THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

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

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

BRIEF OF PETITIONER

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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 to the protection of the Channeling Injunction?

STATEMENT OF THE CASE

On November 5, 2013, Respondents filed two separate lawsuits alleging three causes of action against Petitioner including negligence, strict liability, and breach of warranty for an explosion involving a gas can allegedly purchased from Petitioner's store. Petitioner filed a timely answer to the Complaints denying liability and alleging contractual indemnification by Defendant Blitz pursuant to a contract known as "Vendor's Hold Harmless and Indemnity Agreement" (R. pp. 625-626).

Appellant, on September 15, 2014, filed a Motion to Permanently Enjoin or Alternatively to Stay Proceedings (R. pp. 56-269), which was heard by The Honorable Perry M. Buckner on October 27, 2014 in Hampton, South Carolina. At the aforementioned hearing Respondents made an oral motion with the Court to Amend the Complaint to eliminate all claims arising out of products liability conceding the Bankruptcy Order permanent enjoins them from any such action. After hearing oral arguments and taking the matter under advisement, on November 18, 2014, Judge Buckner issued an Order Denying Petitioner's Motion and granting Appellant's Motion to Amend whereby they were to remove all products liability claims (R. pp. 2-6).

Pursuant to Rule 59(e), SCRCP, Petitioner timely filed a Motion for Reconsideration (R. pp. 621-632) heard on June 15, 2019 and denied on July 9, 2015 (R. pp. 7-12) by Judge Buckner.

Petitioner filed its Notice of Appeal on August 27, 2015 and the Court of Appeals heard oral arguments on October 4, 2018. The Order, which affirmed the lower court's rulings, was filed on November 7, 2018. The Petition for Rehearing was filed November 20, 2018 and an Order denying said petition was filed by the Court on January 17, 2019.

Petitioner proceeded to file its Petitioner for Writ of Certiorari on February 15, 2019, which was granted on June 28, 2019.

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 sold by Petitioner. 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. Throughout the process for bankruptcy the Chapter 11 filing was eventually transitioned to a Chapter 7 filing. A claim was made on behalf of Jacob N. by and through Respondent Alice B. Hazel his *Guardian ad Litem* for benefits payable from the Personal Injury Trust formed as part of the bankruptcy plan rendering Respondent a Participating Claimant.

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 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 ...." (R. p. 364). 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).

The Channeling Injunction bars pursuit of any action against those identified as "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 further provided a definition to establish the term "Released Parties," which includes "Debtors, Participating Insurers, Wal-Mart, and any other person or entity insured under the Subject Policies, including, but not limited to (i) any distributor or retailer of Debtors' products...." *Plan,* (R. p. 551), Section (s); Term Sheet. 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.

ARGUMENTS

In its opinion, the Court of Appeals concluded that Respondents' negligence claims against Petitioner were outside the scope of the Channeling Injunction and release. Here, Petitioner challenges the Court of Appeals opinion in two ways. In the first instance, Petitioner disagrees that the Respondent's claims are outside the scope of the Channeling injunction. Petitioner's purported liability arises only from products liability despite Respondents attempts to create a separate duty not recognized by South Carolina law. The record clearly reflects that Respondents seek damages from Petitioner resulting from the placement of the product into the stream of commerce, which is a principle rooted only in products liability causes of action.

In the second instance, the Court of Appeals erroneously concluded that Petitioner would not be entitled to indemnification for Respondents' negligence claims rendering Blitz U.S.A., Inc. the real party defendant. The vendor agreement contains express directives for indemnification of Petitioner for a suit arising from the sale of the product. The Court of Appeals erred in torturing the terms of the vendor agreement to find that it does not require indemnification by the debtor.

I. The Court of Appeals erred in holding that Respondents' negligence claims are not encompassed by the Channeling Injunction.

Respondents' contend that their claims, as amended, are "general" negligence claims with no relationship to product liability. Their assertion is premised on the assertion that their allegations focus on the knowledge of Petitioner rather than the

dangerous nature of the product. The Respondents' position was made necessary by their decision to participate in the Personal Injury Trust, which they concede bars them from pursuing any and all products liability claims against Petitioner. It is this misapplication of legal precedent that led to the decision by the Court of Appeals that Respondents' claims are not of the type intended to be enjoined under the Bankruptcy Order. The Court of Appeals' conclusion hinges on the erroneous finding there exists a cause of action in South Carolina against a retailer, separate from products liability, for injuries arising out of the placement of a product in the stream of commerce. In fact, Respondents would have this Court believe their cause of action can be entirely divorced from the underlying product such that they do not even have a duty to establish it as dangerous.

Respondents assert that their claims are not subject to the provisions of the Channeling Injunction because they are not products liability claims. Respondents are attempting to graft elements from a recognized cause of action so as to manufacture an entirely new cause of action that does not exist in South Carolina. Respondents must create this new cause of action to do indirectly, pursue a claim against Petitioner relative to the sale of this product, what they have admitted they cannot do directly, pursue a products liability claim against Petitioner. In their claims for negligence Respondents are attempting to inappropriately divorce the product the Court of Appeals conceded to be cause of the injuries from their cause of action.

Respondents maintain they are pursuing "general" negligence claims against Petitioner. The standard elements of a general negligence claim include "(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 ... a [legal] duty, a plaintiff cannot establish negligence." *Id.* Important to this analysis is the rule that 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). There is no common law duty to act, rather, a duty must be created. Negligence does not exist in the air; it must be rooted in some prevailing principle of law. In the claims at bar that prevailing principle of law can only be products liability.

Respondents have failed to identify any South Carolina precedent for their assertion that a seller of a product can be held liable in negligence under some principle other than products liability. "A products liability case may be brought under several theories, including negligence, strict liability, and warranty." *Bragg v.*

Hi-Ranger, 319 S.C. 531, 538, 462 S.E.2d 321, 325 (Ct. App. 1995). Regardless of the theory under which a plaintiff seeks recovery they are required to 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.* 329 S.C. at 462-63; (*See also Bragg, supra; Harris v. Rose's Stores, Inc.* 315 S.C. 344, 433 S.E.2d 905 (Ct. App. 1993)). Only under a products liability cause of action is a buyer entitled to "recover ... damages ... proximately caused by defendant's placing an unreasonably dangerous product into the stream of commerce." *Small v. Pioneer Machinery, Inc.*, 329 S.C. 448, 464 494 S.E.2d 835, 843 (Ct. App. 1997); (*see also Parr v. Gaines*, 309 S.C. 477, 424 S.E.2d 515 (Ct. App. 1992)). Respondents; however, take the position that there is a negligence cause of action that exists against retailers for the sale of products outside of a products liability theory without having offered any supporting precedent for this position. This position is simply an attempt to manufacture a new claim with pieces of existing claims because they know they are foreclosed from a suit against Petitioner relating to their sale of the product.

Specifically, Respondents argue that because the allegations focus on Petitioner's conduct their negligence claims are not products liability claims. In support of this position Respondents stress the difference between the elements of a

negligence claim and those of a products liability claim as though they are wholly independent theories of recovery that may be pursued against the seller of a product. However, this fallacy was dispelled by the Court of Appeals in *Bragg* when the Court was asked to review a perceived inconsistent ruling where a motion for directed verdict was granted as to a strict liability claim but denied as to the negligence-based claim. The Court notes in *Bragg* that "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 ...." *Bragg, supra* 319 S.C. at 539. This requirement is in addition to proving those elements requisite in all products liability claims rather than being a separate and distinct cause of action as Respondents maintain. Importantly, the Court noted that because the focus of the strict liability claim in *Bragg* was on the product without regard to the action of the seller or manufacturer it was not an inconsistent ruling to dispose of the strict liability claim and permit the negligence-based claim to proceed. In arriving at their conclusion, the Court cites to *Bilotta v. Kelley, Co.*, 346 N.W.2d 616 (Minn. 1984) where further distinction was drawn between strict liability and negligence claims. The Supreme Court of Minnesota noted:

> The distinction between strict liability and negligence ... is that in strict liability, knowledge of the condition of the product and the risks involved in that condition will be imputed to the manufacturer, whereas in negligence these elements must be proven.

Id.

Here, Respondents allege their claims focus solely on Petitioner's knowledge regarding the condition of the product, but it is against precedent to create a new purely "knowledge" based claim for negligence. Of course, their claims are distinguishable from a strict liability-based products liability claim as was opined in *Bragg* but merely because they are distinguishable Respondents' claims do not ostensibly become something other than products liability.

Respondents would have this Court accept two clear misconceptions of the applicable law. First, Respondents contend that their causes of action for negligence are not products liability theories because they focus on the conduct of the seller. As a review of *Bragg* points out the conduct of the seller is at the epicenter of any negligence-based claim advanced under a products liability theory. Only in products liability can a buyer recover damages resulting from the placement of a product in the stream of commerce, which is precisely what Respondents are seeking. Specifically, a plaintiff, to pursue such recovery, must show the failure to exercise due care on the part of the seller. Therefore, simply because the conduct of the seller is at issue, as Respondents contend, their negligence claims do not morph into something other than a products liability claim.

Second, Respondents submit that they do not have to establish the product was dangerous. However, at the very core of Respondents' claims is an allegation

that Petitioner "knew or should have known [the product] was dangerous." In fact, Respondents contend that a negligence claim against Petitioner is not encompassed by the Channeling Injunction specifically because they are challenging Petitioner's conduct rather than the dangerous nature of the product. Respondents are speciously asking this Court to essentially permit them to pursue a claim for the sale of a purportedly dangerous product while eliminating their burden of showing the product was dangerous.

The Court of Appeals ruling erroneously reflects this notion stating: "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). The foregoing statement from the Court serves only to reinforce these claims as negligence-based products liability claims.

Importantly, Respondents ask the Court to permit them to bring a products liability negligence claim without obligating them, as consistent with longstanding precedent, to prove those additional elements inherent in a products liability claim. This would have the disastrous effect of not only creating an entirely new cause of action against retailers but would render them absolute insurers for the safety of their customers from injuries by any product it sells irrespective of the dangerous nature of the product. That is not and has never been the law of this State.

Another fundamental component of all negligence claims is proximate cause. "Negligence is not actionable unless it proximately causes the plaintiff's injuries." *Bailey v. Segars*, 346 S.C. 359, 366, 550 S.E.2d 910, 914 (Ct. App. 2001); (*see also Bishop v. S.C. Dep't of Mental Health*, 316 S.C. 79, 88, 502 S.E.2d 78, 83 (1998)). This notion was further expounded upon by noting that:

> Proximate cause requires proof of (1) causation in fact and (2) legal cause. Causation in fact is proved by establishing the injury would not have occurred "but for" the defendant's negligence. Legal cause is proved by establishing foreseeability. Although foreseeability of some injury from an act or omission is a prerequisite to establishing proximate cause, ... the plaintiff need not prove that the actor should have contemplated the particular event which occurred... The defendant may be held liable for anything which appears to have been a natural and probable consequence of his negligence. A plaintiff therefore proves legal cause by establishing the injury in question occurred as a natural and probable consequence of the defendant's negligence.

Id. 346 S.C. 367; (*quoting Bramlette v. Charter-Medical-Columbia*, 302 S.C. 68, 72, 393 S.E.2d 914, 916 (1990)).

The Court of Appeals settled the question as to the proximate cause of the minor's injuries when it concluded that "in a literal sense ... if not for the gas can exploding Jacob N. would not have been injured." (App. 7). It is the foregoing acknowledgment that reinforces Petitioner's contention that these remain products liability claims. The first element of all products liability claims, even those based on a negligence theory, require a showing that the plaintiff was injured by the product. If the product is removed from the equation as Respondents contend, there

is no actionable injury. Only with the product as the source of the injury are Respondents able to establish proximate cause.

Petitioner further disagrees with the Court of Appeals' conclusion that these claims were not of the type intended to be permanently enjoined by the Bankruptcy order because claims exist, involving the product, that remain viable in state courts. The Court of Appeals relied upon an unrelated premises liability analogy involving a "misshapen" Blitz U.S.A., Inc. gas can falling from a shelf in Petitioner's store. The Court erroneously relied on this analogy to support its conclusion that some claims exist involving products that were not intended to be enjoined under the Bankruptcy order. This conclusion misapprehends the source of the duty in the present case.

The instant case emanates from an exploding gas can and was accepted as such by the Trust. Respondents allege Petitioner's liability arises out of their placement of that product in the stream of commerce not premises liability law. The Court conflated the present products liability case with premises liability law where a retailer owes its customers a duty to maintain their premises in a reasonably safe condition. Jacob N.'s injuries did not happen on Petitioner's premises nor did they arise out of a failure to maintain the premises. Jacob N.'s injuries arose out of the exploding gas can. Moreover, the product in the analogy is easily interchangeable

with any another product as opposed to the instant case where the injury only occurred because of the exploding gas can.

In further support that Respondents' claims are still products liability claims subject to the Channeling Injunction, the Court need look no further than a comparison of the original Complaint and the Amended Complaint. Specifically, Respondents asserted, in both, Petitioner was negligent in "failing to properly evaluate the fuel container prior to selling it to the public and failing to warn purchasers and users of the container of the risk of serious injury from use of the container." There were only two appreciable changes to the negligence cause of action between the Complaint and Amended Complaint. First, Respondents' modified the paragraph pertaining to the cause of the injuries and damages. In the Complaint the injuries and damages were attributed to the "***defective nature of the Blitz container*** which allows the container to be subject to flash back fires, danger of explosions and/or failure to warn the intended users of the dangers of the containers...." (***emphasis added***). Conversely, the Amended Complaint contended the injuries and damages were the result of ***"[Petitioner's] decision to continue to sell an unsafe gas can*** which allows the container to be subject to flash back fires, danger of explosions and/or failure to warn the intended users of the dangers of the containers...." (***emphasis added***). There is, in a clear sense, nothing different about this allegation because at a base level the injuries are still attributed to the

unsafe/dangerous gas can. Second, was in the addition of two other grounds upon which it is asserted Petitioner was negligent, while leaving the two grounds Respondents conceded were part of their negligence-based products liability claims. Respondents included allegations that Petitioner was negligent "in choosing to and continuing to sell the fuel container to customers with knowledge of the dangerous nature of the product [and] in failing to stop selling the fuel containers [Petitioner] knew to be unsafe...." These allegations are required to be established in a negligence-based products liability claim seeking recovery of damages from a seller for placing a dangerous, or unsafe, product in the stream of commerce.

In *Livingston v. Noland Corp.*, a products liability suit, a claim was asserted against a supplier of refrigerator compressors for negligence for failure to warn its customers. 293 S.C. 521, 362 S.E.2d 16 (1987). The *Livingston* Court held that "[a] supplier and manufacturer of a product are liable for failing to warn if they know or have reason to know the product is or is likely to be dangerous for its intended use; they have no reason to believe the user will realize the potential danger; and they fail to exercise reasonable care to inform of its dangerous condition or of the facts which make it likely to be dangerous." *Id.* 293 S.C. at 525; (*see also Gardner v. Q.H.S., Inc.*, 448 F.2d 238 (4th Cir. 1971). The foregoing allegation is yet another example of Respondents attempting to cull portions of well settled products liability theories

to manufacture a new cause of action to avoid the effects of the Channeling Injunction.

Finally, in its opinion, the Court of Appeals addressed the issue of the applicability of the Channeling Injunction and Release by concluding that the claims asserted by Respondents' would be covered by Non-Participating Insurers. The Court of Appeals acknowledged that the policies were not in the record thus attempting to determine the exact coverage would be speculative. Nonetheless, the Court improperly concluded, based on acknowledged speculation, that a Non-Participating Insurer would cover Respondents negligence claims such that they do not fall "within the ambit of the Channeling Injunction and Release." (App. 6) Petitioner contends that this action was wholly improper by the Court of Appeals as it violates the longstanding principal that items not included in the record on appeal cannot be considered.

In *Helms Realty, Inc. v. Gibson-Wall, Co.*, this Court refused to address the merits of the appellant's claim that it was entitled to a new trial on the grounds that a jury charge was improper because the particular jury charge was not in the record on appeal. 363 S.C. 334, 399 611 S.E.2d 485, 487-88 (2005); (*see also Germain v. Nichol*, 278 S.C. 508, 509, 299 S.E.2d 335 (1983)). A similar issue to the one present in the case at bar also was addressed by way of a footnote in *Leggett v. Smith*, 386 S.C. 63, 686 S.E.2d 699 (Ct. App. 2009). The Court of Appeals in that case referred

to a *Parker v. Fireman's Ins. Co. of Newark, N.J.*, 297 S.C. 166, 169, 75 S.E.2d 325, 326 (Ct. App. 1988), which cited to *Rossman v. State Farm Mut. Auto Ins. Co.*, 832 F.2d 282 (4th Cir. 1987) wherein it was held that Court could not determine the particularities of the policy at issue was not in the record on appeal.

II. The Court of Appeals erred in failing to recognize that the vendor agreement between Petitioner and Blitz U.S.A., Inc. included indemnification for suits arising out of the sale of the product.

Petitioner also submits that a reversal of the Court of Appeals is necessary as the Court failed to appreciate the scope and plain language of the vendor agreement between Petitioner and Blitz U.S.A., Inc. The Court noted that an Indemnity Agreement existed stating, 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.

There is a glaring absence from the Indemnity Agreement in the foregoing language cited by the Court of Appeals. The Indemnity Agreement also expressly called for the indemnification for ***"any and all claims ... arising out of ... the sale of the product."*** (R. p. 625, paragraph 3) (***emphasis added***). Petitioners claims irrefutably arise out of the sale of a Blitz product triggering the protections of the Vendor Agreement. In fact, Respondents' principle allegation is that Petitioner "had or should have had knowledge of the dangerous nature of the gas can and chose to

continue to sell the product to its customers." Moreover, it was alleged *inter alia* that Petitioner "breached its duty and was negligent ... in choosing to and continuing to sell the fuel containers to customers with the knowledge of the dangerous nature of the product [and] failing to stop selling the fuel containers Petitioner knew to be unsafe."

The Court of Appeals failed to comply with an essential tenant of contract law. "When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used." *Hardee v. Hardee*, 355 S.C. 382, 387, 585 S.E.2d 501, 503 (2003); (*see also B.L.G. Enterprises, Inc. v. First Financial Ins. Co.*, 334 S.C. 529, 514 S.E.2d 327 (1999)). "The judicial function of a court of law is to enforce a contract as made by the parties, and not to rewrite or to distort, under the guise of judicial construction, contracts, the terms of which are plain and unambiguous." *Id.*; (*see also S.S. Newell & Co. v. American Mut. Liab. Ins. Co.*, 199 S.C. 325, 19 S.E.2d 463 (1942)). It is clear and unambiguous that the Vendor Agreement obligated Defendant Blitz to indemnify Petitioner for ***"any and all claims ... arising out of ... the sale of the product."*** (R. p. 625, paragraph 3) (***emphasis added***). Likewise, this case is inarguably a claim arising out of the sale of the product. Therefore, the Court of Appeals had an obligation to enforce the contract made by Defendant Blitz and Petitioner rather than, as it did, distort the language and intention of the agreement.

The importance of the Indemnity Agreement cannot be understated in this matter, as it is precisely this Agreement that further supports Petitioner's contention that these claims should be subjected to the Channeling Injunction and release. In the case of *A.H. Robins Co., Inc. v. Piccinin*, it was established by the Fourth Circuit that a non-debtor might, under "unusual circumstances," be afforded the protections of an injunction or release. 788 F.2d 994, 999 (Ct. App. 4th Cir. 1986). To find such "unusual circumstances" exist it was noted that 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.* 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.* As indicated hereinabove, the Indemnity Agreement unquestionably affords Petitioner absolute indemnity from the debtor in this suit thus rising to the level of an "unusual situation" creating an "identity of interests" as contemplated in *A.H. Robins*.

CONCLUSION

Based on the foregoing Petitioner respectfully requests that this Court reverse the decision of the Court of Appeals and permanently enjoin Respondents suits as required by the Channeling Injunction.

Respectfully submitted,

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This 8th Day of August 2019
Columbia, South Carolina

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PROOF OF SERVICE

I certify that I have served the Brief of Petitioner on all counsel of record, by depositing a copy of it in the United States Mail, postage prepaid, on this 8th day of August 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.

Denise M. Brockwell
Paralegal

August 8, 2019