THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM HAMPTON COUNTY
Perry M. Buckner, Circuit Court Judge

Op. No. 5604
(S.C. Ct. App. filed November 7, 2018)

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 — Petitioner.

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 — Petitioner.

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

Matthew C. LaFave
Crowe LaFave, LLC
Post Office Box 1149
Columbia, South Carolina 29202
(803) 724-5727
Attorney for Petitioner

Mark D. Ball
Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A.
Post Office Box 457
Hampton, South Carolina 29924
(803) 943-2111
Attorney for Respondents

Kathleen Chewning Barnes
Barnes Law Firm, LLC
Post Office Box 897
Hampton, South Carolina 29924
(803) 943-4529
Attorney for Respondents

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

v.

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

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

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

Appellate Case No. 2015-001947

Appeal From Hampton County
Perry M. Buckner, III, Circuit Court Judge

Opinion No. 5604
Heard October 4, 2018 – Filed November 7, 2018

AFFIRMED

Matthew Clark LaFave, of Crowe LaFave, LLC, of Columbia, for Appellant.

Mark David Ball, of Peters Murdaugh Parker Eltzroth & Detrick, PA, and Kathleen Chewning Barnes, of Barnes Law Firm, LLC, both of Hampton, for Respondent.

LOCKEMY, C.J.: Melinda Cook, as the mother of Jacob N., and Alice Hazel, as guardian ad litem (collectively, Respondents), brought separate actions against Fred's, Inc. to recover for injuries Jacob N. sustained when a portable gasoline container exploded. Fred's moved to permanently enjoin or stay the claims, arguing they were subject to an injunction established during bankruptcy proceedings. The circuit court denied the motion. We affirm.

FACTS

For over two decades, Blitz USA, Inc. manufactured and distributed plastic gasoline containers, at one point becoming the largest producer in the country. Fred's is a Tennessee-based chain store operating in South Carolina and throughout the southeast. In 2005, as part of an agreement to sell Blitz gas cans, Blitz and Fred's entered into a Vendors Hold Harmless and Indemnity Agreement (Indemnity Agreement). The Indemnity Agreement stated that in exchange for the purchase and retail of its merchandise, Blitz would

> protect, defend, hold harmless, and indemnify [Fred's] from and against any and all claims . . . arising out of any actual or alleged . . . death of or injury to any person . . . resulting or claimed to result in whole or in part from any actual or alleged defect in [Blitz's] Products.

Additionally, Fred's was a certificate holder on several of Blitz's insurance policies—a commercial general liability (CGL) policy, a products liability policy, and an excess liability policy.

In November 2010, Cook's five-year-old son, Jacob N., was severely burned when a plastic gas container exploded and sprayed him with fuel. The gas can in question was manufactured by Blitz and reportedly purchased from Fred's. In November 2013, Respondents commenced separate lawsuits in Hampton County, both naming Blitz and Fred's as defendants.[1] The complaints asserted claims

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[1] The actions have been consolidated on appeal.

against Blitz for products liability, strict liability, and breach of warranty, as well as against Fred's for breach of warranty, strict liability, and negligence. As to Blitz, it was alleged the gas can suffered from a defect that allowed gasoline vapors outside the spout to ignite and mix with the contents of the fuel container, causing a "flashback" explosion. As to Fred's, Respondents claimed Fred's knew of the containers' propensity to explode but continued to sell them in its stores anyway.

Prior to Respondents filing suit, however, Blitz was already facing an onslaught of potential liability from numerous incidents involving its gas cans. Consequently, in November 2011, Blitz filed for Chapter 11 Bankruptcy in the United States Bankruptcy Court for the District of Delaware (the Bankruptcy court). Through its subsequent liquidation and reorganization, Blitz and its insurers sought to settle numerous pending, and possible future, products liability and personal injury claims.

In January 2014, the Bankruptcy court issued an order (the Bankruptcy order) approving Blitz's First Amended Joint Plan of Liquidation (the Plan). The Plan established the Blitz Personal Injury Trust (the Trust), a single pool of assets from which to provide compensation for "Blitz Personal Injury Claims." The Trust ultimately yielded over one hundred-fifty million dollars paid by Wal-Mart—the largest retailer of Blitz cans—and "Participating Insurers" of Blitz. Among the Participating Insurers were the providers of the products liability policy and excess liability policy for which Fred's was a certificate holder.

The Plan defined Blitz Personal Injury Claims as

> all claims for damages or other relief for, based upon, arising out of, relating to, or in any way involving bodily injury . . . and shall include asserted and unasserted claims, whether known or unknown, based upon, arising out of, or in any way involving the products, premises or operations of [Blitz] . . . and without any limitation of the foregoing shall include . . . any direct action claims by a claimant against the participating insurers.

According to the terms of the Bankruptcy order, no such claims could be maintained against Blitz or any "Released Parties"; instead, the "the sole and exclusive remedies of Blitz Personal Injury Trust Claims" would be against the Trust. Released Parties included Blitz, "the 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 [Blitz]'s products." The Plan provided that

> [a] Vendor . . . sued on a Blitz Personal Injury Claim might be entitled to coverage under the Participating Insurer Policies. If any of the foregoing are insureds under the respective policies, they could tender the Blitz Personal Injury Claims to the Participating Insurers for defense and indemnity. Accordingly, any settlement relating to, and the buy-back of, the Participating Insurer Policies must also resolve all claims against Vendors . . . to the same extent such claims are being resolved against [Blitz], which justifies the inclusion of Vendors . . . as [Released] Parties under the [] Plan.

The Bankruptcy order stated that the release of certain parties from liability was appropriate, "[i]n view of the substantial contribution to the [Trust]," and that Blitz and the Released Parties had "[a]n identity of interests . . . such that a claim asserted against a [Released] Party gives rise to a claim against [Blitz] by contract and/or operation of the law of indemnity and/or contribution."

In order to facilitate the settlement of Blitz Personal Injury Claims, the Bankruptcy order imposed a "Channeling Injunction," defined as "an injunction . . . that . . . (i) permanently enjoins and channels to the [] Trust all Blitz Personal Injury Claims, and (ii) permanently enjoins the prosecution of all Blitz Personal Injury Claims against any Released Party." The Bankruptcy order stipulated, however, that the Channeling Injunction "shall not enjoin . . . the rights of any Entity to assert any claim, debt, obligation, or liability for payment against a Non-Participating Insurer."

Following the Bankruptcy court's approval of the Plan in early 2014, Respondents filed a claim with the Trust and received $2,872,315 to settle their suit against Blitz. Respondents subsequently amended their complaint to remove all other causes of action except for a general negligence claim against Fred's.
On August 26, 2014, Fred's moved to permanently enjoin or alternatively to stay the proceedings, arguing Respondents' claims were Blitz Personal Injury Claims subject to the Channeling Injunction. Additionally, Fred's contended it qualified as a Released Party under the Plan because it was a Vendor insured under a Participating Insurer policy—specifically, Blitz's products liability policy. The circuit court disagreed, finding the Plan did not operate to release and enjoin

claims against a Vendor for its own independent negligence and which would be recovered from a Non-Participating Insurer.

Fred's filed a motion to reconsider, arguing the negligence claim was really a products liability claim and was therefore covered under Blitz's products liability policy. Fred's also contended it was entitled to indemnification from Blitz pursuant to the 2005 Indemnity Agreement. The circuit court denied the motion. This appeal followed.

STANDARD OF REVIEW

"The party seeking an injunction has the burden of demonstrating facts and circumstances warranting an injunction." *Strategic Res. Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). "An order granting or denying an injunction is reviewed for [an] abuse of discretion. An abuse of discretion occurs when the trial court's decision is unsupported by the evidence or controlled by an error of law." *Id.* "As a general rule, judgments are to be construed like other written instruments. The determinative factor is the intent of the court, as gathered, not from an isolated part thereof, but from all the parts of the judgment itself." *Doe v. Bishop of Charleston*, 407 S.C. 128, 135, 754 S.E.2d 494, 498 (2014).

LAW ANALYSIS

Initially, Respondents argue Fred's cannot appeal the circuit court's denial of its motion for a permanent injunction because Fred's only appealed the denial of its motion to reconsider. Respondents therefore assert the circuit court's ruling regarding the interpretation of the Bankruptcy order is the "law of the case" and the only issue properly before this court is whether the circuit court correctly ruled the negligence claim differed from a products liability claim. *See Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("An unappealed ruling is the law of the case and requires affirmance."). Contrary to Respondents' assertion, we believe Fred's motion to reconsider encompassed its objections to the circuit court's original ruling with regard to the motion for a permanent injunction. Accordingly, we decline to construe Fred's appeal of the motion to reconsider as a failure to appeal the circuit court's order denying the motion for an injunction pursuant to the Bankruptcy order.

Turning to the merits of the appeal, Fred's argues the circuit court erred in: (1) finding Respondents' negligence claim was outside the scope of the release and

Channeling Injunction, and (2) holding the claim did not trigger the right of indemnification in accordance with the Bankruptcy order and Indemnity Agreement.

I. The Channeling Injunction and Release

Fred's first contends the circuit court erred in finding Respondents' negligence claim was outside the scope of the Channeling Injunction and release. We disagree.

In support of its argument, Fred's directs this court to the definition of Blitz Personal Injury Claims, which encompasses "all claims for damages or other relief for, based upon, arising out of, relating to, or in any way involving bodily injury . . . based upon, arising out of, or in any way involving the products, premises or operations of [Blitz]." The crux of Fred's position is that regardless of how Respondents frame their theory of recovery, the underlying claim relates to, and is factually inseparable from, a Blitz product. The implication therefore is that any injury related to a defective product or the conduct of Blitz is a Blitz Personal Injury Claim and falls within the ambit of the Channeling Injunction and release.

The Bankruptcy order is clear, however, that 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. *See Doe v. Bishop of Charleston*, 407 S.C. at 135, 754 S.E.2d at 498 ("The determinative factor is the intent of the court, as gathered, not from an isolated part thereof, but from all parts of the judgment itself."). As the Bankruptcy court's findings illustrate, the Trust was funded through the buyback of the Participating Insurer polices. In turn, a release from liability was tendered to the Participating Insurers and their policy holders "[i]n view of the substantial contribution to the [Trust]." This also had the effect of channeling claims to the Trust that could have been asserted against those policies. As to Vendors, their liability was discharged "to the same extent such claims are being resolved against [Blitz], which justifie[d] the inclusion of Vendors . . . as [Released] Parties under the [] Plan." Said another way, 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.

It is undisputed that Fred's was a certificate holder on a products liability policy issued by a Participating Insurer; however, Fred's CGL provider was a Non-Participating Insurer under the Plan. The Bankruptcy order dictates that only

claims asserted against a Participating Insurer are subject to the Channeling Injunction and release. Furthermore, the Bankruptcy order specifically provides that it "shall not enjoin . . . the rights of any [e]ntity to assert any claim, debt, obligation, or liability for payment against a Non-Participating Insurer." Because Fred's CGL provider is a Non-Participating Insurer, the release and injunction do not protect Fred's from claims asserted against that policy.

In their amended complaint, Respondents allege Fred's was negligent for continuing to sell Blitz gas cans after it learned of the cans' propensity to explode. Respondents argue that because the allegations pertain to the general negligence of Fred's, it is covered by Fred's CGL policy, notwithstanding the fact it involves a Blitz product. On the other hand, Fred's maintains this is a products liability claim that naturally falls under the ambit of the products liability policy because the injury was caused by a defect in a Blitz product. Although the parties appear to agree the relevant question is whether Respondents' negligence claim is within the scope of coverage afforded under either the products liability policy or the CGL policy, these policies are not in the record before us. Therefore, any effort to determine the exact coverage afforded under the policies would be a speculative exercise.

Nevertheless, we do not believe this is the type of claim that was intended to be categorically enjoined under the Bankruptcy order. 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. Similarly, while in a literal sense Respondents' claim relates to a product of Blitz—if not for the gas can exploding, Jacob N. would not have been injured—the claim is directed at the knowledge and conduct of Fred's in its particular dealings with Respondents, not the defective nature of the can. We do not believe the Bankruptcy order intended for a Vendor to be absolved of its own allegedly negligent conduct, even if related to a Blitz product. Because Respondents' claim was asserted against, and only seeks to recover from, a Non-Participating Insurer, we agree with the circuit court that Respondents' negligence claim is outside the scope of the release and Channeling Injunction. *See City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund*, 382 S.C. 535, 543, 677 S.E.2d 574, 578 (2009) ("Questions of coverage and the duty of a liability insurance company to defend a claim brought against its insured are determined by the allegations of the complaint."); *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 197, 684 S.E.2d 541, 546 (2009) ("The standard CGL policy grants the insured broad liability

coverage for property damage and bodily injury which is then narrowed by a number of exclusions.").

Moreover, we believe this reading of the Bankruptcy order is consistent with the power of the Bankruptcy court under Chapter 11 "to stay and enjoin proceedings or acts against non-debtors where such actions would interfere with, deplete or adversely affect property of [the debtor's] estate[]." *In re Johns-Manville Corp.*, 26 B.R. 420, 436 (Bankr. S.D.N.Y. 1983), *aff'd*, 40 B.R. 219 (S.D.N.Y. 1984), *appeal allowed, decision vacated in part*, 41 B.R. 926 (S.D.N.Y. 1984). While the Bankruptcy court is charged with adjudicating claims against a debtor, and may enjoin claims against non-debtors for the purpose of preserving the debtor's estate, those powers do not operate to limit third party claims against non-debtors that do not affect a debtor's property. *See* 11 U.S.C. § 105(a) ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."); *In re Millennium Seacarriers, Inc.*, 419 F.3d 83, 92 (2d Cir. 2005) ("Congress has granted the . . . courts expansive bankruptcy jurisdiction to adjudicate claims against a debtor's estate."); *In re Johns-Manville Corp.*, 600 F.3d 135, 146 (2d Cir. 2010) ("[A] bankruptcy court only has jurisdiction to enjoin third-party non-debtor claims that directly affect the *res* of the bankruptcy estate."); *In re Mkt. Square Inn, Inc.*, 163 B.R. 64, 66 (Bankr. W.D. Pa. 1994) ("The bankruptcy laws do not operate as a method to relieve a non-debtor from potential liabilities stemming from lawsuits against them."). Here, the Bankruptcy order provides that claims not affecting Blitz or Blitz's estate would not be channeled to the Trust. Fred's, a non-debtor and non-party to the bankruptcy proceeding, acknowledges that any judgment against it would not directly affect Blitz or the Trust. Accordingly, we affirm the circuit court on this issue.

II. Indemnification

Fred's argues the circuit court erred in failing to grant an injunction or stay because Respondents' lawsuit, if successful, exposes Blitz's estate to claims by Fred's for indemnification. Relying on *A.H. Robins Co. Inc. v. Piccinin*, 788 F.2d 994 (4th Cir. 1986), Fred's argues it has an "identity of interest" with Blitz by virtue of the Indemnity Agreement such that a claim against it will be a claim against Blitz. We disagree.

In *A.H. Robins*, numerous plaintiffs brought products liability actions in federal and state courts against the manufacturer of an allegedly defective contraceptive device, two of its corporate officers, and its products liability insurer. 788 F.2d at 996. Confronted with these claims, the manufacturer, A.H. Robins, filed a petition

under Chapter 11 of the Bankruptcy Code, which automatically stayed all lawsuits against the company. *Id.* at 998. Thereafter, several plaintiffs sought to sever their actions against A.H. Robins and proceed against the non-debtor codefendants. *Id.* In response, A.H. Robins moved to enjoin or stay the claims on the basis that any recovery in the separate actions threatened A.H. Robins' bankruptcy estate due to the company's obligation to indemnify the codefendants. *Id.* at 998-99. The bankruptcy court agreed and granted the stay, and the district court affirmed. *Id.* at 999.

On appeal to the Fourth Circuit Court of Appeals, plaintiffs argued the bankruptcy court lacked jurisdiction to grant a stay of suits against non-debtor codefendants. *Id.* But in affirming the district court, the Fourth Circuit noted that while it is atypical for a bankruptcy court to enjoin claims against non-debtor codefendants, the case presented the "unusual situation" in which "there is such identity between the debtor and the third-party defendant[s] that the debtor may be said to be the real party defendant." *Id.* Specifically, the two corporate officers were entitled to indemnification under the corporate by-laws and statutes of Virginia, the state of incorporation, and were also named as additional insureds under the products liability policy. *Id.* at 1007. Accordingly, the Fourth Circuit held that because the actions against those codefendants would diminish A.H. Robins' sole remaining asset, its products liability policy, the stay was appropriate. *Id.* at 1008.

Respondents contend *A.H. Robins* can be distinguished from the instant case for several reasons. First, the central issue in *A.H. Robins* was the jurisdictional authority of the Bankruptcy court to enjoin or stay claims against non-debtor codefendants; here, Respondents do not challenge the authority of the Bankruptcy court to issue an injunction, they only seek to determine its applicability. Additionally, the *A.H. Robins* court noted the "unusual situation" creating the "identity of interests" between a debtor and codefendant does not arise "where the nondebtor's liability rests upon his own breach of duty." *Id.* at 999. Respondents argue that is the exact situation presented in this case—a claim against Fred's for its own breach of duty.

We agree with Respondents that Fred's has not shown this is the type of "unusual situation" in which Blitz would become the real party defendant. Here, Respondents assert a claim against Fred's based on an alleged independent legal duty and which does not require Blitz to be a necessary party. The Fourth Circuit expressly distinguished circumstances such as this in *A.H. Robins*: "the situation where the third-party defendant was independently liable as, for example, . . . where the nondebtor's liability rests upon his own breach of duty . . . in such a case

the automatic stay would clearly not extend to such non debtor." 788 F.2d at 999 (internal quotation marks and citation omitted). Furthermore, this is not a situation where a judgment against Fred's would in effect be a judgment against Blitz. Fred's, unlike the corporate officers of A.H. Robins, is a separate entity to which Blitz has no statutory obligation to indemnify.

Moreover, under South Carolina and Delaware law, 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." *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."); *Am. Ins. Grp. v. Risk Enter. Mgmt., Ltd.*, 761 A.2d 826, 829 (Del. 2000) ("While a contract for indemnification may provide for indemnification for the indemnitee's own negligence, that intention must be evidenced by unequivocal language."). In this case, we do not believe there is a clear and unequivocal expression of an intention to indemnify Fred's for its own negligence. To the contrary, the Indemnity Agreement does not mention negligence at all and we cannot otherwise discern an intent to indemnify Fred's for its own wrongdoing, as was alleged here. *See Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, No. 2016-000076, 2018 WL 3748616, at 8 (S.C. Ct. App. Aug. 8, 2018), *reh'g denied* (Oct. 18, 2018) ("Although there is no verbatim phrase that must be used to meet the clear and unequivocal standard, there must be some language in an indemnity clause that clearly shows the parties' intent to absolve the indemnitee of the consequences of its own [] negligence.").

Finally, as to the "identity of interests" language included in the Bankruptcy order, we believe it was meant to protect claims against the Trust by those who might seek to recover indirectly through indemnity from a Participating Insurer. Clearly any claims asserted against a party that would then be taken from the Blitz estate support the inclusion of that party in the Plan; however, as discussed above, any judgment against Fred's would not result in funds being taken from the Trust. Accordingly, we find Fred's and Blitz do not have an identity of interests.

CONCLUSION

Based on the foregoing, we find the circuit court properly ruled Respondents' negligence claim was outside the scope of the Bankruptcy order and that Fred's is

not otherwise entitled to indemnity from Blitz. Accordingly, the order of the circuit court is

AFFIRMED.

HUFF and HILL, JJ., concur.

IN THE STATE OF SOUTH CAROLINA
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APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Perry M. Buckner, Circuit Court Judge

Case No. 2015-001947

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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.

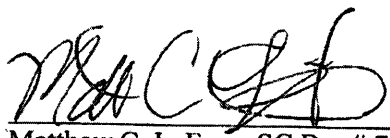
V. The Court Erroneously Addresses and Considers Policies not Included in the Record on Appeal.

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,



Matthew C. LaFave, SC Bar # 75365
Crowe LaFave, LLC
P.O. Box 1149
Columbia, SC 29202
Phone: (803) 724.5727

Attorney for Appellant

November 20, 2018
Columbia, South Carolina

The South Carolina 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.

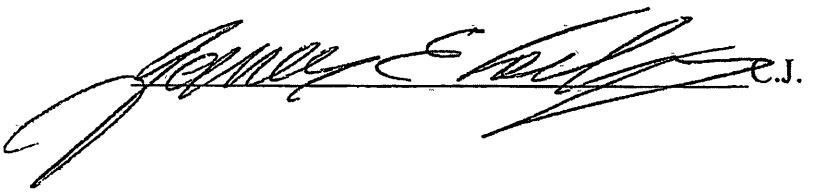
Blitz U.S.A., Inc., Fred's, Inc., Tiger Express Varnville LLC, and James Nix, Defendants,

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

Appellate Case No. 2015-001947

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.


C.J.

Thomas E. Huff J.

J.

Columbia, South Carolina

cc:
Matthew Clark LaFave, Esquire
Mark David Ball, Esquire
Kathleen Chewning Barnes, Esquire

FILED
January 17, 2019