IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
JUN 29 2016
SC Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Perry M. Buckner, Circuit Court Judge

Case No. 2015-001947

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

v.

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

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

And

Melinda Cook, — Respondent.

v.

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

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

FINAL REPLY BRIEF OF APPELLANT

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

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
JUN 29 2016
SC Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Perry M. Buckner, Circuit Court Judge

Case No. 2015-001947

Alice Hazel, as GAL for Jacob N.	Respondent,
v.	
Blitz U.S.A., Inc., Fred's, Inc., Tiger Express Varnville, LLC, and James Nix,	Defendants,
Of Whom Fred's, Inc., is the	Appellant.
And	
Melinda Cook,	Respondent.
v.	
Blitz U.S.A., Inc., Fred's, Inc., Tiger Express Varnville, LLC, and James Nix,	Defendants.
Of Whom Fred's, Inc., is the	Appellant.

FINAL REPLY BRIEF OF APPELLANT

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

Table of Authorities ii

Statement of Issues on Appeal 1

Argument 1

1. Respondents' General Negligence Claim is a Product Liability Claim ... 1

2. Fred's Issue is Properly Before the Court 1

3. This is not a General Negligence Claim and as such is Within the Scope of the Bankruptcy Order 1

4. The Vendor Hold Harmless Agreement Does Provide Indemnity 1

Conclusion 8

TABLE OF AUTHORITIES

CASES

A.H. Robins Co. Inc. v. Piccinin, 788 F.2d 994 (Ct. App. 4th Cir. 1986) 5, 6, 7
Bragg v. Hi-Ranger, Inc., 319 S.C. 531 (Ct. App. 1995) 3
Johnson v. Sonoco Prods. Co., 381 S.C. 172, 177, 672 S.E.2d 567, 570 7
Fed. Pac. Elec. V. Carolina Prod. Enters., 298 S.C. 23, 378 S.E.2d 56, 57
(Ct. App. 1989) 7
Rife v. Hitachi Const. Machinery Co., Ltd., 363 S.C. 209 (Ct. App. 2005) 1

RULES

Rule 59(e), South Carolina Rules of Civil Procedure 4

STATEMENT OF ISSUES ON APPEAL

1. Is Respondents' General Negligence Claim a Product Liability Claim?

2. Is Fred's First Issue Properly Before the Court?

3. Did the Trial Court Err in Holding the General Negligence Claim is Not Within the Scope of the Bankruptcy Order?

4. Does the Vendor Hold Harmless Agreement Provide Indemnity?

ARGUMENT

1. Respondents' brief and argument begin with continued reliance on their fallacy that this claim is not a product liability claim.[1] While Respondents correctly point out the elements of proof differ between a general negligence claim and a product liability negligence claim; however, their assessment of the legal nuances between the two is prematurely cut short to advance their objectives of surviving the challenge to their claim rather Respondents simply repeat their mantra that "this is a general negligence claim."

It is correctly noted that to prove a product liability negligence action a 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.

Rife v. Hitachi Constr. Mach. Co., 363 S.C. 209, 215, 609 S.E.2d 565, 568-69 (Ct. App. 2005). There are certainly scenarios, including some as in *Rife* that assess liability of the manufacturer, which was the original intention of Respondents prior to their dismissing Blitz USA, Inc., and redacting all previously asserted product liability claims. However, Appellant submits the above citation, which was referenced in the Initial Brief of Respondents, is the direct scenario that

[1] *See, e.g.* Br. of Resp. p. 10 (arguing "[m]uch of Fred's argument is based on the *assumption* that Respondents' remaining general negligence claim is really a product liability claim.")

exists in the instant case. Respondents seemingly gloss over significant facts in making their argument that the claim against Appellant is merely a general negligence claim by noting that they are focusing their claim on "Fred's knowledge of the *danger* of the product and its conscious choice to continue selling it to make a profit." (Br. of Resp. p. 11) (emphasis added). However, despite clearly indicating they must show Appellant had knowledge of a danger they contend they "do not have to prove the gas can was ... unreasonably dangerous ...." (Br. of Resp. p. 12). Respondents appear astutely aware of the need to show the product was dangerous despite repeated attempts to deny such a burden. The dangerous nature of the gas can and obligation to show such is inextricably linked with any claim presented by Respondents and as such they cannot avoid the clear fact that this is a product liability negligence claim.

Irrespective of how Respondents attempt to categorize their claim it is undisputed that they are attempting to hold Appellant liable for the sale of a purported dangerous product. Respondents erroneously attempt to analogize the instant claim and cause of action to one where the same product fell from a shelf while in the store causing injuries to a customer. In the analogy provided by Respondents there is no requirement to show that the product itself was dangerous nor would they be required to show the injuries were occasioned by the dangerous nature of the product. Rather under Respondents analogy the claim pursued would be under a theory of premises liability negligence as it would be sufficient to show the gas cans were improperly stacked on the shelves. The dangerous nature of the gas cans is of no consequence to advancing the analogous claim. However, in the present claim as a seminal issue Respondents must begin the process by first establishing the gas can at issue was dangerous before they establish Appellant knew of the dangerous nature of the gas cans. To disregard their duty to first

establish the gas can as dangerous, or otherwise act as it does not exist, is disingenuous and patently untrue.

Likewise, Respondent seems to maintain that a product liability claim can only be brought against a manufacturer, which is inaccurate. "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, and, unlike strict liability, the focus is on the conduct of the *seller* or manufacturer, and liability is determined according to fault. *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 539, 462 S.E.2d 321, 326 (Ct. App. 1995) (*see also Madden v. Cox,* 284 S.C. 574, 328 S.E.2d 108 (Ct. App. 1985); *Sunvillas Homeowners Ass'n v. Square D. Co.,* 301 S.C. 330, 391 S.E.2d 868 (Ct. App. 1990); *see also Carter v. Massey-Ferguson, Inc.,* 716 F.2d 344 (5th Cir.1983)). In the case at bar the focus is on the conduct of the seller, which fits squarely within a product liability negligence theory. Moreover, under any product liability case, negligence included, the plaintiff must show: (1) he was injured by the product; (2) the injury occurred "because the product was in a defective condition, unreasonably dangerous to the user; and (3) that the product at the time of the accident was in essentially the same condition as when it left the hands of the defendant." *Id.* Although Respondents wish to confuse the issues of this case by arguing they are claiming general negligence, outside of a product liability theory, they cannot avoid that the case requires them to show Jacob N. was injured by the product, the product was unreasonably dangerous, and it was in essentially the same condition as it was upon purchase. The foregoing duties of Respondents place this case squarely within the confines of product liability.

Appellant concludes this argument in reply by pointing out the remaining obvious deficiency of Respondents' argument in that they have presented no case law or statutory law

that would support their theory that they have a general negligence claim in this manner. Specifically, while noting the elements of a general negligence claim their brief is devoid of any cases that would support this cause of action under such a theory. In fact, the cases under which liability is imposed on a seller are product liability cases. There is, as was noted in the Initial Brief of Appellant, no established legal duty imposed on the seller of a product outside of those duties created within the confines of product liability cases or product liability statutes. Additionally, the causation element of Plaintiff's claim is likewise directly linked to the product and the alleged dangerous nature of the product as opposed to the simple act of Appellant's sale of said gas can being the proximate cause of the injuries.

2. Respondents' second argument in their Reply Brief centers on the question of whether the ruling of the Court in the Motion for Permanent Injunction is somehow the law of the case as unpreserved. Rule 59(e), SCRCP is a "motion to alter or amend a judgment." Specifically, in the instant case Appellant timely submitted its Motion to Reconsider under Rule 59(e) asking the court to consider altering or amending the November 2014 Order. Therefore, the November 2014 Order did not become final until after the trial judge denied the Motion to Reconsider. Respondents would certainly concede that the November 2014 Order was subject to alteration or amendment by way of the Motion for Reconsideration thus cannot reasonably be argued to have been a final Order. Therefore, given the timeliness of the appeal taken by Appellants the issue of whether or not the trial court erred in denying its Motion for Permanent Injunction is properly before the Court.

3. Appellants openly concede the existence of certain exceptions to the channeling injunction as well as instances wherein vendors of the Blitz gas cans might not be properly included among the released parties. Specifically, as indicated by Respondents a general

negligence claim, which could proceed against a "non-participating insurer" is a claim that would be excepted from the effects of the channeling injunction. However, despite their best efforts to categorize this claim as such the pending suit is not a general negligence claim. It is undisputed by Respondents that Appellant is a vendor as defined by the bankruptcy plan and they are identified as an insured under certain Participating Insurance Policies. Based upon the foregoing status enjoyed by Appellants no product liability claim can be maintained against them, which was conceded by Respondents when they withdrew such claims upon seeking to amend their Complaint.

Appellant's argument is grossly mischaracterized in the Initial Brief of Respondents when they contend that Appellant argues, "any action remotely related to a Blitz gas can is subject to the release and channeling injunction." (Br. of Resp. p. 16). It is clear that there are certain occasions, even such as the analogy drawn by Respondents of the can falling from the shelf, where a claim may relate to the subject product but would not be encompassed by the Bankruptcy Order and channeling injunction. However, the analogy presented by Respondents is vastly different from the case presented here as Jacob N. was reportedly injured because of the product itself not because of how a shelf containing the products was stocked. The Order states the following clearly:

> 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.

(Order) (R. P. 107, paragraph 7) (emphasis added).

Respondents have attempted to distinguish *A.H. Robins Co. v. Piccinin*, 788 F.2d 994 (4th Cir. 1986) from the instant case but in so doing they have simply reinforced the similarities

between the two. Specifically, Respondents note the Fourth Circuit determined the co-defendants, non-debtors, of the debtor could be afforded the protections of a stay or injunction in suits in other courts. The analysis undertaken by the Fourth Circuit as to whether or not injunction was proper centered on the entitlement of a co-defendant as indemnity as a matter of state law, which would thus "reduce and diminish the insurance fund." *Id.* at 1008. Appellant maintains that there is such an identity between them and the "real party defendant," which was Blitz USA, Inc., that any judgment against them would in effect be a judgment against Blitz. The focus of the instant case is on the product manufactured by Blitz and its alleged dangerous nature rather than the attempts to focus on the sale of the product. However, if Respondents intend to continue maintaining their claim is against Appellant for their continued sale of a product they knew to be dangerous there is still the requisite identity between Appellant and Blitz. Appellant points directly to the ruling in *A.H. Robins*, wherein it noted an injunction was proper as to a co-defendant of the debtor when the co-defendant was entitled to indemnity as a matter of law. *Id.*

4. Finally, the Vendor's Hold Harmless and Indemnity Agreement clearly and unequivocally affords Appellant indemnification for the amended claim now being advanced by Respondents. Respondents indicate that the focus of their claim is "on Fred's knowledge of the danger of the product and its conscious choice to continue selling it to make a profit." (Br. of Resp. 11). By the very nature of their assertion it is unmistakable that this suit is against Appellant for the sale of the gas cans manufactured by Blitz.

Respondent directs this Court to *Fed. Pac. Elec. v. Carolina Prod. Enters.*, noting "a contract for 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***."

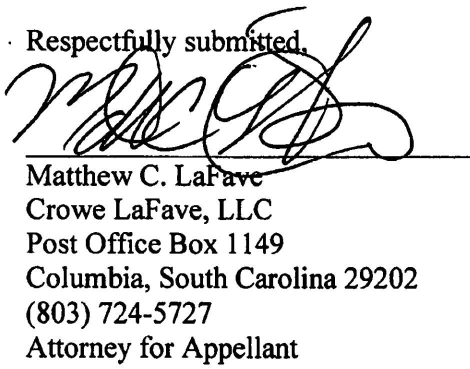
298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989). The Vendor Hold Harmless and Indemnity Agreement expressly called for indemnification by Blitz as to Appellant for the precise nature of the allegations. In clear and unequivocal terms the Vendor Hold Harmless and Indemnity Agreement calls for indemnification for "any and all claims ... arising out of ... the sale of the product." (*Vendor Hold Harmless Indemnity Agreement*) (R. p. 625, paragraph 3). It is undisputable that Respondents suit against Appellant relates to the sale of the product and is specifically contemplated by the foregoing agreement and as such there exists "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 Co., Inc. v. Piccinin*, 788 F.2d 994, 999 (Ct. App. 4th Cir. 1986). The Court further went on to show, by way of illustration, "such a situation would be a suit against a third-party who is entitled to absolute indemnity by the debtor on account of any judgment that might result against them in the case." *Id.*

CONCLUSION

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

(Signature Page Follows)

Respectfully submitted,



June 27, 2016

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