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

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.

FINAL BRIEF OF RESPONDENTS

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COUNTER STATEMENT OF ISSUES ON APPEAL

I. Whether the trial court correctly ruled that Respondents' general negligence claim is not a product liability claim.

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III. Whether the trial court correctly interpreted the scope of the Bankruptcy Order.

IV. Whether the trial court correctly held the Vendor Hold Harmless Agreement between Fred's and Blitz U.S.A. does not affect the scope of the Bankruptcy Order.

STATEMENT OF THE CASE

This is a consolidated appeal from the trial court's Orders denying Appellant Fred's, Inc.'s ("Fred's") motions to reconsider the court's denial of Fred's motions to enjoin. Fred's does not appeal from the trial court's orders denying the motions to enjoin. *See* R. pp. 633-34.

On November 5, 2013, Respondents Alice Hazel, as GAL for Jacob N., ("Hazel") and Melinda Cook ("Cook") (collectively "Respondents") filed Complaints in the Hampton County Court of Common Pleas against Blitz U.S.A., Inc.; Fred's; Tiger Express Varnville, LLC; and James Nix. (R. pp. 13-31). The actions arise out of a severe burn injury suffered by Jacob N., Cook's minor son, as a result of a defective gas can manufactured by Blitz U.S.A. and sold by Fred's. *Id.* On February 5, 2014, Fred's served its Answers to the Complaints. (R. pp. 32-55). On August 26, 2014, Fred's filed a Notice of Motion and Motion to Permanently Enjoin or Alternatively to Stay Proceedings as to Defendant Fred's Stores of Tennessee, Inc., in each case. (R. pp. 56, 266). The Honorable Perry M. Buckner held a hearing on the identical motions on October 27, 2014. Respondents submitted a Memorandum in Opposition to Defendant Fred's Motion to Permanently Enjoin or Alternatively to Stay Proceedings. (R. pp. 2, 270-83, 637-40).

On November 18, 2014, the Court filed an Order denying Fred's motions. (R. pp. 2-6). On January 21, 2015, Fred's filed motions to reconsider. (R. pp. 621-32). The Court held a hearing

on the motions on June 15, 2015, and denied the same in an Order filed July 9, 2015. (R. pp. 7-12). On September 10, 2015, Fred's filed notices of appeal stating it appealed only the Order denying Fred's motions to reconsider. (R. pp. 633-34). This Court consolidated the appeals.

FACTS

On November 5, 2010, Defendant James Nix, the father of minor Jacob N., poured kerosene from a five-gallon Blitz gas container onto a pizza box in a burn pile in the yard. (R. pp. 14, 23 ¶¶ 6, 7). As Mr. Nix poured the kerosene, a "flash ignition" occurred in which the flame of the fire entered the gas container through the unguarded pour spout. (R. p. 23 ¶ 9). This caused the gas container to explode, spraying fuel onto Jacob N., a five-year-old who was standing a few feet behind his father. *Id.* at ¶ 7.

Jacob N.'s clothes caught on fire, and he suffered severe burn injuries to his legs, left arm, torso, buttocks, face, and neck. The burn injuries covered over 50% of his total body surface area. *Id.* at ¶ 10. Jacob N. underwent numerous skin grafts, laser surgery, and physical therapy. He has permanent scarring, pain, and limited range of motion.

The gas container that exploded was manufactured by Blitz U.S.A., Inc. ("Blitz"), and sold by Fred's. *Id.* at ¶ 8. Plastic gas cans manufactured by Blitz have been the subject of numerous lawsuits across the country because they cause flashback explosions like the one that injured Jacob N. The kerosene in the gas container was sold by Defendant Tiger Express Varnville, LLC. *Id.* at ¶ 9.

On November 5, 2013, Respondents filed separate actions arising out of the explosion and Jacob N.'s injuries. (R. pp. 13, 22). The Complaints included causes of action against (1) Blitz for product liability negligence, strict liability, and breach of warranty, (2) Fred's for general negligence, strict liability, and breach of warranty, (3) Tiger Express Varnville for general

negligence, strict liability, and breach of warranty, and (4) James Nix for general negligence. (R. pp. 13-31). On February 5, 2014, Fred's filed an Answer and Cross-claims. (R. pp. 32, 44). Fred's generally denied all allegations against it and asserted a cross-claim against Blitz for contractual indemnification. (R. pp. 32-54).

I. Blitz Filed for Bankruptcy

In 2011, Blitz and its related entities filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the District of Delaware, prompted by the filing of dozens of lawsuits arising out of its defective gas cans. (R. pp. 284, 293; *In re Blitz U.S.A., Inc., et al.*, 2014 Bankr. LEXIS 2461, 2014 WL 258976, Case No. 11-13603 (PJW) (Bankr. Del. Jan. 30, 2014)). Fred's is not a related entity of Blitz and was not a party to the bankruptcy proceeding.

On December 19, 2013, Blitz, and its affiliated entities, filed a *First Amended Joint Plan of Liquidation*, ("the Plan") to liquidate Blitz and create a single pool of assets from which to pay specific claims asserted against it and its insurance policies. (R. pp. 337-425). The Plan provided for a Blitz Personal Injury Trust to which Blitz Personal Injury Claims would be channeled for resolution and payment through the Trust. (R. pp. 343). The Trust was to be funded with over one hundred million dollars, paid by Wal-Mart and Participating Insurers of Blitz. (R. p. 291). Fred's did not pay any money to fund the Trust. Exhibits to the Plan include a list of numerous definitions, the Blitz Personal Injury Trust Agreement, and a list of the Participating Insurer Policies. (R. p. 428).

On January 30, 2014, the United States Bankruptcy Court for the District of Delaware issued its *Findings of Facts, Conclusions of Law and Order Confirming Debtors' and Official Committee of Unsecured Creditors' First Amended Joint Plan of Liquidation* ("Bankruptcy

Order").[1] (R. pp. 284-336; *In re Blitz*, 2014 Bankr. LEXIS 2461, 2014 WL 2582976 (Bankr. D. Del. Jan. 30, 2014)). The interpretation of the Bankruptcy Order is an issue in this appeal.

The Bankruptcy Order provides for over $163,000,000.00 to fund the Blitz Personal Injury Trust, paid by Wal-Mart and "Participating Insurers." (R. p. 291). The Participating Insurers' money was paid "through the buy-back of the Participating Insurer Policies." *Id.* ¶ H.(1)(a). The Participating Insurers paid the money "on behalf of themselves and all entities ***covered under the Participating Insurer Policies***." *Id.* (emphasis added). Relevant to this appeal, the Bankruptcy Order releases certain claims from liability and channels certain claims to the Blitz Personal Injury Trust. (R. pp. 312-16). Fred's claims absolution of liability based on its status as a certificate holder on a participating Blitz product liability policy. However, as discussed below, Respondents' general negligence claim against Fred's is not covered by any Participating Insurer Policy.

As to the release, the Bankruptcy Order states: "***Except as provided in the Plan***,[2] the transfer to . . . the Blitz Personal Injury Trust of the Blitz Personal Injury Trust Assets . . . shall . . . release all obligations of and bar recovery or any action against the Protected Parties . . . for or in respect of all Blitz Personal Injury Claims." (R. pp. 315-16) (emphasis added). It is necessary to define the capitalized phrases to understand and interpret the meaning of the Bankruptcy Order. A "Blitz Personal Injury Claim" is:

> All Claims for damages or other relief for, based upon, arising out of, relating to or in any way involving bodily injury and/or property damage that occurred on or

[1] The Bankruptcy Order "incorporated by reference" "the terms and provisions of the Plan" but the Order "shall control over the terms of the Plan . . . in the event of any inconsistency or ambiguity between the Plan and this Confirmation [Bankruptcy] Order." (R. p. 310 ¶ 6, p. 328 ¶ 33).

[2] This qualifying phrase means that there are some situations in which the release does not apply. As discussed below, this case presents one of those situations.

> before 12:01 AM CST on July 31, 2012, and shall include asserted claims, whether known or unknown, based upon, arising out of, or in any way involving the products, premises or operations of the Debtors and, without any limitation of the foregoing shall include any such claims against Wal-Mart . . . and any direct action claims ***by a claimant against the Participating Insurers.***

(R. p. 436) (emphasis added). A "Protected Party" includes, in relevant part, "the Debtors; . . . the Participating Insurers; [and] . . . Vendors." (R. p. 450). A "Participating Insurer" includes numerous specific insurers of Blitz that paid money to fund the Trust. (R. p. 448). "Debtors" is the Blitz entities, including Blitz Acquisition Holdings, Inc., Blitz Acquisition, LLC, Blitz U.S.A., Inc., and Blitz RE Holdings, LLC. (R. pp. 442, 432, 452). Finally, a "Vendor" is "[a]ny entity that, prior to the Effective Date, sold or distributed any product manufactured, sold, distributed or otherwise produced by the Debtors." (R. p. 453).

The limited extent to which a Vendor is included as a Protected Party is plainly stated in the Bankruptcy Order.

> A Vendor . . . sued on a Blitz Personal Injury Claim ***might be entitled to coverage under the Participating Insurer Policies. If*** any of the [Vendors] 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 . . . the Participating Insurer Policies must also resolve all claims against Vendors . . . ***to the same extent such claims are being resolved against the Debtors, which justifies the inclusion of the Vendors . . . as Protected Parties*** under the Plan.

(R. p. 295) (emphasis added). The Bankruptcy Order makes clear that Vendors are included as a Protected Party only "to the extent" a Blitz Personal Injury Claim is covered under a Participating Insurer Policy and is resolved against Blitz as a Debtor. In this case, the remaining general negligence claim against Fred's is not covered under a Participating Insurer Policy and does not implicate any liability of Blitz.

As to the channeling injunction, the Bankruptcy Order states:

> [A]ll 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.

(R. p. 313). There are numerous exceptions to the channeling injunction, including one applicable in this case. (R. pp. 314-15). The "Channeling Injunction shall not enjoin: . . . (6) the rights of any Entity to assert any claim, debt, obligation or liability for payment against a Non-Participating Insurer." *Id.* A "Non-Participating Insurer" includes some specific insurance companies "and any other Blitz Insurer who is not a Participating Insurer", i.e., did not make any payment into the Trust. (R. p. 447).

To qualify for protection under the release and channeling injunction, the claim at issue must be a Blitz Personal Injury Trust Claim and the party seeking protection must be a Protected Party as to such Claim. (R. pp. 313, 315-16). In this case, Respondents' general negligence claim against Fred's is not a Blitz Personal Injury Trust Claim because it is not a claim against a Participating Insurer and is not covered by a Participating Insurer Policy.

Jacob N. filed a claim with the Blitz Personal Injury Trust and received $2,872,315.00 for his product liability claims against Blitz, U.S.A. (R. p. 532). This amount does not even cover Jacob N.'s medical bills, which exceed $3.3 million. Therefore, the amount does not compensate for future medical care, pain and suffering, or permanent disfigurement.

II. The Lower Court Found Respondents' Actions are Not Enjoined or Stayed

In August 2014, Fred's filed identical Motions to Permanently Enjoin or Alternatively to Stay Proceedings. (R. pp. 56-59, 266-69). Fred's cited the Bankruptcy Order as the basis for its motions. *Id.* Fred's argued it is released from liability due to its status as a "Vendor" of Blitz products and that Respondents' claims against Fred's are subject to the channeling injunction because it "was an additional insured under two participating insurers." (R. pp. 57-58, 267-68).

The Participating Insurers Fred's refers to are Old Republic Insurance Company (Policy No. MWZY 58888) and First Specialty Insurance Corporation (Policy No. IRE98445). (R. pp. 30, 235). Fred's presented a certificate of liability insurance listing Blitz U.S.A. as the "Insured" and Fred's as a "Certificate Holder." Based on the certificate, the policies Fred's relies upon cover products liability and umbrella liability. (R. p. 235). It does not cover general liability, including commercial general liability, for Fred's negligent conduct, which is at issue in Respondents' claim.

At the hearing on Fred's motions, held on October 27, 2014, Respondents presented a Memorandum in Opposition to Defendant Fred's Motion to Permanently Enjoin or Alternatively to Stay Proceedings. (R. pp. 2, 270-83, 637-40). Respondents also moved to amend the Complaints to remove all claims against Blitz, and the product liability breach of warranty and strict liability claims against Fred's. (R. p. 2, 4). The remaining claim against Fred's is a general negligence claim based on Fred's own negligence for continuing to sell a product it knew to be dangerous. (R. pp. 5, 270-71, 281).

Respondents argued that their general negligence claim against Fred's is not within the scope of the release or channeling injunction, is exempt from the channeling injunction, and is not dependent on any liability of Blitz. The trial court agreed with Respondents and, on November 18, 2014, filed an Order denying Fred's motions. (R. pp. 2-6). The trial court granted Respondents' motions to amend the complaints.[3] (R. pp. 5, 651-52). The trial court held the Participating Insurer Policies Fred's cited in its motions "provide coverage for products liability insurance" and do not cover the remaining general negligence claims against Fred's. (R. p. 6). Therefore, the general

[3] Fred's does not appeal the trial court's decision to grant Respondents' motions to amend the complaints. Therefore, that ruling is the law of the case. *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.").

negligence claims are "not within the scope of the bankruptcy release or injunction and do[] not involve the property of the bankruptcy debtor—Defendant Blitz U.S.A." *Id.* Finally, the trial court held "the bankruptcy court intended for the injunction and release to apply to a third party vendor such as Fred's only as to claims covered by a Participating Insurer policy." *Id.*

In January 2015, Fred's filed identical motions to reconsider. (R. pp. 621-23, 627-29). Fred's argued that the general negligence claim remaining in the amended complaint is "a derivative claim from a product's liability action", the bankruptcy documents "contemplated inclusion of [Fred's] in the Channeling Injunction" because it is a "vendor", and that the Trust is obligated "to indemnify" Fred's in this action.[4] (R. pp. 622-23, 628-29). Fred's also cited to a 2005 Vendor's Hold Harmless and Indemnity Agreement between it and Blitz. Fred's did not challenge the trial court's ruling that a general negligence claim is outside the scope of the channeling injunction and release. Rather, it asserted only that Respondents' general negligence claim is really a product liability claim.

On July 9, 2015, the trial court filed orders denying Fred's motions to reconsider. (R. pp. 7-12). The court held that general negligence and product liability negligence claims have different elements of proof and, therefore, Respondents' general negligence claim is not a derivative product liability claim. (R. pp. 8, 11). The court further held that Fred's status as a "vendor" is not dispositive of the issue but, rather, "the relevant question is . . . whether the Plaintiff's general negligence claim against Fred's falls within the claims intended to go to the channeling injunction." (R. pp. 9, 12). Finally, the court found that the vendor agreement between Fred's and Blitz, U.S.A. is also not dispositive because the Bankruptcy Order is the controlling

[4] Fred's has never sought indemnification from the Personal Injury Trust. It only asserted a cross-claim for contractual indemnification against Blitz, an entity that no longer exists.

document and it provides that the general negligence claims are outside the scope of the channeling injunction. *Id.*

Fred's appeals from only the orders denying its motions to reconsider.

STANDARD OF REVIEW

Fred's Brief fails to include a standard of review. Respondents previously filed a motion to dismiss this case as unappealable, arguing the effect of the trial court's Order was to deny a motion to dismiss or for summary judgment rather than to deny an injunction.[5] This Court denied the motion and construed the order as denying an injunction. Therefore, for purposes of the standard of review, Respondents treat the Orders denying Fred's motions to reconsider as denying an injunction.

"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 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.* at 544, 627 S.E.2d at 689 (internal citation omitted).

ARGUMENT

The issue properly before the Court is whether the trial court correctly ruled that Respondents' general negligence claim is not a product liability claim. The law and evidence support the trial court's ruling. Fred's remaining arguments are not properly before the Court because Fred's appealed only the orders denying its motions to reconsider. However, the trial

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[5] *See, e.g., Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 540, 773 S.E.2d 144, 147 (2015) ("We are therefore free to evaluate the trial court's order as what it is—not merely what it appears to be . . . ."); *Thornton v. S.C. Elect. & Gas Corp.*, 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct. App. 2011) (stating the Court must look past labels on motions and orders and, instead, "look to the effect of an interlocutory order to determine its appealability").

court also correctly ruled in its order denying Fred's motions to enjoin that the plain language of the Bankruptcy Order does not encompass Respondents' general negligence claims. Fred's cannot receive 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. For the reasons stated below, the Court should affirm the trial court's rulings and permit the case to proceed as pled against Fred's.

I. Respondents' General Negligence Claim is Not a Product Liability Claim

Much of Fred's argument is based on the assumption that Respondents' remaining general negligence claim is really a product liability claim.[6] In addition to the fact that this is legally and factually incorrect, it is also an acknowledgement by Fred's that the Bankruptcy Order does not release or enjoin claims that are not covered by a Participating Insurer policy. Legally, a general negligence and product liability negligence claim have different elements of proof. Factually, the general negligence action is based on Fred's conduct, not any conduct of Blitz as the product manufacturer. The trial court's finding that Respondents' general negligence claim is not a products liability claim is supported by the law.

The elements of proof for a general negligence and product liability negligence claim are different. "[T]o establish a claim for negligence, a plaintiff must show: (1) the defendant owes a duty of care to the plaintiff; (2) the defendant breached the duty by a negligent act or omission; (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury; and (4) the

[6] *See, e.g.*, Br. of App. p. 6 (arguing "the entirety of this conclusion hinges on the erroneous finding that the negligence claim being advanced does not have its origin in products liability"), p. 8 (arguing "this was again predicated on the conclusion that the negligence claim being pursued is exclusive of any tangible connection to products liability"), p. 9 ("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 Respondents is not a derivative of a products liability claim.").

plaintiff suffered an injury or damages." *Magnolia North Prop. Owners' Ass'n v. Heritage Cmtys., Inc.*, 397 S.C. 348, 368, 725 S.E.2d 112, 123 (Ct. App. 2012). In a product liability negligence action, the plaintiff must prove:

> (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 . . . [; and (4)] the ***manufacturer*** breached its duty to exercise reasonable care to adopt a safe design.

Rife v. Hitachi Constr. Mach. Co., 363 S.C. 209, 215, 609 S.E.2d 565, 568-69 (Ct. App. 2005) (internal citations omitted) (emphasis added). The focus of a product liability action is on the product itself and the defendant's conduct that resulted in the dangerous nature of the product. In Respondents' general negligence claim against Fred's, the focus is on Fred's knowledge of the danger of the product and its conscious choice to continue selling it to make a profit. (R. pp. 8, 11, 658). Further, a negligence product liability action is generally brought against a product manufacturer, not a seller.[7]

In this case, it is undisputed that Fred's did not design or manufacture the gas can. Therefore, the only remaining defect under a product liability theory (which is not asserted in this case) is a warning defect. *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."). However, the product in this case cannot be made safe for its intended use with a warning. *See Allen*, 332 S.C. at 427, 505 S.E.2d at 357 ("If a warning is given which, if followed, makes the product safe for use, the product cannot be deemed defective or unreasonably dangerous."). Rather than alleging Fred's should

[7] *See, e.g., Allen v. Long Mfg. N.C., Inc.*, 332 S.C. 422, 426-27, 505 S.E.2d 354, 356 (Ct. App. 1998) ("Further, liability for negligence requires . . . proof that the manufacturer breached its duty to exercise reasonable care to adopt a safe design." (internal quotation marks omitted)).

have made the product safe, Respondents allege Fred's should not have sold the product. (R. pp. 8-11, 657-58). This is a general negligence action.

Contrary to Fred's argument that the general negligence action is "inseparable" from an allegation of a defective product, Respondents do not have to prove that the gas can was defective and unreasonably dangerous, as required in a product liability case, to prove its general negligence action. Rather, Respondents will prove that Fred's knew the gas can was dangerous. Proof of knowledge of the dangerous nature of a product is different from proof of a defective product.

That a negligence claim involves a defective product does not make it a product liability claim. For example, if a defective Blitz gas can fell off of the shelf at a Fred's store and knocked a customer unconscious, the claim against Fred's would still be a general negligence claim even though it involves a defective product. In this case, Respondents allege Fred's had knowledge of the dangerous nature of Blitz gas cans but chose to continue selling them to profit from a popular product. (R. pp. 8, 11, 658).

Fred's citation to S.C. Code Ann. § 15-73-10 is irrelevant. (Br. of App. pp. 10-11). Section 15-73-10 is the strict liability statute, which is not at issue in this case. Respondents do not allege Fred's is liable simply because it sold a defective product. (R. pp. 8, 11, 652, 657). Rather, Respondents allege Fred's knew the gas cans were dangerous and chose to continue selling them. (R. pp. 657-58).

Finally, Respondents' general negligence claim is not "derivative" of a product liability claim. (Br. of App. p. 9). A "derivative action" is a "lawsuit arising from an injury to another person, such as a husband's action for loss of consortium arising from an injury to his wife caused by a third person." *Black's Law Dictionary* 475 (8th ed. 2004); *see also, e.g., Rosemond v. Campbell*, 288 S.C. 516, 525, 343 S.E.2d 641, 646 (Ct. App. 1986) ("The assignee's liability under

the statute is derivative: unless the consumer has a valid claim against the seller, he has no claim against the assignee."). Respondents' action does not arise from injury to another person, and Fred's liability is not dependent on the liability of anyone else. It is independently liable for continuing to sell a product it knew to be dangerous. Therefore, the general negligence claim is not derivative.

The trial court properly held the general negligence action against Fred's is not a product liability action, and that decision is supported by the law and evidence.

II. Fred's First Issue is Not Properly Before the Court

Fred's appealed from only the July 9, 2015 Order denying its motions for reconsideration. (R. pp. 633-34). Therefore, the following rulings of the trial court in its November 2014 Order denying Fred's motions to enjoin are the law of the case: (1) the Participating Insurer policies as to which Fred's is a certificate holder provide coverage for products liability insurance; (2) a claim that is not "subject to coverage under a Participating Insurer policy . . . is not within the scope of the bankruptcy release or injunction and does not involve the property of the debtor"; and (3) "the bankruptcy court intended for the injunction and release to apply to a third party vendor such as Fred's only as to claims covered by a Participating Insurer policy." (R. p. 6); *see Shirley's Iron Works*, 403 S.C. at 573, 743 S.E.2d at 785 ("An unappealed ruling is the law of the case and requires affirmance.").

To the extent Fred's first Issue on Appeal—"Did the trial court err in denying Appellant's Motion for Permanent Injunction?"—is an attempt to appeal the issues in the November 2014 Order rather than the Order denying Fred's motions to reconsider, such issue is not before this Court because Fred's appealed only from the Order denying its motions to reconsider. *See* Rule

203(d)(1)(B)(ii), SCACR ("The notice filed with the appellate court shall be accompanied by the following: . . . (ii) A copy of the order(s) and judgment(s) to be challenged on appeal . . . .").

Fred's Brief states: "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 Respondents is not a derivative of a products liability claim." (Br. of App. p. 9) (emphasis added). This is an acknowledgement that the issue in the motion to reconsider was whether the general negligence claim is really a product liability claim. Therefore, that is the only issue properly before this Court. Respondents request the Court decline to address any other issues argued by Fred's, but respond to them below.

III. The Trial Court Correctly Held the General Negligence Claim is Not Within the Scope of the Bankruptcy Order

In the event the Court addresses Fred's argument regarding the interpretation of the Bankruptcy Order, Respondents argue that the trial court correctly decided this issue.[8]

Respondents' general negligence claim relates solely to Fred's alleged negligence in choosing to sell a product it knew to be dangerous to customers. These allegations do not relate to any conduct of Blitz or any insurance policy of Blitz, and further do not affect the bankruptcy estate. Therefore, the general negligence claim is not subject to the channeling injunction and release provisions in the Bankruptcy Order. The inquiry is whether the particular general negligence *claim*, not Fred's as a *party*, falls outside of the scope of the release and channeling injunction provisions.

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[8] Respondents cite to Delaware and South Carolina law when possible. The Bankruptcy Order provides that "the construction, implementation, and enforcement of the Plan and all rights and obligations arising under the Plan shall be governed by, and construed and enforced in accordance with, the laws of the State of Delaware." (R. p. 327 ¶ 31); *see also* R. p. 345 ¶ 1.2.3 (stating the same). Fred's does not cite to Delaware law in its Brief and did not argue Delaware law to the trial court.

"When construing written judgments, courts consider the circumstances present at the time of entry and do not consider the meaning of particular provisions of the judgment in isolation but in the context of the whole judgment." 46 Am. Jur. 2d *Judgments* § 74. "In construing a judgment, it is necessary to determine the intention of the court issuing that judgment. The intended scope of the judgment must be considered when applying the language used." *Mason v. Mason*, 571 A.2d 787 (Del. 1990); *accord Doe v. Bishop of Charleston*, 407 S.C. 128, 135, 754 S.E.2d 494, 498 (2014) ("[J]udgments 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. Hence, in construing a judgment, it should be examined and considered in its entirety." (internal quotation marks omitted)). Considering the intention of the Bankruptcy Court and the plain language of the Order, Respondents' general negligence claim does not fall within the scope of the release or channeling injunction.

A. Respondents' General Negligence Claim is Not Subject to the Release

The Order releases "Blitz Personal Injury Claims" "against the Protected Parties", "[e]xcept as otherwise stated in the Plan." (R. pp. 315-16). "Protected Parties" includes "Vendors" of a product manufactured by Blitz. (R. p. 450). However, a Vendor is not released from any and all claims related to a Blitz product. Rather, a Vendor, such as Fred's, is released only as to claims covered by a Participating Insurer Policy. The Order makes this clear:

> A Vendor . . . sued on a Blitz Personal Injury Claim ***might be entitled to coverage under the Participating Insurer Policies. If*** any of the [Vendors] 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 . . . the Participating Insurer Policies must also resolve all claims against Vendors . . . ***to the same extent such claims are being resolved against the Debtors, which justifies the inclusion of the Vendors . . . as Protected Parties*** under the Plan.

(R. p. 295 ¶ 7) (emphasis added).

Respondents' general negligence claim is not a product liability claim and, therefore, does not fall within the coverage of a Participating Insurer Policy as to which Fred's is an insured. No consideration was paid for or on behalf of Fred's as to its own, independent liability for general negligence. Fred's should not receive a windfall of absolution for liability that falls outside of the scope of the Order and for which no entity or insurer paid consideration. Accordingly, Respondents' claim against Fred's for its independent, general negligence is not released.

Fred's argues that any action remotely related to a Blitz gas can is subject to the release and channeling injunction. (Br. of App. p. 5). This interpretation of the Order is overly broad and illogical. There is a limit as to what "related" claims are entitled to the protections of the Bankruptcy Order. *See, e.g.*, *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 149 (2009) ("There is, of course, a cutoff at some point, where the connection between the insurer's action complained of and the insurance coverage would be thin to the point of absurd." (citing *California Div. of Labor Standards Enforcement v. Dillingham Constr., N. A., Inc.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring) ("[A]pplying the 'relate to' provision according to its terms was a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else."))). The limits of the Bankruptcy Order are plainly stated and not every claim that in any way involves a Blitz gas can is subject to the release. The trial court correctly found that Respondents' general negligence claim for Fred's independent liability is not within the scope of the release.

B. Respondents' General Negligence Claim is Not Subject to the Channeling Injunction

The Order enjoins a "Blitz Personal Injury Trust Claim against the Protected Parties." (R. p. 313). The above-discussed limited inclusion of a Vendor as a Protected Party equally applies to the channeling injunction provision. A claim against a Vendor is enjoined only to the extent

that it falls within coverage of a Participating Insurer Policy, which Respondents' general negligence claim does not. This is further supported by language in the Blitz Personal Injury Trust Agreement, which is incorporated into the Order.

> The monies contributed to the Blitz Personal Injury Trust by the Participating Insurers . . . represent consideration for the buy back of the Participating Insurance Policies . . . , the ***channeling of the Blitz Personal Injury Trust claim covered by the Participating Insurance Policies*** to the Blitz Personal Injury Trust, and the releases granted to the Participating Insurers under the Plan.

(R. p. 472 ¶ 2.3) (emphasis added). Only claims "covered by" a Participating Insurer Policy are channeled to the Trust and enjoined. Respondents' general negligence claim is not covered by a Participating Insurer Policy and, therefore, is not subject to the channeling injunction.

Further, Respondents' claim falls within an exception to the channeling injunction—a "claim . . . for payment against a Non-Participating Insurer." (R. pp. 314-15). Respondents' claim is one for payment against Fred's and any non-participating, non-Blitz insurer that insures its general liability. If a Non-Participating Blitz Insurer is exempt from the channeling injunction, it follows that a non-participating, non-Blitz insurer—even further removed from any contribution or connection to the bankruptcy—is also exempt. Therefore, Respondents' general negligence claim falls within an exception to the channeling injunction.

Fred's cites to *A.H. Robins Co. v. Piccinin*, 788 F.2d 994 (4th Cir. 1986), in support of its argument that it and Blitz are so "interrelated" that an injunction is warranted. (Br. of App. pp. 7-8). This is an incorrect reading of *A.H. Robins*, which is factually and legally distinguishable from this case. *A.H. Robins* involved numerous actions filed in state and federal courts that arose out of an allegedly defective intrauterine contraceptive, which resulted in the manufacturer, A.H. Robins, filing for Chapter 11 bankruptcy. 788 F.2d at 996. Although the bankruptcy filing stayed actions against A.H. Robins, plaintiffs with cases involving other defendants "sought to sever their actions against Robins and to proceed with their claims against" the other defendants. *Id.* A.H.

Robins then filed an action seeking to enjoin actions against its co-defendants and a declaratory judgment that its product liability policy was an asset of the estate. *Id.* at 997. The court "held that all actions for damages that might be satisfied from proceeds of the Aetna [product liability] insurance policy were subject to the stay . . . and enjoined further litigation." *Id.* The issue in *A.H. Robins* was whether the bankruptcy court had "jurisdiction to grant a stay or injunction of suits in other courts against co-defendants of the debtor." 788 F.2d at 998.

The Fourth Circuit affirmed the district court's order enjoining actions against co-debtors, holding that the court had jurisdiction to issue an injunction. *Id.* at 1003. The Fourth Circuit then held an injunction was appropriate in *A.H. Robins* because the co-defendants were entitled to indemnity as a matter of state law and, therefore, actions against them could "reduce and diminish the insurance fund." *Id.* at 1008.

In this case, the jurisdiction of the bankruptcy court to issue an injunction is not challenged. Rather, the issue is the scope of the injunction. Unlike in *A.H. Robins*, it is the law of this case that a claim that is not subject to coverage under a Participating Insurer policy "does not involve the property of the bankruptcy debtor—Defendant Blitz, U.S.A." (R. p. 6). Therefore, Respondents' action will not affect, reduce, or diminish any assets of the Trust.

Fred's cites to a passage in *A.H. Robins* discussing a situation in which the court may issue a stay or injunction. (Br. of App. p. 7). This case involves the scope of the injunction, not the authority of the bankruptcy court to issue an injunction. Regardless, the passage Fred's cites does not support its argument. The relevant quote states that a court may issue an injunction in the "'unusual situation' . . . when there is 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." *A.H. Robins*,

788 F.2d at 999. There is no identity between Blitz and Fred's as to the general negligence claim. The terms of the Bankruptcy Order plainly state that only claims falling within the coverage of a Participating Insurer Policy are subject to the channeling injunction and release. Under the heading "Identity of Interest", the Order states:

> The Participating Insurers are the Debtors' insurance providers under the Participating Insurer Policies. . . . Accordingly, any Blitz Personal Injury Claim asserted against the Debtors, if successful, would ultimately be paid from the proceeds of the Blitz Insurance Policies (***subject to the policies' terms and conditions and any applicable coverage defenses***). . . . Because any claim successfully asserted against a Participating Insurer ***will be paid from the proceeds of the Participating Insurer Policies***, a claim against a Participating Insurer will directly reduce the coverage available to the Debtors and any other insureds under those policies. Thus, a claim against a Participating Insurer is essentially a claim against the Debtors.

(R. p. 293 ¶ (5)(a)) (emphasis added). Fred's is incorrect that Respondents' general negligence claim is released and enjoined because the claim is not covered by a Participating Insurer Policy. There is no identity of interest between Fred's and Blitz as to the general negligence claim.

Finally, the Fourth Circuit noted in *A.H. Robins* that a situation such as the one presented in this case is not appropriate for an injunction. In discussing a similar case, the Court stated: "the court first dismissed as inapplicable to the facts of this case the situation where the third-party defendant was independently liable as, for example, where the debtor and another are joint tort feasors or where the nondebtor's liability rests upon his own breach of duty." *A.H. Robins*, 788 F.2d at 999 (internal quotation marks omitted).[9] That is the situation presented in this case—Respondents assert a claim for Fred's liability based upon its own breach of duty. Therefore, an injunction is inappropriate and is not the intention of the Bankruptcy Order.

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[9] *See also 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").

IV. The Vendor Hold Harmless Agreement Does Not Provide Indemnity

The language of an Agreement between Fred's and Blitz cannot alter the interpretation and effect of the Bankruptcy Order. Under the terms of the Bankruptcy Order, a general negligence claim against Fred's does not fall within coverage of a Participating Insurer Policy and, therefore, is not subject to the channeling injunction or release. Further, even if the Court considered the substance of the Agreement, it does not provide indemnity for Fred's own negligence, which is the only negligence at issue in this case. Fred's argues that the Agreement provides for indemnification for "any and all claims . . . arising out of . . . the sale of the product." (Br. of App. p. 7). However, under South Carolina and Delaware law, "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." *Fed. Pac. Elec. v. Carolina Prod. Enters.*, 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989) (emphasis added); *accord American Ins. Group 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."). There is no clear and unequivocal expression of an intention to indemnify Fred's for its own negligence. Fred's does not argue that the Agreement states such an intention. (Br. of App. p. 7). Therefore, the Agreement does not support Fred's argument that the general negligence claim is subject to the channeling injunction based on an alleged right to indemnification. The Court should reject Fred's argument on this issue.

The failure of Fred's indemnification argument is evident by the fact that the Plan provides that the Trust "shall fully and completely defend each of the Indemnified Parties in connection with any proceeding involving, relating to or arising out of, in whole or in part, the enforcement

or enforceability of the Channeling Injunction." (R. p. 374 ¶ 4.14). "Indemnified Parties" includes "Debtors; . . . the Participating Insurers; [and] Wal-Mart" but does not include Vendors or Protected Parties. (R. p. 445). This supports an interpretation of the Bankruptcy Order that intends to channel and release only actions that affect the assets of the Debtors, Participating Insurers, and Wal-Mart. Respondents' general negligence action does not seek to recover any asset of the Debtors, the Trust, or the Protected Parties.

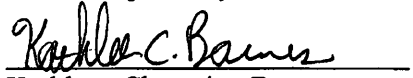
Finally, the weakness of Fred's position is also evident from the fact that it failed to seek defense and indemnification from the Blitz Personal Injury Trust, which, under the terms of the Plan, is available to allegedly Indemnified Parties in a proceeding involving the enforcement or enforceability of the Channeling Injunction. (R. p. 360 ¶ 4.3).

The Court should find any alleged indemnification does not affect the interpretation of the Bankruptcy Order.

CONCLUSION

Fred's fails to show an abuse of discretion by the trial court, whose holdings are supported by the evidence and the law. For the reasons set forth herein, Respondents respectfully request the Court affirm the trial court and allow their general negligence claim to proceed against Fred's.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

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

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.

CERTIFICATE OF COUNSEL

The undersigned counsel hereby certifies the Final Brief of Respondents complies with Rule 211(b), SCACR, consistent with the Consent Motion to Amend Final Briefs and additional change noted in the accompanying cover letter to the Court.

Respectfully submitted,

June 27, 2016

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