THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Appellate Case No. 2019-000220

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.

RESPONDENTS' BRIEF

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COUNTER STATEMENT OF THE CASE

This is an appeal from an order denying a motion for an injunction related to the bankruptcy of non-party Blitz U.S.A., Inc. ("Blitz"). Petitioner Fred's, Inc., ("Fred's") seeks to use Blitz's bankruptcy settlement to avoid liability for its own negligent conduct. The lower court and the Court of Appeals correctly held that Fred's is not entitled to the protections of Blitz's bankruptcy for its own negligent conduct, and this Court should affirm those decisions.

I. JACOB N.'S BURN INJURIES

This case arises out of severe and permanent burn injuries suffered by Respondent minor Jacob N. On November 5, 2010, Jacob N.'s father used a Blitz gas can to pour kerosene on a pizza box on top of a burn pile in the yard. (R. pp. 14, 23). When he poured, a "flash ignition" occurred in which the flame of the fire entered the gas container through the unguarded pour spout. (R. pp. 14, 23). The gas container exploded and sprayed fuel onto Jacob N., a five-year-old boy standing a few feet behind his father. *Id.* at ¶ 7. Jacob N.'s clothes caught on fire, and he suffered severe burn injuries to over 50% of his body, including his legs, left arm, torso, buttocks, face, and neck. *Id.* at ¶ 10. Fred's sold the gas can that exploded. *Id.* at ¶ 8. Blitz manufactured the gas can and, relevant to this appeal, filed for bankruptcy in 2011.

On November 5, 2013, Respondents Alice Hazel and Melinda Cook ("Respondents") filed separate actions arising out of Jacob N.'s injuries.[1] (R. pp. 13, 22). The Complaints stated 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[2] for negligence, strict liability, and breach of warranty, and (4) James Nix for negligence. (R. pp. 13-31). The Blitz negligence action is labeled "Negligence – Product Defect", and the Fred's negligence action is labeled "Negligence". (R. pp. 14-15). The general negligence action against Fred's alleged its failure to evaluate the gas cans prior to selling them and to warn customers of the risk of serious injury. (R. pp. 15-16).

In February 2014, Fred's filed answers denying the allegations and asserting a contractual indemnification crossclaim against Blitz based on a Vendor Hold Harmless and Indemnity Agreement. (R. pp. 42, 54). The relationship between Fred's and Blitz is relevant to understanding the limited extent to which Fred's is entitled to protection under Blitz's bankruptcy. Two facts as to their business relationship are relevant. First, in 2005, Blitz and Fred's entered into a "Vendor's Hold Harmless and Indemnity Agreement" ("Indemnity Agreement") in which Blitz agreed:

> To protect, defend, hold harmless, and indemnify Buyer [Fred's] from and against any and all claims, actions, liabilities, losses, royalties, damages, costs and expenses . . . 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 said Products . . . , or arising out of any actual or alleged violation, in the manufacture, possession, use or sale of said Products . . . .

(R. p. 625). There is no language in the agreement in which Blitz agreed to indemnify Fred's for Fred's own negligence. *Id.* Second, at the time of Jacob N.'s injuries, Fred's was a certificate

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[1] Cook seeks medical expenses incurred on behalf of a minor, and Hazel brings an action on behalf of Jacob N. for his pain and suffering and future medical expenses. (R. pp. 13-30).

[2] Tiger Express took no position as to the issues on appeal. It is named as a defendant for alleged negligence in selling the kerosene in the gas can. (R. pp. 17-18).

holder on three Blitz insurance policies—(1) a Burlington Insurance Company commercial general liability policy (Policy No. HGL0025031), (2) a First Specialty Insurance Corporation excess/umbrella policy (Policy No. IRE98445), and (3) an Old Republic Insurance Company products liability policy (Policy No. MWZY 58888). (R. p. 235).

II. BLITZ'S BANKRUPTCY AS TO WHICH FRED'S IS NOT A PARTY AND NO ENTITY PAID SETTLEMENT MONEY FOR FRED'S OWN NEGLIGENCE

Around 2009 Blitz experienced increased litigation regarding its portable consumer gasoline containers. On November 9, 2011, after dozens of lawsuits and numerous verdicts and settlements for Plaintiffs, Blitz and its related entities filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the District of Delaware. (R. pp. 284, 293; *In re Blitz U.S.A., Inc., et al.*, 2014 Bankr. LEXIS 2461, 2014 WL 2582976 (Bankr. Del. Jan. 30, 2014)). Wal-Mart, Blitz's largest customer, was also named as a defendant in many of the personal injury actions.

Many of Blitz's insurance policies included a $1 million self-insured retention for each claim, among other seven-figure deductibles. Although Blitz intended to reorganize, it eventually decided to liquidate its assets and stop manufacturing as of July 31, 2012, when its insurance coverage expired. The negotiations about how to liquidate Blitz to maximize payments to creditors involved Blitz's insurers, Wal-Mart, dozens of personal injury claimants, and the Official Committee of Unsecured Creditors ("the Committee"). (R. pp. 64-65). After months of mediation and settlement negotiations, numerous interested parties to the bankruptcy entered into a settlement Term Sheet conditioned upon confirmation of a final Chapter 11 plan by the bankruptcy court. (R. p. 64-86). The main component of the Term Sheet was an agreement for certain of Blitz's insurers, called the "Participating Insurers", to buy back their insurance policies and put the payments into a trust to pay for Blitz Personal Injury Claims, which are claims for injury occurring before July 31, 2012, and "involving the products, premises or operations of [Blitz] 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. pp. 65-70, 436). Wal-Mart also agreed to pay into the trust. (R. p. 68). The entire settlement totaled $161,320,000.00 to fund the trust. (R. pp. 67-69). In exchange for the buy back and payments, the Participating Insurers and Wal-Mart received a release from liability and a channeling injunction pursuant to which all claims against them are channeled to the Blitz Personal Injury Trust and may not be pursued in any other forum. (R. pp. 69-71). Failure to make payment into the Trust would result in the Participating Insurer or Wal-Mart "not receiv[ing] any of the benefits provided by this Settlement . . . including but not limited to the releases, injunction or policy buy back." (R. p. 71 ¶ 12).

The Biltz excess/umbrella and products liability policies as to which Fred's is an additional insured are "Participating Insurers" that bought back their policies. (R. p. 94, 235). The Blitz commercial general liability ("CGL") policy as to which Fred's is also an additional insured is a Non-Participating Insurer that did not buy back its policy and, therefore, "shall *not* be released or subject to the buyback contemplated by this Term Sheet" but, instead, is assigned to the Trust with "all rights that the Debtors and/or claimants had to pursue such coverage subject only to the terms and procedures of the Chapter 11 plan." (R. p. 69) (emphasis in original). A Non-Participating Insurer is "any Blitz insurer who is not a Participating Insurer." (R. p. 447).

On December 20, 2013, the bankruptcy court approved the insurance settlement pursuant to the Term Sheet, enabling the Settling Parties to execute the settlement. (R. p. 150, 446). The same day, the Debtors and Committee filed a Joint Plan of Liquidation. (R. pp. 339-427). The Plan proposed to establish a Blitz Personal Injury Trust and contained provisions for a release of liability and channeling injunction in accordance with the Term Sheet. (R. pp. 359-60, 396-67). In exchange for the Participating Insurers' buy back and Wal-Mart's payment, "all Blitz Personal

Injury Trust Claims against the Protected Parties will be permanently channeled to the Blitz Personal Injury Trust pursuant to the Channeling Injunction and the Protected Parties shall receive the benefit of the Channeling Injunction and Releases." (R. p. 416 ¶ 14.2.5, pp. 419-20 ¶ 14.5.1). The definition of a "Protected Party" includes "vendors", which are defined as an entity that "sold or distributed any product manufactured, sold, distributed or otherwise produced by the Debtors." (R. pp. 450, 453). Relevant to this appeal, Fred's argued that, as a vendor, it is a Protected Party and, therefore, any claim against it that in any way relates to a Blitz gas can is released and enjoined. As explained below, the Court of Appeals disagreed and that holding is now the law of the case. (App. p. 6).

Non-Participating Insurer policies are assigned to the Blitz Personal Injury Trust and referred to as "Assigned Insurance Policies". (R. pp. 383, 431). Non-Participating Insurers retained all rights to contest coverage outside of bankruptcy court. (R. p. 383). "The Debtor's release, and the Protected Parties' discharge and release, from all Claims as provided herein shall neither diminish nor impair the enforceability of any of the Assigned Blitz Insurance Policies." (R. p. 383 ¶ 6.3). Claims against a Non-Participating Insurer are not released or enjoined, and the policies are enforceable. (R. pp. 314-15, 383).

On January 30, 2014, the bankruptcy court entered a Confirmation Order confirming the Joint Plan of Liquidation ("Confirmation Order"). (R. pp. 284-336; *In re Blitz*, 2014 Bankr. LEXIS 2461, 2014 WL 2582976 (Bankr. D. Del. Jan. 30, 2014)). The Confirmation Order approves funding for the Blitz Personal Injury Trust with over $163,000,000.00, paid by Wal-Mart and Participating Insurers. (R. p. 291). It also includes the release and channeling injunction, applicable to a "Protected Party." (R. pp. 313-16). An issue on appeal is whether Fred's is a Protected Party with regard to Respondents' general negligence claim.

The bankruptcy court made certain findings as prerequisites to confirming the release and channeling injunction provisions, including that an identity of interest exists between the debtor and the third-party nondebtors such that an action against the nondebtor is essentially an action against the debtor. The court found, "a substantial identity of interest between the Debtors and the Protected Parties, such that a Blitz Personal Injury Claim asserted against a Protected Party is essentially a claim against the Debtors." (R. p. 293). Directly after this sentence, the court explained the limited extent to which a third party such as Fred's is a "Protected Party" based on its relationship to a "Participating Insurer."

> ***To the extent*** any third party has a claim against the Participating Insurers, such claim ***must*** arise out of an incident ***subject to coverage*** under one or more of the Participating Insurer Policies. 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 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). A claim against a Protected Party is released and enjoined "to the extent" that such claim could be asserted against a Participating Insurer. This is consistent with an exception to the channeling injunction that it "shall not enjoin: . . . (6) the rights of any Entity to assert any claim, debt, obligation or liability for payment against a Non-Participating Insurer." (R. pp. 314-15). Stated another way, a vendor is a Protected Party only to the extent a Blitz Personal Injury Claim against it is covered under a Participating Insurer Policy and is resolved against Blitz as a Debtor.

> 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 the Debtors, which justifies the inclusion of the Vendors . . . as Protected Parties under the Plan.***

(R. p. 295) (emphasis added). The "Participating Insurers" as to Fred's covered only product liability, which is not the claim Respondents assert against Fred's. *Id.*

Fred's is not a related entity of Blitz and was not a party to the bankruptcy. Neither Fred's nor any entity on its behalf paid money to settle liability for Fred's own negligence.

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

III. UNDERLYING PROCEDURAL HISTORY

In August 2014, Fred's filed Motions to Permanently Enjoin or Alternatively to Stay Proceedings based on the bankruptcy.[3] (R. pp. 56-59, 266-69). Fred's argued it is released from liability because it is a "Vendor" of Blitz products and Respondents' claims against Fred's are subject to the channeling injunction because it "was an additional insured under two participating insurers", referring to the product liability and excess/umbrella liability policies discussed above. (R. pp. 57-58, 267-68, 30, 235). Respondents argued they may pursue a claim for Fred's own negligence, which may fall within coverage of the Non-Participating Blitz CGL policy or Fred's own insurance policies. (R. pp. 272-82).

[3] The Joint Plan states "the Bankruptcy Court shall retain exclusive jurisdiction . . . [t]o enforce and interpret the terms and conditions of the Plan Documents and any documents issued or executed with respect to the Plan; . . . [t]o hear and determine any proceeding that involves the validity, application, construction, interpretation, enforceability, or enforcement of the Channeling Injunction." (R. p. 410-413 ¶¶ 13.2.5, 13.2.19, p. 328 ¶ 35). The insurance settlement Term Sheet and Joint Plan provide that the Trust will defend a party in a proceeding involving the enforcement of the channeling injunction. (R. p. 72 ¶ 18, pp. 360, 374). Fred's chose to bring this challenge in South Carolina State Court and not to seek defense from the Trust.

At the October 27, 2014 hearing on Fred's motions, Respondents moved to amend the Complaints to remove all claims against Blitz and to dismiss the product liability breach of warranty and strict liability claims against Fred's. (R. p. 2, 4). The remaining claim against Fred's is the general negligence claim based on Fred's own negligence for continuing to sell a product it knew to be dangerous, i.e., "Fred's was negligent for continuing to sell Blitz gas cans after it learned of the cans' propensity to explode." (R. pp. 5, 270-71, 281; App. p. 7). In a November 18, 2014 order, the Honorable Perry M. Buckner granted Respondents' motions to amend the complaints and denied Fred's motion for an injunction. (R. pp. 2-6).

The lower court held Respondents' "remaining claim against Fred's for general negligence is not a products liability cause of action subject to coverage under a Participating Insurer Policy. Therefore, it is not within the scope of the bankruptcy release or injunction and does not involve the property of the bankruptcy debtor—Defendant Blitz U.S.A." (R. p. 6). It found "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", and not to Respondents' general negligence claim. *Id.* After the lower court denied Fred's motions to reconsider, it filed a notice of appeal. (R. pp. 7-9).

In the Court of Appeals, Fred's argued the general negligence claim is really a product liability claim and the allegations trigger indemnification under the Indemnity Agreement. (App. pp. 5-6). The Court of Appeals disagreed.

> 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. . . . 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.

(App. p. 6). Because the CGL policy for which Fred's is a certificate holder did **not** participate in the insurance settlement, "the release and injunction do not protect Fred's from claims asserted against that policy." (App. p. 7). Addressing the general negligence allegations, the Court found "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 it related to a Blitz product." (App. p. 7). "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." *Id.* This interpretation is consistent with bankruptcy law because "Fred's, a non-debtor and non-party to the bankruptcy proceeding, acknowledges that any judgment against it [as to the general negligence claim] would not directly affect Blitz or the Trust." (App. p. 8).

As to indemnification, the Court of Appeals held the Indemnity Agreement did not create an "identity of interest" between Blitz and Fred's such that a claim against Fred's is a claim against Blitz because Fred's liability rests on its own alleged breach of duty. (App. pp. 8-9). "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." *Id.* at p. 9. The Indemnity Agreement does not express "an intention to indemnify Fred's for its own wrongdoing", because an indemnity contract does not indemnify the indemnitee against losses for its own negligence unless that is expressly and unequivocally stated. *Id.*

The Court of Appeals denied Fred's petition for rehearing. This Court then granted Fred's petition for writ of certiorari.

ARGUMENT

The Court of Appeals correctly held Respondents' general negligence claim is not a product liability claim and the Indemnity Agreement does not indemnify Fred's for its own negligent conduct. To accurately frame this appeal, it is necessary to understand that Fred's does not challenge the Court of Appeals' rulings on the limited extent to which it, as a Protected Party vendor, is protected by the channeling injunction and release.[4] (Resp't Return to Pet. for Writ of Cert. p. 8). The issues on appeal are narrow—whether the general negligence claim is not a product liability claim and whether the Indemnity Agreement indemnifies Fred's for its own negligence.

There is no dispute that Fred's did not pay into the bankruptcy trust and that product liability is the only liability of Fred's for which a Participating Insurer paid. Fred's tries to contort the general negligence claim into a product liability claim to avoid the consequences of its negligence. The Court should not permit Fred's to extract more absolution from liability than Blitz received when no one paid into the trust for Fred's independent liability. As this Court explained:

> Settlements are not designed to benefit nonsettling third parties. They are instead created by the settling parties in the interests of these parties. If the position of a nonsettling defendant is worsened by the terms of a settlement, this is the consequence of a refusal to settle. A defendant who fails to bargain is not rewarded with the privilege of fashioning and ultimately extracting a benefit from the decisions of those who do.

Riley v. Ford Motor Co., 414 S.C. 185, 197, 777 S.E.2d 824, 831 (2015) (internal quotation marks omitted). Fred's cannot extract a benefit from Blitz and the Participating Insurers' settlement that

[4] Fred's does not challenge that: "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"; "only claims asserted against a Participating Insurer are subject to the Channeling Injunction and release"; the Confirmation Order does not absolve a vendor "of its own allegedly negligent conduct, even if related to a Blitz product"; and a judgment against Fred's "would not directly affect Blitz or the Trust." (App. pp. 6-8, Resp't Return to Pet. for Writ p. 8).

excludes liability for Fred's own negligent conduct. The Court should affirm the denial of Fred's motion for an injunction.

I. THE COURT OF APPEALS CORRECTLY HELD RESPONDENTS' GENERAL NEGLIGENCE CLAIM IS NOT A PRODUCT LIABILITY CLAIM

Under South Carolina law, the liability of a person or entity that sells a product is not limited to product liability. A seller is subject to traditional principles of common law negligence that are applicable to all persons and corporations. Fred's attempt to shield itself from general negligence principles is unfounded and done solely to fit within bankruptcy protection to which it is not entitled. The Court of Appeals correctly held Respondents' general negligence claim is not a product liability claim and, therefore, does not come within the release and channeling injunction.

The amended complaint is not in the record on appeal. However, Fred's quotes it in its brief, Br. of Pet. pp. 16-17, and the document is public record. For clarity, the allegations against Fred's are as follows:

> Prior to the sale of the gas can at issue, Fred's had or should have had reason to know of the dangerous nature of the gas can and chose to continue to sell the product to its customers; . . .
>
> Fred's owes a duty of reasonable care to its customers and users of its products, such as Nix, to sell safe products and to stop selling products it knows or should know to be dangerous to the user;
>
> Fred's owes a duty of reasonable care to its customers and users of its products in selling a product represented to be safe where Fred's has a pecuniary interest in the sales transactions between Fred's and its customers and users of its products;
>
> The injuries and damages were caused by Fred's decision to continue to sell an unsafe gas container which allows the container to be subject to flash back fires, danger of explosions and/or failing to warn the intended users of the known dangers of the containers with volatile substances;
>
> The Defendant, Fred's Inc., breached its duty and was negligent in the following particulars:
>
> a. In failing to properly evaluate the fuel container prior to continuing to sell it to the public;

b. In choosing to and continuing to sell the fuel container to customers with knowledge of the dangerous nature of the product;

c. In failing to stop selling the fuel containers Fred's knew to be unsafe; [and]

d. In failing to warn purchasers and users of the container of the risk of serious injury from use of the container.

That by reason and in consequence of the Defendant's actions or inactions, the Plaintiff suffered significant and permanent injuries to various parts of his body; that such injuries were of such a nature as to require him to expend monies for doctor's care and other medical necessities; the Plaintiff has suffered and will continue to suffer great pain, humiliation, and mental anguish.

(Am. Cmplt. ¶¶ 8, 11-15).

The elements of proof for a general negligence claim are: "(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 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). "The duty of care is that standard of conduct the law requires of an actor in order to protect others against the risk of harm from his actions. It embodies the principle that the plaintiff should not be called to suffer a harm to his person or property which is foreseeable and which can be avoided by the defendant's exercise of reasonable care." *Snow v. Columbia*, 305 S.C. 544, 554, 409 S.E.2d 797, 803 (Ct. App. 1991). It is foreseeable that injury will occur if someone buys a dangerous product and such injury is avoidable by the seller's exercise of reasonable care in discontinuing the sale of a product it knows or should know is dangerous. This general duty of due care is separate and distinct from a product liability action, which is based on a manufacturing, design, or warning defect. *See Watson v. Ford Motor Co.*, 389 S.C. 434, 444, 699 S.E.2d 169, 174 (2010) ("[T]here are three defects a plaintiff in a products liability lawsuit can allege: 1) a manufacturing defect, 2) a warning defect, and 3) a design defect."). In the general negligence claim, Respondents do not allege a manufacturing,

design, or warning defect. Fred's did not manufacture or design the product, and Respondents do not allege that a warning could make the gas can safe for its intended use. *See Allen v. Long Mfg. N.C., Inc.*, 332 S.C. 422, 427, 505 S.E.2d 354, 357 (Ct. App. 1998) ("If a warning is given which, if followed, makes the product safe for use, the product cannot be deemed defective or unreasonably dangerous."). Respondents allege Fred's should not have sold the product based on actual or constructive knowledge of its danger.[5] The Court of Appeals correctly held this is not a product liability claim.

Fred's argues that product liability is the only recovery available against a South Carolina retailer in an action related to a product it sold. Much of this misguided argument is based on the nonexistence of a case finding a seller liable on the facts and theory stated in the amended complaint. Notably absent from Fred's briefing is a case stating its theory that a seller is liable exclusively in product liability for a product it sold. The nonexistence of a case stating either party's position establishes nothing. It distracts from the simple answer that a seller may owe a duty based on traditional principles of common law negligence applicable to all persons and corporations under South Carolina law.

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[5] Federal consumer protection law recognizes a difference between a defect and an unreasonable risk of injury.

> [E]very distributor and retailer of such product [over which the Commission has jurisdiction], who obtains information which reasonably supports the conclusion that such product—. . .
> (3) contains a defect which could create a substantial product hazard . . . ; ***or***
> (4) creates unreasonable risk of serious injury or death,
> shall immediately inform the Commission . . . of such defect, or of such risk . . . .

15 U.S.C. § 2064(b) (emphasis added).

Fred's owes its customers a common law duty to not sell products it knows or should know are dangerous. The source of duty is not Fred's placement of a product in the stream of commerce.[6] (Br. of Pet. p. 15). It is the knowledge of danger that creates the duty. Whether a person or entity sells, gives, or lends a product to someone, if such person or entity knows the product is dangerous, a duty arises to avoid the danger "by the defendant's exercise of reasonable care." *Snow v. Columbia*, 305 S.C. 544, 554, 409 S.E.2d 797, 803 (Ct. App. 1991). This is not a new cause of action against a seller but simply the application of general negligence to a particular set of facts.

As support for its argument that product liability is the only recovery against a seller, Fred's cites to *Bragg v. Hi-Ranger*, 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995), and its discussion of the differences in strict liability and negligence product liability actions. (Br. of Pet. pp. 10-12). Fred's misses that *Bragg*'s distinction between strict liability and negligence is that strict liability is no-fault and negligence is fault-based. A defendant is strictly liable "although [it] has exercised all possible care in the preparation and sale of his product", S.C. Code Ann. § 15-73-10, whereas, a defendant is negligent in product liability when the plaintiff demonstrates it "failed to exercise due care in some respect," focusing "on the conduct of the seller or manufacturer" and determining liability "according to fault." *Bragg*, 319 S.C. at 539, 462 S.E.2d at 326. *Bragg*'s reference to the "conduct of the seller" is to explain that a negligence product liability claim is fault-based. It is not to restrict claims against sellers to product liability.

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[6] Fred's criticizes the Court of Appeals' analogy of a gas can falling from a shelf. (Br. of Resp. pp. 15-16). The Court did not rely on the analogy to hold that the claim is not a product liability claim. It used the analogy only to show that even Fred's acknowledges not every claim in any way related to a Blitz gas can is subject to the injunction. (App. p. 7) ("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."). This is not a misapprehension of "the source of the duty" but an illustration of the limited protections of the channeling injunction and release.

Fred's also takes issue with Respondents' contention that the general negligence claim does not require proof that the product was defective and unreasonably dangerous. (Br. of Pet. pp. 12-13). As noted above, "defect" in product liability refers to manufacturing, design, and warning defects, none of which Respondents assert in this case. *See Watson*, 389 S.C. at 444, 699 S.E.2d at 174. The amended complaint alleges Fred's knew or should have known that the product was dangerous. This may involve, for example, proof that Fred's received notice of dozens of gas can explosions from its customers or received bulletins from Blitz about reported injuries. This is evidence of knowledge of danger which is different from proof that the product itself is defective and unreasonably dangerous.

The Court of Appeals stated, "while in a literal sense Respondents' claim relates to a product of Blitz—if not for the gas can exploding, Jacob N. would have not 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." (App. p. 7). Based on this statement, Fred's argues that, if the gas can is the "source of injury", Respondents' claim is a product liability claim. (Br. of Pet. pp. 14-15). This is another way of saying Fred's believes that Blitz should bear all liability because it manufactured the gas can. On the contrary, "[t]he defendant's negligence does not have to be the sole proximate cause of the plaintiff's injury; instead, the plaintiff must prove the defendant's negligence was at least one of the proximate causes of the injury." *Roddey v. Wal-Mart Stores East, LP*, 415 S.C. 580, 590, 784 S.E.2d 670, 676 (2016). That the injuries are "attribute[able] to the" gas can does not foreclose that Fred's decision to sell the gas can is a proximate cause. (Br. of Pet. pp. 16-17). Respondents allege that but for Fred's decision to continue selling gas cans it knew or should have known to be dangerous, Jacob N. would not have been injured. Fred's discussion of the amended complaint allegations also ignores that a defendant

can be liable under multiple theories. That facts exist for a negligence product liability claim against Fred's does not mean that is the only negligence claim a plaintiff may pursue. "A party may also state as many separate causes of action or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both." Rule 8(e)(2), SCRCP.

Fred's cites to *Livingston v. Noland Corp.*, 293 S.C. 521, 362 S.E.2d 16 (1987), a product liability action that included a failure-to-warn claim, as support for its argument that the general negligence claim is really a product liability claim. (Br. of Pet. pp. 17-18). Fred's again misses the point. This is not a failure-to-warn case. A failure-to-warn theory is that, with a proper warning, a product may be made safe for its intended use. "[A] seller may prevent a product from being 'unreasonably dangerous' if the seller places an adequate warning on the product regarding its use. If a warning is given which, if followed, makes the product safe for use, the product cannot be deemed defective or unreasonably dangerous." *Allen v. Long Mfg. N.C., Inc.*, 332 S.C. 422, 427, 505 S.E.2d 354, 357 (Ct. App. 1998). Respondents do not allege that any warning could make the gas can safe for its intended use as a gas can. Respondents allege that Fred's should not have sold the gas can or that, if it did sell the gas can, it should have told customers that it is not safe for its intended use. At every turn, Fred's is misguided in its attempt to mold the general negligence allegations into a product liability claim.

Finally, Fred's argues the Court of Appeals "concluded" that the Non-Participating Insurer CGL policy as to which Fred's is an additional insured would cover Respondents' claim and this conclusion is improper because the policy is not in the record. (Br. of Pet. pp. 18-19). This is a complete misstatement of the Court of Appeals' opinion. It states: "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." (App. p. 7). The Court of Appeals could not have been clearer in its statement that it did not make a coverage determination. It held that "the type of claim" Respondents assert was not "intended to be categorially enjoined under the Bankruptcy order" and "only seeks to recover from, a Non-Participating Insurer." *Id.* Fred's does not (and never did) argue that the product liability policy that is a Participating Insurer provides coverage for a general negligence action based on Fred's own negligence. The Court of Appeals properly based its decision on the conclusion that Respondents' general negligence claim is not a product liability claim rather than on a coverage determination.

II. THE COURT OF APPEALS CORRECTLY HELD THERE IS NO IDENTITY OF INTEREST AND NO INDEMNIFICATION BETWEEN BLITZ AND FRED'S FOR RESPONDENTS' GENERAL NEGLIGENCE CLAIM

The Court of Appeals correctly held the Indemnity Agreement does not indemnify Fred's for its own negligent conduct and there is no identity of interest between Fred's and Blitz such that a claim against Fred's is a claim against Blitz.

Fred's sole argument is that the Indemnity Agreement's reference to "claims . . . arising out of . . . the sale of the product" encompasses Respondents' claim. (Br. of Pet. pp. 19-20). Fred's makes this argument without acknowledging or addressing the Court of Appeals' holding that "a contract of indemnity will not operate to indemnify the indemnitee against losses for its own negligence unless the intention is expressed in clear and unequivocal terms" and the Indemnity Agreement does not state "an intent to indemnify Fred's for its own wrongdoing." (App. p. 10) (internal quotation marks omitted). Those rulings are the law of the case. The law requiring a clear and unequivocal expression of intent to indemnify for one's own negligence existed prior to the 2005 Indemnity Agreement. *See Fed. Pac. Elec. v. Carolina Prod. Enters.*, 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989) ("[A] contract of indemnity will not be construed to indemnify

the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in clear and unequivocal terms.").[7] "[C]itizens are presumed to know the law and are charged with exercising reasonable care to protect their interests." *Ahrens v. State*, 392 S.C. 340, 355, 709 S.E.2d 54, 62 (2011) (internal quotation marks omitted). Fred's and Blitz chose not to use any language regarding Fred's own negligence despite the law known to them.

Fred's argument that "arising out of . . . the sale of the product" encompasses claims arising out of a sale based on its own negligence would make the presumption against indemnification for one's own negligence superfluous. Under Fred's interpretation of the Indemnity Agreement, it could seek indemnification if it sold the product after Blitz told it not to or in the face of a recall. Absurd results such as these are a basis for the law that courts will not construe an indemnity agreement to indemnify the indemnitee against losses resulting from its own negligent acts unless that is expressly stated. A contract "interpretation which establishes the more reasonable and probable agreement of the parties should be adopted while an interpretation leading to an absurd result should be avoided." *Koon v. Fares*, 379 S.C. 150, 155, 666 S.E.2d 230, 233 (2008). There is simply no language in the Indemnity Agreement showing an intent for Blitz to indemnify Fred's for its own negligent conduct.

The Court correctly held that there is no identity of interest between Fred's and Blitz as to Respondents' claims. Fred's argument to the contrary is based solely on the Indemnity Agreement. (Br. of Pet. p. 21) ("[I]t is precisely this Agreement that further supports Petitioner's contention

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[7] *See also First Gen. Servs. v. Miller*, 314 S.C. 439, 442-43, 445 S.E.2d 446, 448 (1994) ("Ordinarily, if one person is compelled to pay damages because of negligence imputed to him as the result of a tort committed by another, he may maintain an action over for indemnity against the person whose wrong had thus been imputed to him; but this is ***subject to the proviso that no personal negligence of his own has joined in causing the injury***." (internal quotation marks omitted) (emphasis added)).

that these claims should be subjected to the Channeling Injunction and Release."). As the Indemnity Agreement does not indemnify Fred's for Respondents' claim, the Court need not reach the identity of interest argument. However, if it does, it should affirm the Court of Appeals' finding that there is no identity of interest.

Fred's cites to *A.H. Robins Co. v. Piccinin*, 788 F.2d 994 (4th Cir. 1986), to support its identity-of-interest argument. (Br. of Pet. p. 21). A.H. Robins filed for Chapter 11 bankruptcy when its allegedly defective intrauterine contraceptive resulted in numerous actions filed against it in state and federal courts. 788 F.2d at 996. Although the bankruptcy stayed actions against A.H. Robins, plaintiffs with cases that named other defendants "sought to sever their actions against Robins and to proceed with their claims against" other defendants. *Id.* A.H. Robins then filed an action to enjoin actions against its co-defendants and a declaratory judgment that its product liability policy was an estate asset. *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.

In this case, the jurisdiction of the bankruptcy court to issue an injunction is not challenged. The issue was the scope of the injunction. Fred's relies on a passage in *A.H. Robins* stating 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." (Br. of Pet. p. 21) (citing *A.H. Robins*, 788 F.2d at 999). It argues the Indemnity Agreement creates such an identity of interest between it and Blitz. (Br. of Pet. p. 21). Fred's

ignores a significant and dispositive part of *A.H. Robins* that the Court of Appeals relied on to reject Fred's argument. In discussing a similar case, *A.H. Robins* 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***." 788 F.2d at 999 (internal quotation marks omitted) (emphasis added). The Court of Appeals correctly held, "[h]ere, 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." (App. p. 9).

Consistent with the Court of Appeals' holding, other Courts have permitted claims related to Blitz gas cans to proceed against sellers. *See Gomez v. Scepter Holdings, Inc.*, 2017 U.S. Dist. LEXIS 160567, *8 (M.D. Ga. Sept. 29, 2017) (denying a motion to dismiss where "the allegations are based on [seller]s' own alleged decision to distribute, without an adequate warning, the Blitz gas containers . . . even though [they] both allegedly knew the gas containers were defective"); *Al-Shara v. Wal-Mart Stores, Inc.*, 2012 U.S. Dist. LEXIS 47228 (E.D. Mich. Apr. 3, 2012) (holding a plaintiff may continue claims against Wal-Mart, for its alleged independent negligence, even where Blitz had "accepted tender of defense and indemnification" because "where independent claims are asserted . . . it is not at all clear that Blitz's indemnification will indeed be absolute"). The Court of Appeals correctly held there is no identity of interest between Fred's and Blitz as to Respondents' general negligence claims based on Fred's knowledge and conduct.

Finally, the weakness of Fred's position is evident from the fact that it did not 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, 374 ¶ 4.14).

CONCLUSION

For the reasons stated, the Court should affirm the Court of Appeals' decision to deny the motion for an injunction and remand the case to proceed in circuit court as pled.

Respectfully submitted,

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September 3, 2019

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Appellate Case No. 2019-000220

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.

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing *Respondent's Brief* has been served upon the following counsel of record by mailing one copy by United States Mail, addressed as shown below on September 3, 2019.

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