S PETITION FOR REHEARING

Pursuant to Rules 220 and 240(e), SCACR, and the Court's November 30, 2018 letter requesting a return to Appellant's petition for rehearing, Respondents submit this return. On November 4, 2018, the Court issued Opinion No. 5604 affirming the decision of the lower court. The law and record support the Court's Opinion, and Appellant fails to show any point overlooked or misapprehended by the Court. Therefore, the Court should deny the petition for rehearing.

For brevity, Respondents incorporate the Final Brief of Respondents and do not repeat here the factual and procedural background.

**I. THE COURT CORRECTLY ANALYZED FRED'S LEGAL DUTY TO ITS CUSTOMERS**

Appellant Fred's, Inc., incorrectly argues that the Court misapprehended its legal duty and misapplied the law. To the contrary, Fred's continues to misstate Plaintiffs' cases against it.

Significantly, Fred's does not challenge the Court's holdings as to the scope of the Channeling Injunction and release. For example, it does not challenge the holdings that (1) "not all personal injury claims are subject to the release and Channeling Injunction; rather, the release and injunction are only applicable to the extent the Trust has assumed liability for a particular claim"; (2) "a Vendor is protected by the release and injunction only to the extent a claim is covered by a Participating Insurer policy or as to which a Vendor could seek indemnity against Blitz"; (3) "only claims asserted against a Participating Insurer are subject to the Channeling Injunction and release"; and (4) the Bankruptcy Order does not intend "for a Vendor to be absolved of its own allegedly negligent conduct, even if related to a Blitz product." *Hazel v. Fred's, Inc.*, Op. No. 5604 (S.C. Ct. App. filed November 7, 2018) (Shearouse Adv. Sh. No. 44 at 13-14). Rather, Fred's argues that the Court should have construed Plaintiffs' negligence cause of action as a product liability claim, thus bringing the claim within the scope of the product liability policy that is a Participating Insurer.

The only cause of action against Fred's is a general negligence cause of action for Fred's own negligence in selling a product it knew to be dangerous. This is not a product liability action. Fred's cannot contort Plaintiffs' cases to obtain absolution for liability greater than that received by the bankrupt party—Blitz—when Fred's paid no money into the Trust in consideration of its

own liability. Fred's argument incorrectly interprets the Court's Opinion and incorrectly states the applicable law.

First, Fred's discussion of the Court's analogy demonstrates a misinterpretation of the Opinion. (Pet. pp. 5-6). The Court does not rely on the analogy of a gas can falling off of a shelf to hold that Plaintiffs' claims are not enjoined. The Court used the analogy to show that even Fred's acknowledges that not every claim related to a Blitz gas can is subject to the injunction. *Hazel v. Fred's, Inc.*, Op. No. 5604 (S.C. Ct. App. filed November 7, 2018) (Shearouse Adv. Sh. No. 44 at 14) ("Fred's acknowledges that not all claims relating to a Blitz product would be subject to the injunction as a products liability claim, such as, for example, if Fred's knowingly stocked its shelves with misshapen Blitz gas cans that then fell on the head of an unassuming customer."). The analogy is not the basis of the Court's holding that Plaintiffs' claims are not enjoined. The significant point is that Plaintiffs' general negligence claims are based on Fred's own conduct, a holding which Fred's does not challenge in its petition.

Second, Fred's incorrectly asserts that the only possible duty related to the dangerous nature of a product that it could owe to a consumer is a duty based in product liability. (Pet. pp. 6-7). This is legally incorrect and implicitly argues that Fred's is somehow exempt from general negligence duties of reasonable care to its customers. Plaintiffs' negligence claims against Fred's are a general negligence claim. Fred's cannot recharacterize Plaintiffs' claims as product liability to avoid liability. "The character of an action is primarily determined by the allegations contained in the complaint." *Stoneledge at Lake Keowee Owners' Ass'n v. Clear View Constr., LLC*, 413 S.C. 615, 620, 776 S.E.2d 426, 429 (Ct. App. 2015) (internal quotation marks omitted). "It is well established that the plaintiff is the master of his complaint." *Chavis v. Fid. Warranty Servs.*, 415 F. Supp. 2d 620, 627 (D.S.C. 2006) (internal quotation marks omitted); *see also Morrow v.*

*Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 539, 773 S.E.2d 144, 146 (2015) (“The effect of this order is to prevent the [Plaintiffs] from being architects of their own complaint . . . .”). Plaintiffs, as the masters of the complaints, plead a general negligence action.

Stated simply, Fred’s urges this Court to hold that any claim related to the dangerous nature of a product is a product liability claim. The fallacy of this position is demonstrated by the following example: Blitz notifies Fred’s that Blitz’s gas cans may be defective and should not be sold; Fred’s sells the gas cans any way and someone is injured. In that example, the injured person’s claim against Fred’s relates to the dangerous nature of the gas can but is based on Fred’s own conduct for selling a product it knew to be dangerous. This is a separate and distinct theory of liability from a product liability action, which is based on a manufacturing, design, or warning defect. *See Watson v. Ford Motor Co.*, 389 S.C. 434, 444, 699 S.E.2d 169, 174 (2010) (“[T]here are three defects a plaintiff in a products liability lawsuit can allege: 1) a manufacturing defect, 2) a warning defect, and 3) a design defect.”). The Court should reject Fred’s attempt to mischaracterize Plaintiffs’ complaint.

The Court’s finding that the general negligence cause of action is not a product liability action is sufficient to affirm the lower court’s Order. Fred’s seems to argue the merits of whether a plaintiff may assert a general negligence action against it for knowingly selling a dangerous product. However, the merits of Plaintiffs’ Amended Complaints are not at issue in this appeal. Therefore, the Court need go no further than its finding that the remaining claim is not a product liability claim. Regardless, the law supports a general negligence action against a seller.

A seller owes a duty to its customers to not sell products it knows or should know are dangerous. “Duty is generally defined as the obligation to conform to a particular standard of conduct toward another.” *Huggins v. Citibank, N.A.*, 355 S.C. 329, 333, 585 S.E.2d 275, 277

(2003) (internal quotation marks omitted) (citing *Prosser and Keaton On the Law of Torts* § 53 (5th ed. 1984) (“ . . . ‘duty’ is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff; and in negligence cases, the duty is always the same - to conform to the legal standard of reasonable conduct in the light of the apparent risk. What the defendant must do, or must not do, is a question of the standard of conduct required to satisfy the duty.”)). “The duty of care is that standard of conduct the law requires of an actor in order to protect others against the risk of harm from his actions. It embodies the principle that the plaintiff should not be called to suffer a harm to his person or property which is foreseeable and which can be avoided by the defendant’s exercise of reasonable care.” *Snow v. Columbia*, 305 S.C. 544, 554, 409 S.E.2d 797, 803 (Ct. App. 1991). Plaintiffs allege that Fred’s owes a duty to its customers to sell safe products and stop selling products it knows or should know are unsafe. These allegations are of a general negligence claim that is supported by the law.

Finally, Fred’s citation to and reliance on *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995), is misplaced. (Pet. pp. 6-7). *Bragg* does not state that any case related to a product is always a product liability action. *Bragg* did not even involve a claim against a seller but specifically noted that the seller settled with the plaintiff and the case proceeded against only the manufacturer. 319 S.C. at 534 n.1, 462 S.E.2d at 323 n.1. Fred’s quotes the following language from *Bragg*: “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”, 319 S.C. at 539, 462 S.E.2d at 326. (Pet p. 7). However, Fred’s omits the rest of the sentence from *Bragg*: “and, unlike strict liability, the focus is on the conduct of the seller or manufacturer, and liability is determine according to fault.” 319 S.C. at 539, 462 S.E.2d at 326. As the remainder of the sentence makes clear, the issue in *Bragg* was the difference of proof for strict liability and

negligence product liability causes of action. *Bragg* does not hold that a negligence product liability action is the only action that may be asserted against the seller of a product. Therefore, nothing in the Court's Opinion in this case is a failure "to follow the precedent" in *Bragg* because there is no precedent in *Bragg* stating that the only negligence a plaintiff may assert against a seller of a defective product is a product liability action. (Pet. p. 7). Rather, in this case, Fred's duty is defined by the law of general negligence that is equally applicable to all defendants.

The Court correctly analyzed Fred's legal duty and correctly applied the law.

## **II. THE COURT CORRECTLY HELD THERE IS NO INDEMNIFICATION OR IDENTITY OF INTEREST BETWEEN BLITZ AND FRED'S AS TO PLAINTIFFS' CLAIMS**

As to indemnification and identify of interest, Fred's simply repeats its argument that the language of the Vendor Agreement encompasses any and every claim related to a Blitz gas can. Fred's does not dispute the Court's holding that "a contract of indemnity will not operate to indemnify the indemnitee against losses for its own negligence unless the intention is expressed in clear and unequivocal terms." *Hazel v. Fred's, Inc.*, Op. No. 5604 (S.C. Ct. App. filed November 7, 2018) (Shearouse Adv. Sh. No. 44 at 17) (internal quotation marks omitted). It simply argues that the language of the Vendor Agreement is so broad that it must encompass Fred's own negligence. (Pet. p. 17). However, this argument would make the presumption against indemnification for one's own negligence superfluous. The Vendor Agreement does not say anywhere that Blitz agrees to indemnify Fred's for its own negligence. The law requiring a clear and unequivocal expression of intent to indemnify for one's own negligence existed prior to the 2005 Vendor Agreement. *See Fed. Pac. Elec. v. Carolina Prod. Enters.*, 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989) ("[A] contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in clear and unequivocal terms."). "[C]itizens are presumed to know the law and are charged with

exercising reasonable care to protect their interests.” *Ahrens v. State*, 392 S.C. 340, 355, 709 S.E.2d 54, 62 (2011) (internal quotation marks omitted). Fred’s and Blitz chose not to use any language regarding Fred’s own negligence despite the law known to them. The Court did not misapprehend Fred’s argument or the law.

The Court correctly held that there is no identity of interest between Fred’s and Blitz as to Plaintiffs’ claims. Fred’s argument to the contrary is based solely on Blitz’s alleged “contractual obligation to defend and hold harmless.” (Pet. p. 8). Given that the Court found there was no such obligation in this case, it may easily reject Fred’s argument. Regardless, Fred’s is incorrect when it says that “there can be no conclusion other than one that finds Blitz as the real party defendant.” (Pet. p. 8). Courts have permitted claims related to the defective nature of Blitz gas cans to proceed against sellers. *See Gomez v. Scepter Holdings, Inc.*, 2017 U.S. Dist. LEXIS 160567, \*8 (M.D. Ga. Sept. 29, 2017) (denying a motion to dismiss where “the allegations are based on [seller]s’ own alleged decision to distribute, without an adequate warning, the Blitz gas containers . . . even though [they] both allegedly knew the gas containers were defective”); *Al-Shara v. Wal-Mart Stores, Inc.*, 2012 U.S. Dist. LEXIS 47228 (E.D. Mich. Apr. 3, 2012) (holding a plaintiff may continue claims against Wal-Mart, for its alleged independent negligence, even where Blitz had “accepted tender of defense and indemnification” because “where independent claims are asserted . . . it is not at all clear that Blitz’s indemnification will indeed be absolute”). The Court correctly held that there is no identity of interest between Fred’s and Blitz as to Plaintiffs’ general negligence claims based on Fred’s knowledge and conduct.

### **III. THE COURT PROPERLY CONSIDERED THE AVAILABLE INSURANCE INFORMATION**

The Court’s discussion and consideration of the insurance policies was proper and based on actual information in the Record on Appeal. The information in the Record on Appeal included

a certificate of liability insurance with insurance types and limits, and the list of Participating Insurers. (R. pp. 94-95, 235). The Court properly used only this information to reach its decision, Rule 220(c), SCACR (stating the Court “may affirm any ruling . . . upon any ground(s) appearing in the Record on Appeal.”); and plainly stated that it did not consider the “exact coverage” of the policies in reaching its decision, Rule 210(h), SCACR (“Except as provided by Rule 212 and Rule 208(b)(1)(C) and (2), the appellate court will not consider any fact which does not appear in the Record on Appeal.”).<sup>1</sup> Fred’s does not contend that the Opinion states anything incorrect about the insurance policies discussed. Rather, Fred’s takes issue only with the Court’s conclusion that Plaintiffs’ claims are asserted against a Non-Participating Insurer. (Pet. p. 9). However, nothing about this conclusion is based on the content of an insurance policy. It is based on the Court’s holding that Plaintiffs’ general negligence claims against Fred’s are not product liability claims. Fred’s does not (and never did) argue that the product liability policy that is a Participating Insurer provides coverage for a general negligence action based on Fred’s own negligence. Therefore, consideration of any content of insurance policies not in the Record on Appeal did not affect the outcome of the Court’s decision.

### CONCLUSION

The evidence in the record before this Court supports the lower court’s decision and Fred’s identifies no point overlooked or misapprehension or error of law. For the reasons set forth above, in the Court’s Opinion, and in Respondents’ brief, Respondents request the Court deny Appellant’s petition for rehearing.

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<sup>1</sup> Fred’s discussion of this issue in its petition does not contain a single citation to authority. The Court may reject it for this reason alone. *See* Rule 221(a), SCACR (“A petition for rehearing shall be in accordance with Rule 240 . . . .”); Rule 240(c)(2), SCACR (“Each . . . petition shall including the following: . . . (2) A memorandum with citation to authorities in support of the motion.”).

*Kathleen C. Barnes*

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December 6, 2018

# BARNES

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December 6, 2018

Via U.S. Mail

The Honorable Jenny Abbott Kitchings  
Clerk of Court for the Court of Appeals  
Post Office Box 11629  
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DEC 10 2018  
SC Court of Appeals

Re: *Alice Hazel, as GAL for Jacob N., and Melinda Cook v.  
Fred's, Inc.*  
Consolidated Appellate Case No. 2015-001947

Dear Ms. Kitchings:

Enclosed for filing please find the original and seven (7) copies of the Respondents' Return to Appellant's Petition for Rehearing in the above-referenced case. Also enclosed is a proof of service of the Return. Please return the additional copy to me in the enclosed self-addressed, stamped envelope.

By copy of this letter, I am serving all counsel of record with a copy of the same.

If you have any questions, please do not hesitate to contact me. Thank you.

With kind regards, I am,

BARNES LAW FIRM, LLC



Kathleen C. Barnes

Enclosures

cc: Matthew C LaFave  
Mark D. Ball (via e-mail)

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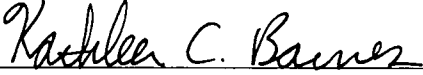
Of Whom Fred's, Inc. is the .....Appellant.

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing *Respondents' Return to Appellant's Petition for Rehearing* has been served upon the following counsel of record by mailing one copy by United States Mail, addressed as shown below this 6<sup>th</sup> day of December, 2018.

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