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S.C. SUPREME COURT

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Perry M. Buckner, Circuit Court Judge

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 — Appellant.

And

Melinda Cook, — Respondent,

v.

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

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

APPELLANT'S PETITION FOR REHEARING AND MEMORANDUM IN SUPPORT

Pursuant to Rule 221(a) and Rule 240(i), SCACR, Appellant Fred's Inc. ("Appellant") respectfully petitions this Court for a rehearing of Opinion No. 28016, filed March 17, 2021. Rehearing is appropriate where, as here, the Court has overlooked or misapprehended an argument.

Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001). The Petition for Rehearing should be granted because the Court's Opinion misapprehends the argument being made by Appellant and overlooked critical aspects of the record. Appellant hereby incorporates by reference its previously filed briefs and the Record on Appeal for a substantive review of the facts and procedural history relevant to this matter.

I. Background Facts.

On or about November 5, 2010, Respondent Alice Hazel's minor nephew, Jacob N., reportedly sustained injuries when a gasoline container, used to reignite a fire, exploded. Respondents allege that the container in question was purchased at Appellant's store and was manufactured by Defendant Blitz U.S.A., Inc. Defendant Blitz filed for Chapter 11 Bankruptcy in United States Bankruptcy Court for the District of Delaware on November 19, 2011. At some point following Respondent Melinda Cook becoming aware of the application for bankruptcy a claim was filed on behalf of her minor son for his injuries. It is uncontroverted that Respondent Melinda Cook's minor son, by and through Respondent Alice B. Hazel, his *Guardian ad Litem*, is a Participating Claimant presenting a Blitz Personal Injury Claim as established in line with the requirements of Defendant Blitz's bankruptcy Plan. Throughout the process for bankruptcy the Chapter 11 filing was eventually transitioned to a Chapter 7 filing.

Ultimately 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), which eventually resulted in the filing of Findings 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 was addressing the Debtors' and Official Committee of Unsecured Creditors' First Amended Joint Plan of Liquidation dated

December 18, 2013 ("Plan") (R. pp. 337-620). The Plan forms the basis for Appellant's pursuit of a permanent injunction. The Blitz Personal Injury Trust was created subject to Section 4.3 of Article IV of The Plan (R. pp. 359-367) "to assume 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.

The Imposition of Channeling Injunction set forth in Section 4.3.3 of Article IV of The Plan stated "[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 defined 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, which is noted to include and bar any action against the "Protected Parties" it is noted that a list of said parties 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.

Moreover, 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. It is uncontested that Appellant was, at all applicable times, an additional insured under two participating insurers policies and was a distributor/retailer of Debtors' products. *Confirmed Order,* (R. p. 595); Exhibit 2: Participating Insurers - Subject Policies.

II. Procedural Posture.

On November 5, 2013 Respondents, Alice Hazel as Guardian *ad Litem* of Jacob N. and Melinda Cook, filed lawsuits alleging three causes of action relative to Appellant Fred's including negligence, strict liability, and breach of warranty for injuries caused by a Blitz gas can purportedly purchased from Appellant Fred's store in Varnville, South Carolina. Appellant 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. 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. After hearing oral arguments and taking the matter under advisement

Judge Buckner issued an Order Denying Appellant's Motion (R. pp. 2-6). At the aforementioned hearing Respondents made an oral motion with the Court to Amend the Complaint to eliminate or otherwise strike any "product liability" causes of action. Judge Buckner granted Respondents' Motion to Amend the Complaint in the Order signed by Judge Buckner and filed November 18, 2014. Appellant subsequently filed, pursuant to Rule 59(e), SCRCP, a Motion for Reconsideration (R. pp. 621-632). Judge Buckner heard Appellant's Motion for Reconsideration on June 15, 2015 with an Order denying said motion filed July 9, 2015 (R. pp. 7-12). The instant appeal followed.

III. The Supreme Court Misapprehended the Legal Duty Argument of Appellant Resulting in a Misapplication of the Law as Pertaining to the Negligence Claim Presented by Respondents.

In affirming the decision of the Court of Appeals to deny the permanent injunction as required by the Blitz Bankruptcy Plan the Court of Appeals misapprehended the argument advanced by Appellant as to duty owed by the seller of a product to a customer. Underscoring the depth and impact of the misapprehension, the Court, identifies this as "Fred's Secondary Argument." This was the very crux of the issues before the Court as Respondents had heretofore conceded they were enjoined from bringing products liability claims against Appellant. Respondents have, on the record, acknowledged they are barred from pursuing all products liability claims. The Court's misapprehension of Appellant's argument is plainly clear wherein it states, "whether Hazel's claim is a products liability claim is not important to our analysis." Therefore, Court's failure, despite its own reliance on multiple products liability cases when addressing a seller's duty, to address whether Hazel's claim is a products liability claim in Opinion 28106 is in error.

In its opinion, contended that Appellant argued it owed no duty "a retail seller of a product owes no duty to its customers." Appellant, as the Court noted, relied heavily on *Bragg v. Hi-*

Ranger, Inc., 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995); however, this reliance was done so as to establish the duty of a seller of a product to a customer. Likewise, the Court cites to a number of other cases, specifically *McClure ex rel. Scott v. Freuhauf Corp.*, 302 S.C. 364, 369, 396 S.E.2d 354, 357 (199), wherein the duty of a seller of a product was also addressed. Of great significance is Footnote 11, wherein the Court plainly states *McClure* "is a products liability case." This case and holding are directly applicable to the facts in the instant case wherein an injured party is seeking to hold a seller of a defective product accountable under ordinary negligence principles.

"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.* One must look no further than any of the cases the Court cited in its opinion to accurately categorize the claims presented by Respondents as being solely grounded in products liability. Appellant cited to *Bragg* for its holding that, "[u]nder a negligence theory, the plaintiff bears the additional burden of demonstrating the defendant (seller or manufacturer) failed to exercise due care in some respect." *Id.* 319 S.C. at 539. This holding, like those in the numerous products liability cases relied on by the Court, create only one conclusion that, while these are negligence claims against Appellant, as a seller, the duty owed is created by the very same body of law Respondents have acknowledged on the record they cannot pursue as a result of the Channeling Injunction. There is no other body of law, relied on by the Court or cited to by Respondents, creating a duty as to the seller of a product aside from products liability and as such there can be no other conclusion that Hazel's claim, albeit for alleged negligence of a seller, are nonetheless the very products liability claims Respondents have agreed they are enjoined from

bringing. Therefore, the Court's indication that Hazel's claims being, or not being, a products liability claim is not important to the analysis is indicative of the misapprehension of Appellant's argument.

IV. The Court Misapprehends Appellant's Indemnification Argument.

Additionally, Appellant submits that the Court misapprehended their argument relative to indemnification. The Court notes "[a]n indemnity agreement could create a sufficient nexus with the debtor such that the Confirmation Order and Plan would extend to a third-party, no-debtor seller like Fred's." In analyzing this issue, as noted by the dissent, the Court erroneously omits the very portion of the agreement that Appellant's argued and relied on as evidence of its absolute indemnity by Blitz. The portion of the agreement overlooked by the Court afforded Appellant, as a seller of the debtor's product, absolute indemnification for "from and against ***any and all*** claims, actions, liabilities, losses, ..., damages, costs and expenses, including attorney's fees ... arising out of ***any actual or alleged violation in the*** use ***or sale of said Products.***" (***emphasis added***). The foregoing terms represent clear and unequivocal language that show Blitz's intent to absolve Appellant from the consequences of ***any*** claim arising out of the sale of the product, which would include the instant claim. Appellant submits that the language of the agreement clearly and unequivocally reflects the intention of Blitz to indemnify and defend Appellant against ***any and all claims*** arising out of the sale of the products. This language as having been omitted by the Court, after acknowledging an indemnity agreement could create the nexus needed for a non-debtor to be afforded protection under the Confirmation Order and Plan. represents a clear error.

V. The Court Erroneously Addresses and Considers Policies not Included in the Record on Appeal.

The Court in its effort to determine whether Appellant met the definition of a Released Party improperly evaluated and addressed insurance policies despite acknowledging none were in

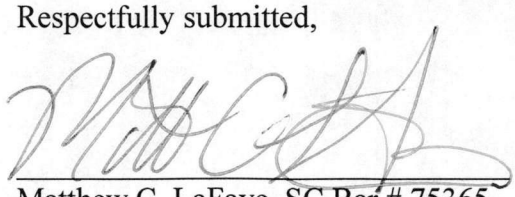
the Appendix or Record on Appeal. In a conflicting turn the Court contends "[t]he commercial general liability policy would likely cover a negligence claim against Fred's, ***such as Hazel's claim***" yet noted the absence of the products liability policy or the excess liability policy as depriving them of the ability to determine if either covered Hazel's claim. It was this omission that the Court relied on to arrive at the conclusion Appellant was not a Released Party. This undertaking by the Court is clear error.

In Footnote 8 the Court lays the burden at Appellant's feet to demonstrate insurance policies apply to Hazel's claim. This notation erroneously ignores Respondents' arguments relative to non-participating insurers. It was Respondents' duty to enter into the record the policies of non-participating insurers that they believed covered the very claims the purport to bring. Appellant, in this instance, had no reason to introduce products liability or excess liability policies as Respondents had already acknowledged the accepted fact that they were enjoined from bringing products liability claims against Appellant. This acknowledgment was tantamount to their conceding coverage to Appellant for participating insurers. The Court, having ignored this settled and uncontested acknowledgement, erred in addressing the presence or absence of policies and relying on same to conclude Appellant is not a Released Party.

VI. Conclusion

The Court of Appeals misapprehended Appellant's arguments and the prevailing law of this State in rendering Opinion 28016. Therefore, the petition for rehearing should be granted reversing the Orders of the trial court enjoining Respondents from pursuing their negligence claims against Appellant for the injuries to Jacob N. and damages resulting therefrom.

Respectfully submitted,



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This 5th day of April 2021
Columbia, South Carolina