THE STATE OF SOUTH CAROLINA
In The 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, ... Petitioner.

And

Melinda Cook, ... Respondent,

v.

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

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for the Petitioner Fred's Inc. certifies that the Petition for Rehearing was made and finally ruled on by the South Carolina Court of Appeals on January 17, 2019. (App. 5-6).

QUESTIONS PRESENTED

I. Did the Court of Appeals err in finding Respondents' negligence claims were not subject to the Channeling Injunction as product liability claims?

II. Did the Court of Appeals err in failing to recognize the identity of interest between Petitioner and Blitz U.S.A., Inc. thereby entitling Petitioner, as a non-debtor, protection of the Channeling Injunction?

STATEMENT OF THE CASE

On November 5, 2013, Respondents filed two separate lawsuits against Petitioner including claims for negligence, strict liability, and breach of warranty as a result of an alleged explosion involving a gas can purportedly purchased from their store in Varnville, South Carolina. Respondents 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. 625-626).

Petitioner, on September 15, 2014, filed a Motion to Permanently Enjoin or Alternatively to Stay Proceedings (R. 56-269), which was heard by The Honorable Perry M. Buckner on October 27, 2014 in Hampton, South Carolina. At the aforementioned hearing Respondents made an oral motion with the Court to Amend the Complaint to eliminate or otherwise remove any "products liability" causes of action. After hearing oral arguments and taking the matter under advisement Judge Buckner issued an order denying Petitioner's motion and granting Respondents oral Motion to Amend. (R. 2-6).

In response to the filing of the aforementioned Order Petitioner filed a Motion for Reconsideration, pursuant to Rule 59(e), SCRCP. (R. 621-632). Judge Buckner heard Petitioner's Motion for Reconsideration on June 15, 2015 with an Order denying said motion filed on July 9, 2015. (R. 7-12).

Petitioner timely filed a Notice of Appeal on August 27, 2015. The Court of Appeals heard oral arguments in this matter and affirmed the lower court rulings that "Respondent's negligence claim is outside the scope of the release and Channeling Injunction" and this is not "the type of 'unusual situation'" where Petitioner, as a non-debtor, would be afforded protection of an injunction and release. (App. 7 & 9-10). A Petition for Rehearing was filed and summarily denied petition. (App. 12-23).

STATEMENT OF FACTS

On or about November 5, 2010, Respondent Alice Hazel's minor nephew, Jacob N., reportedly sustained significant burns when a gasoline container exploded. Respondents contend that the container in question was manufactured by Blitz U.S.A., Inc. and purchased at Petitioner's store. Shortly after the subject accident Blitz U.S.A., Inc. filed for Chapter 11 Bankruptcy in the United States Bankruptcy Court for the District of Delaware. Following the filing on November 19, 2011 a claim was made on behalf of Jacob N. by and through Respondent Alice B. Hazel his *Guardian ad Litem* thus rendering Respondent a Participating Claimant. Throughout the process for bankruptcy the Chapter 11 filing was eventually transitioned to a Chapter 7 filing.

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). The Confirmation Hearing eventually resulted in the filing of Finding's 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 addressed the Debtors' and Official Committee of Unsecured Creditors' First Amended Joint Plan of Liquidation dated December 18, 2013 ("Plan") (R. pp.

337-620). Through the Plan the Blitz Personal Injury Trust ("Trust") was created. Section 4.3 of Article IV of the Plan (R. pp. 359-367) established the Trust for the purpose of assuming "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.

Section 4.3.3 of Article IV of the Plan established the Channeling Injunction by indicating "[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 set forth 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).

Applicable to the Channeling Injunction is the definition of "Protected Parties", which 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.

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 defined "Released Parties" as "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. Petitioner was, at all applicable times, an additional insured under two participating insurers policies and was undisputedly a distributor/retailer of Debtors' products. *Confirmed Order,* (R. p. 595); Exhibit 2: Participating Insurers

- Subject Policies. Therefore, consistent with the terms of the Plan the term "Released Parties" would include Petitioner.

ARGUMENTS

In its opinion, the Court of Appeals concluded that Respondents' negligence claim was outside the scope of the Channeling Injunction and release. (App. 7). Petitioner disagrees with this conclusion specifically noting the failure of the Court of Appeals to adequately analyze and accurately categorize Respondents' negligence claim. Respondents negligence claim is founded in product liability law such that it fits squarely within the ambit of the Channeling Injunction and release.

Moreover, the Court of Appeals concluded that Petitioner would not be entitled to the protections afforded them by their Indemnification Agreement with Blitz U.S.A., Inc. for Respondents' negligence claim as it "based on an independent legal duty ... which does not require Blitz to be a necessary party." (App. 9). Petitioner disagrees noting specifically that the Indemnification Agreement contains an express directive that they be indemnified for claims arising from the sale of the product. Respondents' negligence claim irrefutably arises from the sale of the product thereby triggering complete indemnification rendering Blitz U.S.A., Inc. the "real party defendant." This identity of interests between Petitioner, a non-debtor, and Blitz U.S.A., Inc., debtor, affords Petitioner the protections of the injunction and release.

I. The Court of Appeals erred in holding that Respondents negligence claims are not within the ambit of the Channeling Injunction such that a permanent injunction is warranted.

In the Opinion, the Court of Appeals addressed the issue of the applicability of the Channeling Injunction and release as to Respondents claims by initially focusing on whether the claims would be covered by a Participating Insurer or a Non-Participating Insurers. The Court of Appeals concluded that a Non-Participating Insurer would cover Petitioner for Respondents claim thus they do not fall "within the ambit of the Channeling Injunction and Release." (App. 6). Petitioner respectfully disagrees with this analysis as 1) founded on speculation and 2) incomplete.

The Court of Appeals accurately notes that Petitioner was a certificate holder on a products liability policy issued by a two "Participating Insurers." *(App. 6)*. Moreover, Petitioner was a certificate holder of a commercial general insurance policy that was a Non-Participating Insurer under the Plan. The Court of Appeals acknowledged that the policies were not in the record and that "any effort to determine the exact coverage would be a speculative exercise." (App. 7). Despite acknowledging that a determination of coverage would be speculative the Court undertook such an exercise reaching a baseless conclusion that Respondents' claim would be covered by the commercial general insurance policy, a Non-Participating Insurer. It was upon this conclusion; admittedly founded wholly in speculation,

that it was determined Respondents claim was "outside the scope of the release and Channeling Injunction." (App. 7).

At the core Petitioner's demand for permanent injunction relied on the clear fact that Respondents negligence claim is a product liability claim within the scope of the Channeling Injunction. The Court of Appeals; however, found itself ensnared by the same trap of misdirection set by Respondents at the hearing on October 27, 2014. Respondents have long argued that their claim is for negligence and relates solely to the conduct of Petitioner. In aligning the ruling with this notion the Court of Appeals focused on the allegations relating to Petitioner's conduct such it falls outside the reach of the Channeling Injunction. They even go so far as to imply that, in the negligence claim, they do not have to establish the product sold by Petitioner was dangerous. However, in focusing only on whose conduct Respondents are arguing constitutes a breach of duty the conclusion is rendered fatally flawed. This incomplete analysis bypasses the point where every negligence must begin; Petitioner's duty. The Opinion does not set forth the affirmative legal duty owed by Petitioner in the context of Respondents claim for negligence. In fact there is only one occasion where the phrase "legal duty" appears and *referencing in form only* that Respondents claim alleges an "independent legal duty" against Petitioner. The Court neglects to analyze this alleged *independent legal duty in substance.* In every other instance where the

word duty appears it is preceded by the notation that Respondents are challenging Petitioners "own breach of duty."

The standard elements of a negligence claim are "(1) duty, (2) breach, (3) proximate cause, and (4) injury." *Cody P. v. Bank of Am., N.A.*, 395 S.C. 611, 620, 720 S.E.2d 473, 478 (Ct.App. 2011). "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.* Though there is no common law duty to act "an affirmative legal duty may be created by statute, contract relationship, status, property interest, or some other special circumstance." *Pratt v. CSX Transp., Inc.*, 379 S.C. 249, 258, 665 S.E.2d 631, 636 (Ct.App. 2008). Neither Respondents nor the Court of Appeals, despite Petitioner's requests, identified any affirmative legal duty owed by Petitioner. Respondents and the Court of Appeals instead focused on whose conduct qualified as a breach of duty.

As noted by the Court in *Pratt* there is no common law duty to act. A duty must be created through legal precedent. Petitioner of course does not take the position that it has no affirmative legal duty as a seller but contends its duty arises from and rests in product liability law. The legal duty owed by a seller was created

in *Bragg v. Hi-Ranger, Inc.* 319 S.C. 531, 462 S.E.2d 321 (Ct.App. 1995). In *Bragg*, to establish a claim for negligence, the Court required a showing that "[4] the defendant (***seller*** or manufacturer) failed to exercise due care in some respect." *Id.*, 319 S.C. at 539.

Here, Respondents fail to identify a duty owed by a seller creating a negligence claim several from South Carolina product liability law. Likewise, the Court of Appeals, failed to follow the precedent in *Bragg* requiring a showing of an affirmative legal duty founded in some area of South Carolina jurisprudence. There simply is none. Respondents fail to show another affirmative legal duty imposed on a seller outside of the duty created in products liability law. These are precisely the type of claims to be enjoined as part of the Channeling Injunction and release. Respondents' attempts to extract their claims from products liability and recast them as "general" negligence remain ineffective under *Bragg*.

The flaw in the Court of Appeals' ruling is underscored by an analogy included in the Opinion, which is intended as sample claim involving the product and Petitioner that may be outside the scope of the Channeling Injunction and release. In the analogy a customer is injured when a "misshapen Blitz gas can" falls from a shelf in Petitioner's store. The foregoing analogy is in no way comparable to Respondents' negligence claim. The duty in the analogy is rooted in premises liability law and arises from the relationship between a premises owner

and a customer who enters said premises. A shopkeeper owes its customers a duty to maintain its premises in a reasonably safe condition. The case at bar did not arise from an injury sustained while in or on Petitioner's premises thus the duty owed by a shopkeeper bears no logical connection with Respondents' claim. Here, the *use* of the product caused the injury.

Further differentiating Respondents' claim from the falling merchandise analogy is that the specific product is of little consequence to the claim as it could have easily involved any other shelved product. However, in the case at bar the Court of Appeals admits, "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***." (App. 7). It is the foregoing admission that brings Respondents claims squarely within the purview and confines of the Channeling Injunction and release as product liability claims. Respondents claim is inextricably linked to this allegedly dangerous product and does not exist without a Blitz gas can, or the negligence of Blitz U.S.A., Inc. pertaining thereto.

Absent from the Opinion is any discussion of proximate cause, which is another essential element of any negligence claim. "Proximate cause requires proof of both causation in fact and legal cause." *Small v. Pioneer Machinery, Inc.*, 329 S.C. 448, 463, 494 S.E.2d 835, 842 (Ct.App. 1997); (*see also Rush v. Blanchard*, 310 SC. 375 426 S.E.2d 802 (1993); *Oliver v. South Carolina Dep't of Hwys. and*

Pub. Transp., 309 S.C. 313, 422 S.E. 2d 128 (1992); *Vinson v. Hartley*, 324 S.C. 389, 477 S.E.2d 715 (Ct.App. 1996)). "Causation in fact is proved by establishing the injury would not have occurred "but for" the defendant's negligence." *Id.*; (*see also Rush v. Blanchard,* 310 S.C. 375, 426 S.E.2d 802 (1993); *Thomas v. South Carolina Dep't. of Hwys. and Pub. Transp.*, 320 S.C. 400, 465 S.E.2d 578 (Ct.App. 1995). As noted hereinabove the Court of Appeals clearly and accurately concluded that the injuries to Jacob N. would not have occurred "but for" the gas can having exploded, which resulted from the use of an allegedly defective product. The foregoing "but for" is precisely why this case sounds in product liability. The injuries to Jacob N. are inextricably linked to the use of this specific product and Blitz U.S.A. Inc.'s manufacturing of said product. This is precisely the scenario contemplated by the language "in any way involving the products" contained in the Plan. Therefore Respondents' claim is precisely the type of claim the Channeling Injunction was created to resolve.

To accept Respondents' theory that their claim is not within the ambit of the Channeling Injunction requires one to believe the sale of the product was the proximate cause of the injuries. To put Respondents' theory differently, Petitioner should be held liable for "damages that were proximately caused by ... placing an unreasonably dangerous product in the stream of commerce." *Id.,* 329 S.C. at 464; (*see also Parr v. Gaines*, 309 S.C. 477, 424 S.E.2d 515 (Ct.App. 1992). The

foregoing premise for recovery of damages is permissible for "a plaintiff suing under a products liability cause of action." *Id.* By Respondents own admission they are, under the Plan, enjoined from pursuing any causes of action against Petitioner that are founded in product liability, which include their negligence claim.

II. The Court of Appeals erred in failing to recognize that the Indemnification Agreement between Petitioner and Blitz U.S.A., Inc. requires Petitioner be afforded the protections of the Channeling Injunction.

Petitioner also submits that a reversal of the Court of Appeals is warranted as the Court failed to appreciate the full scope of the Indemnity Agreement between Petitioner and Blitz U.S.A., Inc. The Indemnity Agreement stated, in part, "that in exchange for 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.

(App. 2).

However, the foregoing excerpt is lacking. The Indemnity Agreement also expressly called for the indemnification of Petitioner from and against "any and all claims ... arising out of ... the sale of the product." (R. 625). It is irrefutable that Respondents' claim arises out of the sale of a Blitz product triggering

indemnification of Petitioner and the protections afforded them by the Channeling Injunction.

The importance of the Indemnity Agreement cannot be understated in this matter, as it is precisely this Agreement that supports Petitioner's contention that Respondents' claim should be subjected to the Channeling Injunction and release even in the face of Petitioner's status as a non-debtor. In the case of *A.H. Robins Co., Inc. v. Piccinin*, the Fourth Circuit held that, under "unusual circumstances, a non-debtor may be afforded the protections of an injunction or release. 788 F.2d 994, 999 (Ct. App. 4th Cir. 1986). For "unusual circumstances" to exist there must be "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." *Id.* By way of illustration of "unusual circumstances" the Court noted, "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.* As indicated hereinabove, the Indemnity Agreement affords Petitioner absolute indemnity from and against claims arising out of the sale of the product, as in Respondents' claim, thus rising to the level of an "unusual situation" creating an "identity of interests" as contemplated in *A.H. Robins*. Therefore, even as a non-

debtor, Petitioner is entitled to the protection of the injunction and release as to Respondents' negligence claim.

CONCLUSION

Based on the foregoing discussion, the Petitioner Fred's Inc. respectfully requests that this Court grant its petition for a writ of certiorari.

Respectfully submitted,

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This 15th Day of February 2019
Columbia, South Carolina

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PROOF OF SERVICE

I certify that I have served the Petition for Writ of Certiorari and Appendix on all counsel of record by depositing a copy of it in the United States Mail, postage prepaid, on this 15th day of February 2019, addressed to Mark D. Ball, Esquire, P.O. Box 457, Hampton, SC 29924 and Kathleen C. Barnes, Esquire, P.O. Box 897, Hampton, SC 29924.

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Paralegal

February 15, 2019