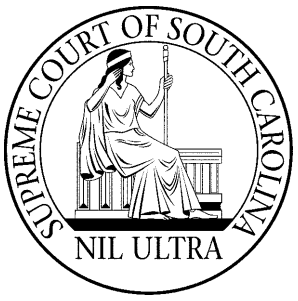

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 9
March 17, 2021
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Bradley A. Norton

Appellate Case No. 2020-001191

Opinion No. 28014
Submitted February 10, 2021 – Filed March 17, 2021

DEFINITE SUSPENSION

Disciplinary Counsel John S. Nichols and Deputy Disciplinary Counsel Carey Taylor Markel, both of Columbia, for the Office of Disciplinary Counsel.

Bradley A. Norton, of Walhalla, Pro Se.

PER CURIAM: In this attorney disciplinary matter, Respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, Respondent admits misconduct, consents to the imposition of any sanction contained in Rule 7(b), RLDE, and agrees to pay the costs incurred by ODC and the Commission on Lawyer Conduct (Commission) in investigating and prosecuting this matter. We accept the Agreement and suspend Respondent from the practice of law in this state for one year. The facts, as set forth in the Agreement, are as follows.

I.

Matter A

Respondent represented Client A from 1994 to 2007 in a personal injury matter arising out of an automobile accident. Respondent neglected the matter, failed to return phone calls from Client A, canceled client meetings, and failed to communicate with Client A. Respondent lacked competence in handling the personal injury matter and ultimately the trial court dismissed the litigation for failure to prosecute. Respondent admits his conduct violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (diligence); Rule 1.4 (communication); Rule 3.2 (reasonable efforts to expedite litigation); and Rule 8.4(e) (engaging in conduct prejudicial to the administration of justice). We find Respondent's conduct also violated Rule 1.1, RPC, Rule 407, SCACR (competence).

Matter B

Respondent represented Client B from 2005 to 2012 in a personal injury matter arising out of an automobile accident. Respondent neglected the matter, failed to return phone calls from Client B and the insurance carrier, failed to communicate, and failed to file a summons and complaint despite assurances to the client that he had done so. Respondent lacked competence in handling Client B's claim. After the initiation of these proceedings, Respondent compensated Client B for her damages. Respondent admits his conduct violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (diligence); Rule 1.4 (communication); Rule 3.2 (reasonable efforts to expedite litigation); Rule 8.4(d) (conduct involving dishonesty); and Rule 8.4(e) (engaging in conduct prejudicial to the administration of justice). We find Respondent's conduct also violated Rule 1.1, RPC, Rule 407, SCACR (competence).

Matter C

Respondent represented Client C from 2007 to 2014 in a personal injury matter arising out of an automobile accident. For a period of seven years, when Client C would call to check on the status of her case, Respondent would assure Client C that he was waiting on a court date. In 2014, Client C learned that Respondent had

never filed a lawsuit on her behalf because Respondent did not know where to file the suit. Respondent did not file a timely response to the Notice of Investigation in this matter, necessitating the issuance of a letter pursuant to *In re Treacy*, 277 S.C. 514, 290 S.E.2d 240 (1982). Subsequent to the initiation of these proceedings, Respondent compensated Client C for her damages. Respondent admits his conduct violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (competence); Rule 1.3 (diligence); Rule 1.4 (communication); Rule 3.2 (reasonable efforts to expedite litigation); Rule 8.1(b) (failure to respond to disciplinary inquiry); Rule 8.4(d) (conduct involving dishonesty); and Rule 8.4(e) (engaging in conduct prejudicial to the administration of justice).

Matter D

Respondent represented Client D from 2009 to 2015 in a personal injury matter arising out of an automobile accident. During the course of representation of Client D, Lawyer failed to return phone calls and failed to file appropriate paperwork with the trial court. Ultimately the case was dismissed pursuant to Rule 40(j), SCRCP, in 2015 and not restored to the docket. Respondent did not file a timely response to the Notice of Investigation in this matter, necessitating the issuance of a letter pursuant to *In re Treacy*, 277 S.C. 514, 290 S.E.2d 240 (1982). Respondent admits his conduct violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (competence); Rule 1.3 (diligence); Rule 1.4 (communication); Rule 3.2 (reasonable efforts to expedite litigation); Rule 8.1(b) (failure to respond to disciplinary inquiry); and Rule 8.4(e) (engaging in conduct prejudicial to the administration of justice).

Matter E

During the course of representation of a client in a personal injury matter, Respondent agreed to protect a subrogation claim. Upon settlement of the personal injury matter, Respondent failed to pay the subrogation claim. The subrogation vendor contacted Respondent repeatedly over the course of fifteen months after the settlement concerning payment of the subrogation claim. Respondent never responded to the subrogation vendor's attempts to obtain payment. After the initiation of these proceedings, Respondent paid the subrogation claim. Respondent admits his conduct violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.15(e) (promptly distributing funds); Rule

8.4(d) (conduct involving dishonesty); and Rule 8.4(e) (engaging in conduct prejudicial to the administration of justice).

Matter F

Respondent represented Client F in a family court matter. Client F had physical custody of her grand-niece and grand-nephew and wanted to obtain legal custody of them. Respondent advised Client F that adoption was preferable over legal custody because adoption would protect Client F's interests in providing a stable home environment for the children. After the temporary hearing, communications between Respondent and Client F broke down. Respondent was unsuccessful in securing the adoption for Client F. Respondent admits his conduct violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (competence) and Rule 1.4 (communication).

Matter G

Respondent represented Client G from 2003 to 2014 in a personal injury action arising out of her injuries in an automobile accident. Client G was eleven years old at the time of the accident. Respondent filed an action for Client G on December 31, 2009, the last day of the calendar year in which Client G turned eighteen years old. For the next approximately year and a half, Respondent failed to return phone calls to Client G or her father. On August 25, 2011, the trial court dismissed Client G's action for a failure to prosecute. On August 17, 2012, Respondent filed a motion to restore. After getting the case restored to the docket, Respondent took no further action on Client G's case. On August 26, 2015, the court again dismissed Client G's case for a failure to prosecute. On October 14, 2015, Respondent filed a second motion to restore Client G's case to the docket. On October 19, 2015, the case was restored to the docket. In 2017, the court granted summary judgment to the defendant because the statute of limitation in Client G's case had already expired when Respondent filed Client G's second motion to restore. Respondent admits his conduct violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (competence); Rule 1.3 (diligence); Rule 1.4 (communication); Rule 3.2 (reasonable efforts to expedite litigation); and Rule 8.4(e) (engaging in conduct prejudicial to the administration of justice).

II.

Respondent admits his conduct constitutes grounds for discipline under the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (a violation of the Rules of Professional Conduct shall be grounds for discipline) and Rule 7(a)(5) (conduct tending to pollute the administration of justice shall be grounds for discipline).

We find Respondent's misconduct warrants a definite suspension from the practice of law in this state for one year. Accordingly, we accept the Agreement and suspend Respondent for a period of one year. Within thirty (30) days of the date of this opinion, Respondent shall pay or enter into a reasonable payment plan with the Commission to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission.

Additionally, we remind Respondent that, prior to seeking reinstatement, he must demonstrate his compliance with Rule 33, RLDE, Rule 413, SCACR (reinstatement following a definite suspension of nine months or more), including completion of the Legal Ethics and Practice Program Ethics School within one year prior to filing a petition for reinstatement.

Finally, within fifteen days of the date of this opinion, Respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR.

DEFINITE SUSPENSION.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Richard Ralph and Eugenia Ralph, Respondents,

v.

Paul Dennis McLaughlin and Susan Rode McLaughlin, Petitioners.

Appellate Case No. 2019-002031

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
Roger M. Young Sr., Circuit Court Judge

Opinion No. 28015
Heard December 9, 2020 – Filed March 17, 2021

REVERSED

G. Hamlin O'Kelley III, of Buist Byars & Taylor, LLC, of Mt. Pleasant, for Petitioners.

Ainsley F. Tillman and Ian S. Ford, both of Ford Wallace Thomson LLC, of Charleston; and G. Dana Sinkler, of Gibbs & Holmes, of Wadmalaw Island, for Respondents.

PER CURIAM: This action involves a dispute stemming from the removal of a drainage pipe running across neighboring properties. The pipe was part of an

easement that was originally owned by the Seabrook Island Property Owners Association (SIPOA) and was intended to carry away stormwater from a road in the community, with the pipe running through the backyard portions of seven contiguous lots. Over the years, the drainage pipe degraded and became porous such that, aside from carrying away stormwater from the road, it also began draining standing water from the backyards of those seven lots. Nearly twenty years later, SIPOA installed a new drainage system for the road, rendering the old one obsolete. At a property owner's request, SIPOA formally abandoned the easement, although the porous pipe remained in place. Petitioners Paul and Susan McLaughlin later purchased one of the seven lots containing the old drainage pipe (Lot 22). After six years of meetings and consultation with SIPOA and their neighbors, and after receiving home design and location approval from SIPOA, Petitioners removed the pipe and built their new house over the area in which the pipe was previously located. Respondents Richard and Eugenia Ralph own the parcel next door to Petitioners (Lot 23). Following removal of the pipe, Respondents claimed their backyard flooding became worse than it already was and sued Petitioners. A jury awarded Respondents $1,000 in "nominal" damages, but, despite winning below, Respondents appealed. The court of appeals reversed and remanded for a new trial on damages alone. *Ralph v. McLaughlin*, 428 S.C. 320, 834 S.E.2d 213 (Ct. App. 2019). We reverse the court of appeals and reinstate the jury's $1,000 verdict, thereby ending this case.

I.

In the mid-1980s, when Lots 22 and 23 were initially created, the developer installed a corrugated-metal pipe to facilitate drainage from a road in the community. The developer installed the pipe through the backyard-portions of Lots 22 to 28, after which the pipe emptied into a water hazard on a neighboring golf course. When the developer recorded the plats for Lots 22 to 28, it noted the pipe as a twenty-foot wide drainage easement running under the lots. The recorded plat indicated the area between the drainage pipe and the golf course was a "no-build area."

As the years passed, the joints in the drainage pipe rotted and, although they were not originally designed to do so, began to allow standing water from the backyards of Lots 22 to 28 to seep into the pipe and be carried away with the stormwater from the road. In terms of the drainage easement, Lot 22 (Petitioners' lot) is upstream of Lot 23 (Respondents' lot).

In 2002, a parallel drainage system of high-density plastic piping was installed on the neighboring golf course, which rendered obsolete the existing corrugated-metal pipe running through Lots 22 to 28. Therefore, the SIPOA Board of Directors passed a resolution "to give the easement back to the property owner[s of Lots 22 to 28] with the understanding that the property owner[s] pay all cost[s] necessary to remove the easement." The then-owner of Lot 22—Petitioners' predecessor in title—promptly recorded a plat (the Forsberg plat) showing the easement as abandoned, in line with the action taken by the SIPOA Board of Directors. The Forsberg plat states, "By the approval and recording of this plat[,] the existing 'No Build Area' is hereby removed as a limitation to location of any structure on Lot 22." Only one or two of the other six affected property owners of Lots 23 to 28 formally removed the easement from their property by recording SIPOA's abandonment of the easement.

Petitioners subsequently purchased Lot 22 with the understanding that SIPOA had abandoned the easement and that they (Petitioners) merely had to "take care of the removal of the pipe."[1] For the next three years, believing the drainage easement was abandoned, Petitioners made plans to build their new home over the area in which the drainage pipe sat (i.e., the former no-build area). Eventually, Petitioners received approval from SIPOA to build their home in that location, subject to certain conditions, the most relevant of which was that Petitioners were "to assume all responsibility for the abandoned drainage easement that may contain a pipe."[2]

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[1] According to Mr. McLaughlin's trial testimony, Petitioners' purchase offer was contingent upon the easement being removed.

[2] The parties dispute what "all responsibility for the abandoned drainage easement" was intended to mean. Petitioners claim SIPOA told them the phrase meant financial responsibility for the construction costs of removing the pipe only, whereas Respondents claim the phrase meant financial responsibility to the downstream lot owners who would be affected if Petitioners removed the drainage pipe. Given that SIPOA actually approved of Petitioners' proposed home location, we agree with Petitioners' reading of the contested phrase. It would be nonsensical for SIPOA to approve of a home in a prohibited location while simultaneously warning Petitioners they would be liable to neighboring homeowners for any future problems. If that was what SIPOA intended by saying Petitioners "assume[d] all responsibility for the abandoned drainage easement," then SIPOA would have simply denied Petitioners application to build their home in that location.

Respondents discovered Petitioners planned to remove the drainage pipe and voiced concerns about the potential adverse impact it could have on their lot's already-poor ability to drain itself. In response, SIPOA commissioned an engineering study of the pipe and the immediately surrounding area. The study ultimately recommended against destroying the drainage pipe because the pipe still functioned somewhat and benefitted the owners of Lots 22 to 28 by draining standing water from their backyards to some degree.

Subsequently, SIPOA invited the owners of Lots 22 to 28 to a meeting "to discuss the possibility of *re-establishing* the easement and providing for the long-term care of the pipe," acknowledging that "doing so w[ould] require the cooperation of all property owners." (Emphasis added). Ultimately, Petitioners, Respondents, and the other lot owners tentatively "agreed to grant [SIPOA] a *new* easement to connect out th[e corrugated-metal] pipe" to the drainage system in the neighboring golf course. (Emphasis added). However, connecting the abandoned pipe to the golf course's drainage system would have required the golf course to grant SIPOA an easement across the golf course's property.

Following that meeting, SIPOA informed Petitioners they bore the burden of negotiating for the new easement with the golf course. Believing any negotiations should be SIPOA's responsibility, Petitioners refused to take responsibility for negotiating a new easement with the golf course and declined to grant SIPOA a new easement. Moreover, the golf course was not willing to grant an easement or otherwise work with SIPOA or the parties to resolve the dispute over the abandoned easement. Thus, six years after Petitioners purchased Lot 22 with the abandoned easement, they decided to move forward with the building of their home.

Petitioners notified the other property owners of Lots 23 to 28 of their decision, explaining that they had attempted to be patient during the multi-year process, but they had already delayed construction of their home for six years waiting for the dispute to play out, and they did not want to put off building their home any longer. Petitioners then authorized their contractor to remove the drainage pipe and constructed their house over the former no-build area formerly containing the pipe.

After the pipe was removed, Respondents claimed there was an increase in the amount of water on their property, which they attributed to Petitioners. Believing their property's value had been greatly diminished, Respondents filed suit against Petitioners, asserting claims for trespass and intentional infliction of emotional

distress and seeking hundreds of thousands dollars in actual and punitive damages. In turn, Petitioners filed a third-party complaint against SIPOA for indemnification in the event Respondents were successful, asserting Petitioner's actions were taken in reasonable reliance upon SIPOA's abandonment of the easement and representations that Petitioners could remove the pipe.

SIPOA then moved for, and was granted, summary judgment. In the summary judgment order, the presiding circuit court judge (who was not the trial judge) acknowledged Petitioners had produced evidence that would tend to show they reasonably relied on SIPOA's representations before removing the drainage pipe, which would seem to defeat SIPOA's summary judgment motion. Rather than considering the existence of evidence in support of Petitioners' claims, the circuit court judge discounted Petitioners' evidence, characterizing the evidence as hearsay and rejecting it. Petitioners did not appeal the summary judgment order at that time. Given the standard for granting summary judgment, the circuit court judge's decision is troubling.

The case proceeded to trial. At the close of Respondents' (plaintiffs) case-in-chief, Petitioners successfully moved for a directed verdict on the punitive damages issue. The trial court found Respondents failed to prove by clear and convincing evidence that Petitioners acted with a reckless disregard of Respondents' rights. Specifically, the trial court held Petitioners acted in reliance of SIPOA's statements that the easement was abandoned and they were permitted to build their house in the former no-build area.[3] As a result, the trial court found that Petitioners' actions did not "rise[] to the level of punitive damages."

Later, at the close of Petitioners' (defendants) case-in-chief, Respondents made a motion for a directed verdict on their trespass claim. In relevant part, Respondents argued SIPOA's purported abandonment of the easement did not affect Respondents' ownership interest in the easement. Therefore, according to Respondents, Petitioners' actions in removing the drainage pipe and building a

[3] The prior grant of summary judgment for SIPOA may have foreclosed Petitioners' ability to seek indemnification from SIPOA, but it did not foreclose the trial court from allowing in relevant evidence at trial. The representations and conduct of SIPOA were highly relevant to the issues raised by Respondents, including the issue of punitive damages.

house in the former no-build area constituted trespass as a matter of law. The trial court denied Respondents' motion for a directed verdict, finding the issue presented a jury question.

Ultimately, the jury found in favor of Respondents but only awarded them $1,000 in "nominal" damages.[4] Respondents made motions for a new trial absolute, a new trial as to damages only, or a new trial *nisi additur* pursuant to Rule 59, SCRCP. The trial court denied Respondents' post-trial motions. In relevant part, the trial court found there was evidence to support the factual findings implicit in the jury's verdict, including the fact that, while Petitioners may have "committed trespass by removing the drainage pipe," "the jury did not find that [Petitioners'] trespass caused the damage alleged by [Respondents] but understood the law requires at least nominal damages to vindicate [Respondents'] rights." As an example of that supporting evidence, the trial court cited to Mrs. Ralph's testimony that her property "always had some type of surface water problem" even before the drainage pipe was removed. Therefore, the trial court held it would be inappropriate to grant a new trial absolute, a new trial on damages only, or a new trial *nisi additur*.

Respondents then appealed to the court of appeals. The court of appeals reversed and remanded for a new trial as to compensatory and punitive damages alone. In relevant part, the court of appeals found the trial court erred in failing to grant Respondents' motion for a directed verdict as to the trespass issue, explaining Respondents had established Petitioners' liability as a matter of law. The court of appeals also held the trial court improperly entered a verdict for Petitioners on the punitive damages issue because it failed to follow the "determinations of law" in the summary judgment order that Petitioners did not justifiably rely on SIPOA's

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[4] Generally speaking, nominal damages amount to substantially less than $1,000. *See, e.g.*, *Hinson v. A.T. Sistare Constr. Co.*, 236 S.C. 125, 133–34, 113 S.E.2d 341, 345 (1960) ("[N]ominal damages have been defined as a trifling sum awarded to a plaintiff when there is no substantial loss or injury to be compensated, but still the law recognizes a technical invasion of his rights or a breach of the defendant's duty, or in cases where, although there has been a real injury, the plaintiff's evidence entirely fails to show an amount . . . . A verdict for $200 is a verdict for substantial, not nominal, damages."). Here, the jury handwrote in the word "nominal," so that instead of saying $1,000 in "actual damages," the verdict form read $1,000 in "actual nominal damages."

representations in removing the pipe. Because the court of appeals found Respondents had established Petitioners' trespass—and their resulting liability—as a matter of law, the court of appeals held the trial court erred in failing to grant Respondents' post-trial motions, finding a new trial as to compensatory and punitive damages alone would be the appropriate remedy.

We granted Petitioners a writ of certiorari to review the decision of the court of appeals.

II.

We first address the court of appeals' finding that Respondents were entitled to a directed verdict on the trespass issue because they established an ownership interest in the drainage easement as a matter of law. Because the jury ruled in Respondents' favor on the matter of liability by finding Petitioners had committed a compensable trespass, Respondents were not aggrieved by the denial of their motion for a directed verdict as to liability and, as a result, had no right to appeal that decision.

"The right of appeal arises from and is controlled by statutory law." *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006). As set forth in section 18-1-30 of the South Carolina Code (2014), only a "party aggrieved" may appeal. *See also* Rule 201(b), SCACR ("Only a party aggrieved by an order, judgment, sentence or decision may appeal."). As we explained long ago,

> [A]n aggrieved party is one who is injured in a legal sense; one who has suffered an injury to person or property. . . . [A]n aggrieved party with[in the meaning of the] statute relating to appeals is a person who is aggrieved by the judgment or decree when it operates on his rights of property or bears directly upon his interest, the word aggrieved referring to a substantial grievance, a denial of some personal or property right or the imposition on a party of a burden or obligation.

Cisson v. McWhorter, 255 S.C. 174, 178, 177 S.E.2d 603, 605 (1970) (quoting *Bivens v. Knight*, 254 S.C. 10, 13, 173 S.E.2d 150, 152 (1970)). Here, the jury found in Respondents' favor on the matter of liability. Therefore, Respondents were not "aggrieved," in the legal sense, by the trial court's denial of their motion

for a directed verdict. We therefore hold the court of appeals improperly reversed the jury verdict on this basis.[5]

III.

We also find the court of appeals erred in holding the trial court erred in failing to grant Respondents' motions for a new trial. "Upon review, a trial judge's order granting or denying a new trial will be upheld unless the order is wholly unsupported by the evidence, or the conclusion reached was controlled by an error

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[5] Because we reverse the court of appeals' decision based on Respondents' lack of "aggrieved party" status, we need not address the merits of their claim that they had some sort of ownership right in the drainage easement. Nonetheless, we express concern over the court of appeals' discussion of the matter, and particularly, its alteration of a quote from the *Williamson* case. *Compare Ralph*, 428 S.C. at 352, 834 S.E.2d at 230 (stating, with the alterations inserted by the court of appeals, "It is generally held that when the owner of land has it subdivided and platted into lots and [easements,] and sells and conveys the lots with reference to the plat, he hereby dedicates said [easements] to the use of such lot owners [and] their successors in title. . . ." (quoting *Blue Ridge Realty Co. v. Williamson*, 247 S.C. 112, 118, 145 S.E.2d 922, 924–25 (1965))), *with Williamson*, 247 S.C. at 118, 145 S.E.2d at 924–25 ("It is generally held that when the owner of land has it subdivided and platted into lots *and streets* and sells and conveys the lots with reference to the plat, he thereby dedicates said *streets* to the use of such lot owners, their successors in title, *and the public*." (emphasis added)). The two scenarios presented here and in *Williamson* (and other cases relied on by the court of appeals) are fundamentally different. *Williamson* involved the claim of a property owner to use a public street shown on a recorded plat. In contrast, here, we have a person whose property contains an easement *intended for the benefit of another*, but who nonetheless claims an ownership interest over the easement because it inadvertently benefits him as well—regardless of the original intent behind the easement. In *Williamson*, the property owner (and their successors in title) were *intended* to benefit from access to the public road. Here, the exact opposite is true, and the owners of Lots 22 to 28 were never intended to benefit directly from the easement. The fact that they did so was a pure accident, caused by the unexpected degradation of the corrugated-metal pipe. In short, *Williamson* does not stand for the proposition for which it was cited by the court of appeals, but, because it is not required, we express no further opinion on the merits of Respondents' argument.

of law." *Norton v. Norfolk S. Ry. Co.*, 350 S.C. 473, 478, 567 S.E.2d 851, 854 (2002) (citation omitted) (internal quotation marks omitted). We find no evidence the trial court abused its discretion in denying Respondents' motions for a new trial. Respondents themselves testified that their lot always had drainage problems, even before the removal of the drainage pipe. The issue of damages was fully vetted, with no limitations placed on Respondents' presentation of damages evidence, and the jury determined Respondents were entitled to $1,000 in damages. Under the circumstances, we find no basis to set aside the trial court's denial of Respondents' new trial motion.

IV.

Finally, as to the punitive damages issue, given the specific facts of this case, we find as a matter of law that Respondents were not entitled to punitive damages. It is undisputed that over the course of six years, Petitioners took a series of good-faith steps in dealing with SIPOA and their neighbors in an attempt to resolve the drainage pipe dispute. In essence, Petitioners did everything they could to accommodate SIPOA and their neighbors besides filing a declaratory judgment action to confirm what was already shown on their deed—that SIPOA had abandoned the drainage easement in 2002. SIPOA indicated multiple times that it had abandoned the drainage easement, and all of the recent discussions were about "re-establishing" the easement or creating a "new" easement—things which Petitioners had no legal obligation to do. We recognize Respondents believe that Petitioners could have done more to accommodate them and, therefore, contend Petitioners acted in a malicious manner entitling Respondents to punitive damages. However, we have carefully reviewed the record in a light most favorable to Respondents, and we find no evidence creating a question of fact on the issue of punitive damages. *See Cartee v. Lesley*, 290 S.C. 333, 337–38, 350 S.E.2d 388, 390 (1986) (explaining that when the evidence is susceptible of only one reasonable inference, the question of punitive damages becomes one for the court). The suggestion that removing the drainage pipe under these circumstances established clear and convincing evidence of Petitioners' malicious intent to invade Respondents' rights was not merely speculation, but absurd. We therefore reverse the court of appeals on this issue.

V.

In sum, we find the trial court did not err in any respect and, thus, reinstate the jury's $1,000 verdict in favor of Respondents. The decision of the court of appeals is therefore reversed. Our decision to reinstate the jury's verdict ends this case.

REVERSED.

BEATTY, C.J., KITTREDGE, FEW and JAMES, JJ., and Acting Justice Thomas E. Huff, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Alice Hazel, as guardian ad litem for Jacob N., Respondent,

v.

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

Of Whom Fred's Stores of Tennessee, Inc. is the Petitioner.

and

Melinda Cook, Respondent,

v.

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

Of Whom Fred's Stores of Tennessee, Inc. is the Petitioner.

Appellate Case No. 2019-000220

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Hampton County
Perry M. Buckner III, Circuit Court Judge

Opinion No. 28016
Heard December 11, 2019 – Filed March 17, 2021

AFFIRMED

Matthew Clark LaFave, Crowe LaFave, LLC, of Columbia, for Petitioner.

Kathleen Chewning Barnes, Barnes Law Firm, LLC; Mark David Ball, Peters Murdaugh Parker Eltzroth & Detrick, PA, both of Hampton, for Respondent.

JUSTICE FEW: Petitioner Fred's Stores of Tennessee, Inc.[1] contends the circuit court erred by refusing to enjoin these lawsuits under the terms of a bankruptcy court order and injunction entered in the bankruptcy proceedings of Blitz U.S.A., Inc. We find the circuit court correctly determined the bankruptcy court's order and injunction do not protect Fred's from these lawsuits. We remand to the circuit court for discovery and trial.

I. Alleged Facts and Procedural History

On November 5, 2010, James Nix poured kerosene from a gasoline can onto a burn pile in his yard. The kerosene ignited, and the flame entered the gas can through its unguarded pour spout. The gas can exploded and sprayed kerosene and fire onto Nix's five-year-old son Jacob, who was standing only a few yards away. Jacob suffered severe burn injuries to over 50% of his skin. Jacob has undergone numerous skin grafts and surgeries, but he continues to suffer from pain and limited range of motion. He has permanent scarring.

[1] The caption in the circuit court and court of appeals incorrectly identified the petitioner as Fred's, Inc. The correct name is Fred's Stores of Tennessee, Inc.

Blitz U.S.A., Inc. manufactured the gas can. Blitz gas cans have been involved in numerous other lawsuits involving burn injuries like Jacob's.[2] Blitz sought bankruptcy protection in the United States Bankruptcy Court for the District of Delaware. *In re Blitz U.S.A. Inc.*, 475 B.R. 209 (Bankr. D. Del. 2012). According to the bankruptcy court, "Blitz spent millions of dollars to defend numerous product liability lawsuits alleging injuries sustained in the use of Blitz's gas cans. In part, the influx of litigation and rapidly escalating defense costs led Blitz to seek bankruptcy protection." 475 B.R. at 211. Blitz filed the action seeking bankruptcy protection on November 9, 2011. *Id.*

Blitz distributed the gas can involved in Jacob's injury through Fred's, a retail store chain headquartered in Tennessee. Fred's sold the gas can to a consumer at its store in the town of Varnville, in Hampton County, South Carolina. The explosion and fire that burned Jacob occurred at Nix's home in Hampton County.

On November 5, 2013, Jacob's aunt Alice Hazel, who is also his legal guardian, and Jacob's mother Melinda Cook, filed separate but almost identical lawsuits in state court in Hampton County seeking damages for Jacob's injuries. Both plaintiffs asserted claims against Blitz on products liability theories of strict liability, breach of warranty, and negligence. Both plaintiffs asserted claims against Fred's for strict liability and breach of warranty based on the sale of the allegedly defective gas can. Both plaintiffs also asserted a claim against Fred's on a negligence theory based only on Fred's negligence, not based on the negligence of Blitz. This is the claim important to this appeal, and we will refer to it as "Hazel's claim."

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[2] *See, e.g.*, *Gomez v. Harbor Freight Tools USA, Inc.*, 383 F. Supp. 3d 1376 (M.D. Ga. 2019); *Thornton v. Blitz USA, Inc.*, 850 F. Supp. 2d 1374 (S.D. Ga. 2011); *Walker v. Blitz USA, Inc.*, 663 F. Supp. 2d 1344 (N.D. Ga. 2009); *Grubbs v. Wal-Mart Stores, Inc.*, Civ. A. No. 1:19-cv-02229-JMC, 2020 WL 3843635 (D.S.C. July 8, 2020). Our Westlaw search of "Blitz" and "gas can" or "gas container" found an additional eighteen lawsuits relating to Blitz's gas cans. *See, e.g.*, *Boldman v. Walmart Stores, Inc.*, 754 F. App'x 148 (3d Cir. 2018); *Smith ex rel. VanBrunt v. Blitz U.S.A. Inc.*, Civ. No. 11-1771 (RHK/LIB), 2012 WL 5413513 (D. Minn. Nov. 6, 2012); *Purvis v. Blitz, U.S.A., Inc.*, No. 7:11-cv-111 (HL), 2012 WL 645884 (M.D. Ga. Feb. 28, 2012).

Fred's moved to "permanently enjoin or alternatively stay" the two lawsuits. Fred's claimed the Blitz bankruptcy order and injunction foreclosed any claims against third-party sellers like Fred's. Before the initial hearing on Fred's motion, the plaintiffs asked for—and the court granted—permission to amend the complaints to withdraw any claims based on Blitz's conduct, and to allege against Fred's only Hazel's claim. The circuit court later filed a written order granting leave to amend the complaints, and denying Fred's motion to enjoin Hazel's claim. Fred's appealed the denial of the injunction to the court of appeals, which affirmed. *Hazel v. Blitz U.S.A., Inc.*, 425 S.C. 361, 822 S.E.2d 338 (Ct. App. 2018). We granted Fred's petition for a writ of certiorari.

II. Analysis

Fred's motion to enjoin Hazel's claim, and its argument to this Court that the circuit court erred by denying it, is based on a 53-page order entered on January 30, 2014—with hundreds of pages of attachments—in the Blitz bankruptcy proceedings in Delaware. The text of the order—without attachments—may be found at *In re Blitz U.S.A., Inc.*, No. 11-13603 (PJW), 2014 WL 2582976 (Bankr. D. Del. Jan. 30, 2014). The attachment important to our analysis—the "Debtors' and Official Committee of Unsecured Creditors' First Amended Joint Plan of Liquidation"—may be found at *In re BLITZ U.S.A., INC., et al., Debtors.*, No. 11-13603 (PJW), 2013 WL 6825608 (Bankr. D. Del. Dec. 19, 2013). As the parties have done, we will refer to these documents as the "Confirmation Order" and the "Plan."

A. Summary of Confirmation Order and Plan

The United States Bankruptcy Code provides an "automatic stay" that prevents "the commencement or continuation" of most civil litigation against any debtor named in a bankruptcy proceeding. 11 U.S.C.A. § 362(a)(1) (2015). Fred's is not a named debtor in the Blitz bankruptcy proceeding. However, the Confirmation Order and Plan also enjoin civil actions against certain other parties who are not named as debtors. To accomplish this, the Confirmation Order permitted Wal-Mart Stores, Inc.[3] and willing insurance companies to fund the Blitz Personal Injury Trust. In

[3] Wal-Mart appears to have sold a lot of Blitz gas cans and defended a lot of Blitz Personal Injury Trust Claims. According to one plaintiff in a Blitz Personal Injury Trust Claim, "Wal-Mart, the country's largest seller of plastic gas containers, 'sold more than 40 million Blitz gas containers without flame arrestors between 2002 and

exchange for their contributions, the Confirmation Order protected Wal-Mart and the insurance companies who contributed to the Trust—the Participating Insurers—from all liability "based upon, arising out of, relating to, or in any way involving bodily injury and/or property damage" from a Blitz product. Under the operative language of the Confirmation Order and Plan,[4] claims against Blitz, Wal-Mart, Participating Insurers, and Protected Parties are "channeled" into the Blitz Personal Injury Trust, and any party asserting such a claim is enjoined from pursuing the claim in any other forum.

B. Fred's Primary Argument

Fred's argues it is a Protected Party under the operative language of the Confirmation Order and Plan. Thus, Fred's argues, Hazel's claim must be channeled to the Blitz Personal Injury Trust and may not be litigated in state court.[5] The operative

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2013.'" *Jackson v. Wal-Mart Stores, Inc.*, 753 F. App'x 866, 868 (11th Cir. 2018) (quoting the plaintiff's complaint). According to another court, "Wal-Mart has been named along with Blitz in at least thirty-five actions involving portable consumer gas containers in multiple jurisdictions." *Al-Shara v. Wal-Mart Stores, Inc.*, No. 11-CV-14954, 2012 WL 1119339, at *2 (E.D. Mich. Apr. 3, 2012).

[4] The operative language uses numerous defined terms, not all of which are clear, and several of which are defined inconsistently in different places. We have capitalized all defined terms. Exhibit 1 to the Plan—entitled "Definitions"—includes 153 defined terms; Exhibit 8—entitled "Term Sheet"—includes twenty-nine defined terms. Twelve of the terms are defined in both documents. Of those twelve, only three are given the same definition both times.

[5] Much of the parties' briefs and oral argument focused on whether Hazel's claim is a "products liability" claim. Neither the Confirmation Order nor the Plan mention the phrase "products liability." As we will explain below, the debate over whether Hazel's claim is a products liability claim does not relate to the operative language of the Confirmation Order or Plan, but relates to Fred's secondary argument that Hazel's claim invokes insurance coverage through a policy issued by Old Republic Insurance Company insuring Fred's for products liability claims. Fred's contends Hazel's claim must be paid by Old Republic—a Participating Insurer—and thus Hazel's claim is barred.

language of the Confirmation Order and Plan supports Fred's argument in some passages, but refutes the argument in other passages. We begin our discussion of Fred's primary argument by explaining the supporting language, then the contrary language. We will finish by attempting to reconcile the inconsistency to discern the bankruptcy court's intent.

The "Introduction" to the Plan summarizes the operative language, "Following the issuance of the Channeling Injunction, holders of Blitz Personal Injury Trust Claims will be permanently enjoined from seeking satisfaction of their Blitz Personal Injury Trust Claims against the Debtors or any other Protected Party." The definition of Blitz Personal Injury Trust Claim is extremely broad. The definition includes, "All claims for damages or other relief for, based upon, arising out of, relating to or in any way involving the products . . . of the Debtors." This definition includes Hazel's claim. The term Protected Party is defined to include Vendors. The term Vendor is defined as "any Entity that . . . sold or distributed any product manufactured . . . by the Debtors." Fred's argues it is a Protected Party because it is a Vendor. Thus, Fred's argues, the Confirmation Order and Plan bar Hazel's claim because Fred's is a Protected Party.

The operative language itself also provides support for Fred's argument. The paragraph of the Confirmation Order entitled "Imposition of Channeling Injunction" provides, "Entities that . . . assert any Blitz Personal Injury Trust Claim against the Protected Parties . . . shall be permanently stayed, restrained and enjoined . . . ." The operative language of the Plan is found in sections 3.3.4 and 3.4.4. The third sentence of both sections provides "each holder of a Blitz Personal Injury Trust Claim shall have its Claim permanently channeled to the Blitz Injury Trust, and such [a] Claim may thereafter be asserted exclusively against the Blitz Personal Injury Trust."

The Channeling Injunction itself is section 4.3.3 of the Plan. That section includes two subsections, one of which provides "(i) all Blitz Personal Injury Trust Claims will be subject to the Channeling Injunction," and the other of which provides "(ii) the 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 Claims." Section 4.3.3.1 contains the "Terms" of the Channeling Injunction. That section provides, "all Entities . . . that hold or assert any Blitz Personal Injury Trust Claim against the Protected Parties . . . shall be permanently . . . enjoined from

taking any action for the purpose of . . . recovery from any such Protected Party with respect to any such Blitz Personal Injury Trust Claim."

Fred's relies on these provisions to support its argument that Hazel's claim is channeled into the Blitz Personal Injury Trust and may be asserted only against the Trust.

There are other provisions of the Confirmation Order and Plan, however, which refute Fred's argument. First, several of the provisions quoted above that Fred's argues support its argument are inconsistent with each other. For example, the headings and first two sentences of sections 3.3.4 and 3.4.4 indicate the sections apply only to USA Debtors and BAH Debtors respectively, while later sentences indicate the sections apply to all Protected Parties. As another example, sections 3.3.4, 3.4.4, and 4.3.3 of the Plan provide that "each" or "all" Blitz Personal Injury Trust Claims must be channeled to the Blitz Personal Injury Trust. On the other hand, the "Introduction" to the Plan, other sentences of sections 3.3.4 and 3.4.4, and the "Terms" set forth in section 4.3.3.1 provide only that claims "against the Protected Parties" are prohibited. In the first example, the part of the text applicable to Debtors clearly does not apply to Fred's, but the part applicable to Protected Parties arguably applies. In the second example, the part applicable to Protected Parties limits the application of the operative language and Channeling Injunction, but the extremely broad definition of Blitz Personal Injury Trust Claim makes the "each" or "all" part of the operative language and Channeling Injunction applicable to claims to which the provisions were clearly not intended to apply.

To explain this last point, it is conceivable that some person who knew of the danger of fire entering the gas can through its unguarded spout might nevertheless pour kerosene onto a burn pile in the presence of others to whom he owes a duty of due care. If the same type of explosion and fire that burned Jacob then occurred and injured others nearby, the hypothetical claim accruing to any injured parties against the person who poured the kerosene would be a Blitz Personal Injury Trust Claim. The plaintiffs actually asserted this very claim against Nix in this case. It is inconceivable the bankruptcy court meant to enjoin a claim against such a person, or against Nix, even though both the hypothetical claim and the actual claim against Nix are Blitz Personal Injury Trust Claims. Yet, the "each" or "all" part of sections 3.3.4, 3.4.4, and 4.3.3—which foreclose "each" or "all" Blitz Personal Injury Trust Claims—purport to prevent a claim against the person who negligently poured the kerosene on the fire.

Second, the term Channeling Injunction is defined in inconsistent ways. In Exhibit 1, Channeling Injunction is defined by simply referring the reader to section 4.3.3 of the Plan, which we discussed above. In Exhibit 8—Term Sheet—the definition is substantive: "'Channeling Injunction' shall mean an injunction pursuant to Sections 105(a) and 363(f) of the Bankruptcy Code that to the fullest extent permitted by law[6] . . . permanently enjoins the prosecution of all Blitz Personal Injury Claims against any Released Party." The language we discussed in support of the argument Fred's raises applies to Protected Parties, not Released Parties, and those terms are defined differently. Fred's meets the definition of Vendor, and thus—arguably—is a Protected Party; Fred's is not a Released Party.

The last statement warrants an explanation. The Term Sheet defines Released Party as "the Debtors, the Participating Insurers, Wal-Mart and any other person or entity insured under the Subject Policies . . . ."[7] Exhibit 2 to the Term Sheet contains a list of the "Subject Policies." Blitz had three liability insurance policies naming Fred's as an insured. Burlington Insurance Company issued a commercial general liability policy. Old Republic Insurance Company issued what the parties call a products liability policy. A third insurer—First Specialty Insurance Corporation—issued an excess liability policy. The list of Subject Policies includes both the products liability policy and the excess liability policy, but it does not include the commercial general liability policy. The commercial general liability policy would likely cover a negligence claim against Fred's, such as Hazel's claim. However, none of the policies are in the Appendix or in the Record on Appeal. Thus, the record before us does not indicate whether the products liability policy or the excess liability policy would cover Hazel's claim.[8] Because Fred's has not demonstrated it is an insured

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[6] We discuss below the extent to which the law permits the bankruptcy court to impose an injunction in favor of a third-party, non-debtor like Fred's.

[7] The sentence continues with the language ". . . including, but not limited to (i) any distributor or retailer of Debtors' products . . . ." This language does not make "any distributor or retailer" a Released Party, but includes as a Released Party distributors or retailers that are "insured under the Subject Policies."

[8] As the court of appeals stated, "these policies are not in the record before us," and therefore, "any effort to determine the exact coverage afforded under the policies would be a speculative exercise." *Hazel*, 425 S.C. at 369, 822 S.E.2d at 342.

under a Subject Policy, Fred's is not a Released Party. Under the substantive definition of Channeling Injunction the bankruptcy court included on the Term Sheet, Hazel's claim is not enjoined.

Third, and perhaps most importantly, there are multiple indications in the Confirmation Order and Plan that the bankruptcy court did not intend the term "Vendor" to include a seller—like Fred's—that did not contribute funds to the Blitz Personal Injury Trust. Throughout the Confirmation Order and Plan, the bankruptcy court indicated the Protected Parties were released from liability *in exchange* for the contributions the Participating Insurers made to the Blitz Personal Injury Trust. For example, the Confirmation Order and Plan state the documents enjoin cases against Protected Parties, "In view of the substantial contributions to the Blitz Personal Injury Trust . . . made by or on behalf of the Protected Parties," and, "For good and valuable consideration . . . ." In other words, the bankruptcy court appears to have intended to restrict the definition of Protected Party to those who made financial contributions to the Blitz Personal Injury Trust. These include Wal-Mart and sellers insured by Participating Insurers. As evidence of this intent, the bankruptcy court stated, "The Channeling Injunction and Releases, as applied to Blitz Personal Injury Trust Claims against the Protected Parties, are essential and necessary for the Debtors because . . . the Protected Parties would not be willing to make their contributions to the Blitz Personal Injury Trust . . . without the protection provided by the Channeling Injunction and Releases."

In addition, the bankruptcy court stated,

> If Wal-Mart or any Participating Insurer defaults and does not pay its agreed upon share of the Insurance Settlement Payment . . . in accordance with the terms of the Insurance Settlement, that defaulting party shall, after ten days notice and an opportunity to cure, not receive any benefits provided by the Insurance Settlement, including but not limited to the Releases, Injunctions and Insurance Policy

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Fred's—as the party who filed the motion to enjoin these lawsuits, the appellant at the court of appeals, and the petitioner here—bears the burden of demonstrating the insurance policies apply to Hazel's claim.

> Buy-Back until such time as the defaulting party makes full payment.

If the bankruptcy court refused to provide protection to entities who failed to make their agreed upon contributions to the Blitz Personal Injury Trust, it is inconceivable the court intended to protect entities like Fred's who refused to make contributions to the Trust in the first place.

Finally as to the bankruptcy court's intent to release non-debtors only *in exchange* for contributions to the Blitz Personal Injury Trust, the bankruptcy court indicated claims insured by Non-Participating Insurers were not intended to be released from liability. The exceptions to the releases state, "[T]he Channeling Injunction shall not enjoin: . . . the rights of any Entity to assert any claim, debt, obligation or liability for payment against a Non-Participating Insurer." The bankruptcy court found, "The Plan does not materially increase any Non-Participating Insurer's risk of providing coverage for any Blitz Personal Injury Trust Claims . . . ." The bankruptcy court stated, "The Plan shall not, and is not intended to, modify any of the rights or obligations of Non-Participating Insurers . . . ." These provisions clearly permit Hazel's claim at least to the extent Fred's is insured by Burlington—a Non-Participating Insurer—or is self-insured.

This language releasing Protected Parties *in exchange* for payments made to the Blitz Personal Injury Trust, and the language excluding Non-Participating Insurers from the release, refutes Fred's argument that Hazel's claim against it was subject to the Channeling Injunction and Fred's was therefore released from liability.

As an additional effort to discern whether the bankruptcy court intended to include Fred's as a Protected Party under the operative language of the Confirmation Order and Plan, we consider the scope of the bankruptcy court's power to protect non-debtors, for surely the bankruptcy court in this case did not intend to exceed its power. The bankruptcy court specifically stated in its definition of Channeling Injunction on the Term Sheet the Channeling Injunction extends "to the fullest extent permitted by law." The court of appeals also considered the extent of the bankruptcy court's power as an indication of its intent, stating "we believe this reading of the Bankruptcy order is consistent with the power of the Bankruptcy court under Chapter 11 'to stay and enjoin proceedings or acts against non-debtors where such actions would interfere with, deplete or adversely affect property of [the debtor's] estate[ ].'" *Hazel*, 425 S.C. at 370, 822 S.E.2d at 342-43 (alterations by

court of appeals) (quoting *In re Johns-Manville Corp.*, 26 B.R. 420, 436 (Bankr. S.D.N.Y. 1983), *aff'd*, 40 B.R. 219 (S.D.N.Y. 1984), *appeal allowed, decision rev'd in part*, 41 B.R. 926 (S.D.N.Y. 1984)); *see generally Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 155, 129 S. Ct. 2195, 2207, 174 L. Ed. 2d 99, 112 (2009) (stating—as to future cases involving asbestos—"a channeling injunction . . . would have to be measured against the requirements of [11 U.S.C.A.] § 524," in which "Congress explicitly authorized bankruptcy courts, in some circumstances, to enjoin actions against a nondebtor"); 557 U.S. at 160-61, 129 S. Ct. at 2210, 174 L. Ed. 2d at 115 (Stevens, J., dissenting) (arguing the majority's statement as to future cases should be applied in the current case, and stating, "We should not lightly assume that the Bankruptcy Court entered an order that exceeded its authority. . . . A bankruptcy court has no authority . . . to adjudicate, settle, or enjoin claims against nondebtors that do not affect the debtor's estate.").

Under the Bankruptcy Code, bankruptcy courts have broad power to reorganize or distribute the estate of a named debtor. *See Braunstein v. McCabe*, 571 F.3d 108, 120 (1st Cir. 2009) (stating bankruptcy courts have a "broad range of powers . . . 'in passing on a wide range of problems arising out of the administration of bankrupt estates'" (quoting *Pepper v. Litton*, 308 U.S. 295, 304-05, 60 S. Ct. 238, 244, 84 L. Ed. 281, 288 (1939))). The power to enjoin claims against entities that are not named as debtors, however, is not so broad. As the bankruptcy court clearly recognized in this case, there must be a nexus to protecting the estate of the bankrupt debtor before the court may enjoin claims against a third-party, non-debtor. As to what that nexus must be, "There is a long-running circuit split on this issue." *Blixseth v. Credit Suisse*, 961 F.3d 1074, 1082 n.4 (9th Cir. 2020). The Fourth Circuit takes an expansive approach. *See A.H. Robins Company v. Piccinin*, 788 F.2d 994, 998-1004 (4th Cir. 1986) (discussing the four categories of non-debtors a bankruptcy court may protect).[9] Several other circuits take a restrictive approach, prohibiting almost any injunction in favor of a non-debtor except by consent of the creditor. *See, e.g.*, *Blixseth*, 961 F.3d at 1083 (Ninth Circuit stating "[t]his court has repeatedly held, without exception, that § 524(e) precludes bankruptcy courts from discharging the liabilities of non-debtors" (quoting *In re Lowenschuss*, 67 F.3d 1394, 1401 (9th Cir. 1995))).

[9] *But see Behrmann v. Nat'l Heritage Found.*, 663 F.3d 704, 712 (4th Cir. 2011) (stating "approval of nondebtor releases . . . should be granted cautiously and infrequently").

The Third Circuit—comprising the District of Delaware—has taken a cautious approach. In *In re Continental Airlines*, 203 F.3d 203 (3d Cir. 2000), the court analyzed the split in the circuits, 203 F.3d at 212-13, and then concluded "we need not establish our own rule regarding the conditions under which non-debtor releases and permanent injunctions are appropriate or permissible." 203 F.3d at 214. The Third Circuit revisited the issue in *In re Millennium Lab Holdings II, LLC.*, 945 F.3d 126 (3d Cir. 2019). "We are asked," the Third Circuit stated, "whether the Bankruptcy Court . . . can confirm a Chapter 11 reorganization plan containing nonconsensual third-party releases and injunctions." 945 F.3d at 129. Without deciding the full scope of the bankruptcy court's power to protect a non-debtor by imposing an injunction in a plan of reorganization, the court focused on the question of what nexus is sufficient to justify the court's exercise of this power. The court permitted the specific injunction at issue in that case because "the Bankruptcy Court was resolving a matter *integral* to the restructuring of the debtor-creditor relationship." 945 F.3d at 137 (emphasis added). The court relied on the $325 million contribution made by the released third parties and found the nexus sufficient, stating "the deal to avoid corporate destruction would not have been possible without the third-party releases." 945 F.3d at 132.

In this case, the bankruptcy court carefully analyzed the nexus between the debtor's estate and the third parties it intended to protect through the Channeling Injunction. The bankruptcy court stated, "The Releases and the Channeling Injunction are critical to the success of the Plan. Without the Releases and the Channeling Injunction, the Protected Parties are not willing to make their contributions under the Plan." We do not doubt this is true. As the bankruptcy court earlier recognized, Blitz faced tremendous liability because of its defective gas cans, 475 B.R. at 211, and the Participating Parties—such as Wal-Mart—and the Participating Insurers would have no incentive to contribute to the bankruptcy estate unless they received a benefit such as a release from liability. However, a third-party, non-debtor seller like Fred's—who made no contribution to the bankruptcy estate and did not even participate in any negotiations or litigation in bankruptcy court—has no nexus to the success of the bankruptcy proceedings. Protecting Fred's bears no relationship to the "integral" connection the Third Circuit approved in *Millennium Lab Holdings II*, nor even to the expansive construction given by the Fourth Circuit. Importantly, neither Fred's nor any other similarly situated seller of Blitz products is even mentioned by the bankruptcy court in the Confirmation Order or the Plan.

Nevertheless, Fred's makes two arguments that it has a sufficient nexus to the bankruptcy proceedings to give the bankruptcy court the power to protect it. The first is Fred's secondary argument about products liability insurance, which we address in Section II.C. The second is indemnity. An indemnity agreement *could* create a sufficient nexus with the debtor such that the Confirmation Order and Plan would extend to a third-party, non-debtor seller like Fred's. *See A.H. Robins Company*, 788 F.2d at 999 (hypothesizing that "a third-party who is entitled to *absolute* indemnity by the debtor" would have a sufficient nexus) (emphasis added). Blitz and Fred's entered into a "Vendor's Hold Harmless and Indemnity Agreement." Blitz agreed,

> To protect, defend, hold harmless and indemnify [Fred's] from and against any and all claims, actions, liabilities, losses, . . . 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 . . . .

Under South Carolina law, however, Blitz's indemnity obligation is not absolute. A right of contractual indemnity will not be enforced if the indemnitee's own negligence caused the loss, unless the agreement expressly provides otherwise. *Laurens Emergency Med. Specialists, PA v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 111, 584 S.E.2d 375, 379 (2003). The very nature of any indemnity agreement is that it requires the indemnitor (Blitz) to pay the indemnitee (Fred's) when the indemnitee becomes liable to pay a claim covered by the indemnity agreement. That claim in this case is Hazel's claim. Hazel's claim alleges only Fred's was negligent. Therefore, Fred's becomes liable to pay Hazel's claim only if a jury finds Fred's was negligent. The indemnity agreement between Blitz and Fred's does not provide that Blitz must indemnify Fred's for Fred's own negligence. If Fred's was negligent—under *Laurens Emergency Medical Specialists*—then Blitz cannot be liable to Fred's under the indemnity agreement. In other words, the validity of Hazel's claim depends on a finding that Fred's was negligent, and such a finding—by law—forecloses Blitz's indemnity obligation. Therefore, there can never be any indemnity from Blitz to Fred's on Hazel's claim, and the indemnity obligation will never provide a sufficient nexus to the bankruptcy proceedings.

In conclusion as to the operative language, the Confirmation Order and the Plan are inconsistent as to whether the bankruptcy court intended to enjoin third-party sellers

like Fred's. We considered this inconsistency in light of the bankruptcy court's power. The bankruptcy court made a careful effort to act only within its power by considering whether any third parties who might be protected met the legally required nexus to preserving the bankruptcy estate before enjoining claims against such a third party. We find the bankruptcy court did not intend to define Protected Party so broadly as to prohibit claims like Hazel's claim against a seller like Fred's who did not participate in the bankruptcy proceedings and who made no contribution to the bankruptcy estate.

C. Fred's Secondary Argument

Fred's also argues Hazel's claim must be enjoined because it is a "products liability" claim. We begin our discussion of this argument by repeating that the phrase "products liability" is not found in the Confirmation Order or the Plan. *See supra* note 5. Whether a claim is a products liability claim, therefore, was not part of the bankruptcy court's analysis. Fred's argument that Hazel's claim is a products liability claim relates to a different point: whether Hazel's claim is insured by Old Republic Insurance Company, which is a Participating Insurer. If so, Fred's argues, Hazel's claim is a Blitz Personal Injury Trust Claim against a Protected Party, and thus must be enjoined.

As discussed above, however, the Old Republic policy is not in the Appendix and was not in the Record on Appeal. It is not possible, therefore, for us to determine if Fred's is covered by the Old Republic policy as to Hazel's claim. The simple fact Hazel's claim is—or is not—a products liability claim does not answer this question.[10]

To support its argument, Fred's relies heavily on *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995). Fred's pieces together random statements from *Bragg* to fit its argument that the only negligence claim available to these plaintiffs is a claim based on the negligence of Blitz. Fred's overlooks a key circumstance in *Bragg*: the court of appeals' opinion has nothing to do with the negligence of a retail

[10] We do not argue, as the dissent suggests, "that the Old Republic Insurance Company policy" provides no coverage for Hazel's claim "because the parties call it a products liability policy." We simply make it clear that whether Hazel's claim is a products liability claim is not important to our analysis.

seller. While the plaintiff in *Bragg* initially sued both the manufacturer of the product and the retail seller, the retailer settled with the plaintiff during trial. 319 S.C. at 534 n.1, 462 S.E.2d at 323 n.1. Thus, the discussion Fred's relies on in *Bragg* is not applicable to a negligence claim—like Hazel's claim—against a retail seller.

Regardless of *Bragg*, Fred's argument is misplaced. Fred's argument depends on the idea that a retail seller of a product owes no duty to its customer. The idea is shocking; a retail seller absolutely owes a duty of due care to its customers. It is a point of law so obvious this Court has hardly ever had an occasion to discuss it. *But see McClure ex rel. Scott v. Fruehauf Corp.*, 302 S.C. 364, 369, 396 S.E.2d 354, 357 (1990) ("In South Carolina, . . . the supplier of a defective product is accountable to an injured party on ordinary negligence principles . . . ." (citing *Carolina Home Builders, Inc. v. Armstrong Furnace Co.*, 259 S.C. 346, 357, 191 S.E.2d 774, 778 (1972)));[11] *Livingston v. Noland Corp.*, 293 S.C. 521, 525, 362 S.E.2d 16, 18 (1987) ("A supplier . . . of a product [is] 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.");[12] *Guyton v. S.H. Kress & Co.*, 191 S.C. 530, 537-38, 5 S.E.2d 295, 298 (1939) (acknowledging if a retail seller of nail polish had actual knowledge of its inherently dangerous nature, it could be liable for its failure

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[11] *McClure* "is a products liability case." 302 S.C. at 367, 396 S.E.2d at 355. The plaintiff settled with the product manufacturer—Firestone—and proceeded to trial against the seller and others. 302 S.C. at 367, 396 S.E.2d at 356. The seller—Fruehauf—appealed the adverse jury verdict, contending the plaintiff "failed to establish [Fruehauf] owed him a duty of care because it did not design or manufacture the defective wheel assembly and was merely a seller." 302 S.C. at 369, 396 S.E.2d at 357. We noted, "Evidence indicates Fruehauf knew at the time that such wheel assemblies are dangerous . . . ." 302 S.C. at 367, 396 S.E.2d at 356. We rejected Fruehauf's contention and recognized the seller of a product owes a duty of due care. *McClure* is on point here.

[12] The plaintiffs argue *Livingston* is a failure to warn case, and this case is not. We are not concerned with this difference. The point for which we cite *Livingston* is that a retail seller owes a duty of due care to its customers, not the manner in which the duty may be breached.

to exercise reasonable care, but affirming a directed verdict for the seller in that case because "there was no proof the [seller] had actual knowledge"). Under this duty, if a retail seller has knowledge a product is dangerous, the sale of the product could be actionable under a theory of *the seller's* negligence if the jury finds the seller did not exercise reasonable care. A claim based on the retail seller's negligence in such an instance is a separate claim from any claim based on negligence by the manufacturer.

Fred's essentially argues the simple fact a product was "defective" under the law of products liability somehow protects a retail seller from liability for its own negligence. In this case, however, Fred's is protected from liability for its own negligence only if the terms of the Confirmation Order and Plan provide that protection. As we have explained, the terms of those documents do not protect Fred's.

III. Conclusion

We affirm the circuit court's order denying Fred's motion to enjoin the proceedings, and we affirm the court of appeals. We remand to the circuit court for discovery and trial.

AFFIRMED.

BEATTY, C.J., HEARN and JAMES, JJ., concur. KITTREDGE, J., dissenting in a separate opinion.

JUSTICE KITTREDGE: I respectfully dissent. I would reverse the court of appeals and enjoin these lawsuits pursuant to the order and injunction entered in the bankruptcy proceedings of Blitz U.S.A., Inc. (Blitz).

I commend Justice Few for his thorough majority opinion. I take no issue with his review of the case proceedings and selected quotes from the bankruptcy court's Confirmation Order and Plan (which I will refer to as the Bankruptcy Plan or the Plan). However, in my judgment, the trial court erred in denying Fred's motion to enjoin these claims.

I.

Jacob, a minor, was injured on November 5, 2010, when his father, James Nix, poured kerosene from an allegedly defective gas can manufactured by Blitz. The kerosene ignited, and Jacob, who was standing nearby, was severely burned. The Blitz gas can was sold in Varnville, South Carolina, by Fred's Stores of Tennessee, Inc. (Fred's).

Because of the number of products liability claims filed in connection with the use of Blitz gas cans, Blitz filed for bankruptcy protection in November 2011 in the United States Bankruptcy Court for the District of Delaware. A trust—the Blitz Personal Injury Trust—was established to handle designated claims from July 31, 2007, through January 28, 2014. Respondents, on behalf of Jacob, filed a claim in the bankruptcy court pursuant to the Blitz Personal Injury Trust.

It is my view that the claims against Fred's in the state court should be enjoined pursuant to the Bankruptcy Plan. I begin with the Plan's definitions of relevant terms. A Blitz Personal Injury Claim is defined to "mean and include all claims for damages or other relief for, based upon, arising out of, relating to, or in any way involving bodily injury [during the relevant time period] and shall include [claims] based upon, arising out of, or in any way involving the products, premises or operations of [Blitz]." Attached to the Bankruptcy Plan is Exhibit 1 entitled "Participating Blitz Personal Injury Claimants." Jacob's claim is included in Exhibit 1; Jacob is therefore a Blitz Personal Injury Claimant.

I turn now to Fred's, and specifically, whether Fred's may invoke the Channeling Injunction of the Bankruptcy Plan. Fred's status as a non-debtor to the bankruptcy proceeding is the real nub of this appeal. The majority correctly cites to the term "Protected Party" in the Plan, which includes "Vendors." A Vendor is defined as

"any Entity that . . . sold or distributed any product manufactured . . . by the Debtors." Thus, the Plan envisions its reach to include non-debtor vendors like Fred's. Fred's is a Protected Party, and the majority so concedes. The Plan unmistakably provides "holders of Blitz Personal Injury [] Claims will be permanently enjoined from seeking satisfaction of their Blitz Personal Injury [] Claims against the Debtors *or any other Protected Party*," including Fred's. (Emphasis added).

To the extent there is any doubt, the Plan additionally confirms "all Blitz Personal Injury [] Claims will be subject to the Channeling Injunction."[13] The majority recognizes the Plan's language concerning the term "Channeling Injunction" provides support for Fred's argument. As set forth in the Plan, "'Channeling Injunction' shall mean an injunction pursuant to Sections 105(a) and 363(f) of the Bankruptcy Code [] to the fullest extent permitted by law." The Channeling Injunction here "permanently enjoins and channels to the Plan Trust all Blitz Personal Injury Claims, and [] permanently enjoins the prosecution of all Blitz Personal Injury Claims against any Released Party." Thus, at this point, the only possible thing that stands in the way of Fred's invoking the Channeling Injunction is whether Fred's is a Released Party.

The Plan defines "Released Parties" to "mean the Debtors, the Participating Insurers, . . . and any other person or entity insured under the Subject Policies, including, but not limited to (i) any distributor or retailer of [the] Debtors' products . . . ." "Subject Policies" is further defined to "mean the policies of insurance listed on Exhibit 2." Blitz had several insurance policies naming Fred's as an insured. Those insurance policies are listed in Exhibit 2 of the Plan. I therefore conclude Fred's is a Released Party.

Given the fact that Fred's is both a Protected Party and a Released Party, the conclusion is inescapable—Fred's is entitled to invoke the Channeling Injunction and enjoin the state court proceedings.

II.

Respectfully, I do not agree with the majority that perceived inconsistencies in the Plan lead to a contrary result. The majority cautions against a broad reading of the term "Blitz Personal Injury Claim," for someone like James Nix might attempt to

[13] As noted above, Jacob's claims are Blitz Personal Injury Claims.

seek the protection of the Channeling Injunction. The bankruptcy court, according to the majority, could not possibly have intended to include the claim against Nix. I agree. Nix is not a Vendor and, as such, is not a Protected Party. In addition, Nix does not meet the criteria for a Released Party. Under no circumstances could someone like Nix invoke the protections of the Plan.

I further part company with the majority in its speculation that the Participating Insurers (that named Fred's as one of their insureds) really provide no coverage for the claims against Fred's. The majority acknowledges that Blitz had multiple insurance policies naming Fred's as an insured, yet because those policies are not included in the record on appeal, the majority concludes "Fred's has not demonstrated it is an insured under a Subject Policy." Juxtaposed to this finding, the majority somehow is able to discern the likely applicability of coverage for Fred's from a non-Subject Policy that is also not included in the record. Specifically, the Burlington Insurance Company policy is a commercial general liability policy that is not a Subject Policy. This commercial general liability policy, the majority says, "would likely cover a negligence claim against Fred's."

Fred's contends that the Old Republic Insurance Company policy, a Subject Policy, provides coverage. Fred's is a named insured under the Old Republic policy. Old Republic is a Participating Insurer that, presumably, paid money into the fund comprising the Blitz Personal Injury Trust. That money was paid by Old Republic on behalf of its insureds (such as Fred's) who were likely to be sued based on their roles in selling the faulty Blitz gas can. Thus, a portion of the funds in the Blitz Personal Injury Trust were paid in part to defend vendor-insureds like Fred's against exactly this type of lawsuit.[14]

However, according to the majority, this Subject Policy cannot be relied on because "the parties call [it] a products liability policy." I do not understand how the presence of a products liability policy weighs against Fred's ability to invoke the Channeling Injunction. The products liability claims against Blitz and vendors of Blitz gas cans were the entire impetus behind Blitz's bankruptcy and the resulting Bankruptcy Plan. The potential for claims against Blitz vendors arising from the sale of the gas can in an alleged defective condition, unreasonably

[14] The majority makes much ado of the fact that Fred's did not directly pay into the Trust itself. I see no reason to distinguish between Fred's making the payment directly, versus an insurer (i.e., Old Republic, as a Participating Insurer) making the payment on behalf of a named insured.

dangerous to the user, was the reason Fred's was listed as an insured in multiple Blitz insurance policies.

Is it really disputed that the claims listed in Exhibit 1, including Respondents' claims on Jacob's behalf, are not products liability claims? Yet the majority dismisses the *undeniable* presence of products liability claims because "the phrase 'products liability' is not found in the Confirmation Order or the Plan." As to the majority's position that Blitz's bankruptcy and the Bankruptcy Plan are unrelated to products liability claims, I strongly disagree.

The majority's effort to divorce the presence of products liability claims from the Bankruptcy Plan must not stand. The nature of the regrettable circumstances that led to Jacob's injuries demands that Respondents initial claims on Jacob's behalf, including the remaining negligence claims against Fred's, be characterized as products liability claims. This is true whether the claims are characterized as strict liability, breach of warranty, negligence, or otherwise.

There is no legal path to accept Respondents' position that Jacob's negligence claims against Fred's are somehow unrelated to a products liability claim concerning Blitz's gas cans. As alleged here, the only possible negligence against Fred's is directly linked to a product defect claim against Blitz. I believe the Complaint proves my point. The initial Complaint alleged Fred's was negligent in failing to properly evaluate the fuel container and in failing to properly warn users of the container of the risk of injury. Both of these contentions are based on Respondents' allegation that the "injuries and damages were caused by [the] defective nature of the Blitz 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 dangers of the containers with volatile substances."

According to Fred's brief to this Court, the Complaint was amended to assert that Jacob's injuries and damages were the result of Fred'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 failing to warn the intended users of the dangers of the containers with volatile substances." In my view, the amendment does not alter the underlying basis of Respondents' negligence claims. Those claims remain Blitz Personal Injury Claims. Accordingly, I conclude Respondents' negligence claims must be channeled into the Blitz Personal Injury Trust.

Contrary to the majority's suggestion, Fred's makes no argument that a retail seller of a product owes no duty to its customers. The majority pitches nothing more than a strawman argument. Fred's argument, in the context of the pleadings of this case and the Bankruptcy Plan, is a valid one. While a retail seller of a product owes a duty to its customers, the allegations in the pleadings directly link the alleged negligence of Fred's to the claims against Blitz. Yet the majority insists that in this case, the "retail seller's negligence . . . is a separate claim from any claim based on negligence by the manufacturer." Respondents have *not* alleged negligence against Fred's independent of the alleged defective nature of the Blitz gas container.

III.

My final response to the majority opinion relates to the notion that the Court must exercise caution in ensuring that the Bankruptcy Plan is not applied too broadly, for the power of a bankruptcy court to enjoin claims against entities that are not debtors of the estate "is not so broad." I agree with the majority in principle, yet I respectfully disagree with the majority's conclusion in this case. First, as discussed above, the Bankruptcy Plan was structured to allow non-debtors to enforce the Channeling Injunction. Fred's comfortably satisfies all the necessary definitional requirements to invoke the Channeling Injunction. The plain language of the Bankruptcy Plan entitles Fred's to enforce the injunction.

Next, the majority references the need for "a nexus to protecting the estate of the bankrupt debtor before the court may enjoin claims against a third-party, non-debtor." I believe Fred's had established that nexus. My reasoning is guided by the approach taken by the United States Court of Appeals for the Fourth Circuit in *A.H. Robins Co. v. Piccinin*, 788 F.2d 994 (4th Cir. 1986). The Fourth Circuit recognized the authority of a bankruptcy court to properly stay proceedings against non-debtors where there are "unusual circumstances." *Id.* at 999. Following a detailed review of the relationship between the debtor and non-debtors, the Fourth Circuit concluded "the record was thus more than adequate to support the district court's grant of injunctive relief" to the non-debtors. *Id.* at 1008.

In analyzing the facts of the case before it, the Fourth Circuit provided an example of a situation that would establish the nexus and "unusual circumstances":

> An illustration of 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. To refuse application of the statutory stay in that case would defeat the very purpose and intent of the statute.

Id. at 999.

That is precisely the situation here between the debtor Blitz and the non-debtor Fred's. In 2005, Blitz and Fred's entered into a "Vendors Hold Harmless and Indemnity Agreement." That agreement provided Blitz would "protect, defend, hold harmless and indemnify" Fred's from all claims "arising out of any . . . injury . . . resulting . . . from any actual or alleged defect in [Blitz's] Products." The majority summarily dismisses the hold harmless and indemnity agreement on the basis the agreement does not reach Fred's negligence in selling the Blitz gas can. I do not believe that finding is accurate. Omitted from the majority opinion is the additional provision in the agreement that calls for indemnification for "any and all claims . . . arising out of . . . the sale of said Products." Respondents' negligence claims are manifestly covered by the indemnity agreement. Not only has Fred's clearly met the nexus requirement for a non-debtor, today's decision nullifies the 2005 indemnity agreement.

IV.

Because I would reverse and order the entry of an injunction against the state court proceedings, I dissent.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

In the Matter of the Care and Treatment of Richard Ridley, Appellant.

Appellate Case No. 2018-000527

Appeal From Aiken County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 5810
Heard November 10, 2020 – Filed March 17, 2021

AFFIRMED

Arthur Kerr Aiken, of Aiken & Hightower, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General Deborah R.J. Shupe, both of Columbia, for Respondent.

WILLIAMS, J.: Richard Ridley appeals his commitment to the South Carolina Department of Mental Health (the Department) as a sexually violent predator (SVP). On appeal, Ridley argues the trial court erred in admitting expert testimony regarding his diagnosis of Other Specified Paraphilic Disorder – Biastophilia/Non-Consent (OSPD – Biastophilia/Non-Consent). We affirm.

FACTS/PROCEDURAL HISTORY

In 2002, Ridley pled guilty to assault and battery of a high and aggravated nature (ABHAN), third degree criminal sexual conduct (CSC), and failure to register as a sex offender. Prior to his release in 2014, the State filed a petition for Ridley's civil commitment to the Department pursuant to the Sexually Violent Predator Act[1] (the Act). The trial court appointed an evaluator who diagnosed Ridley with OSPD – Biastophilia/Non-Consent and Antisocial Personality Disorder (APD) with Narcissistic Traits and recommended commitment. Thereafter, Ridley voluntarily committed to the Department for treatment pursuant to the Act.

As required by the Act, the Department evaluated Ridley's mental status in 2015, 2016, and 2017 and determined each time that Ridley required further commitment. In 2017, Ridley petitioned for release against the Department's recommendation, and the circuit court held a trial.

During a pretrial hearing, Ridley made a motion in limine to exclude expert testimony regarding his diagnosis of OSPD – Biastophilia/Non-Consent, arguing the diagnosis was not scientifically reliable and was, therefore, insufficient to qualify as a predicate diagnosis under the Act.[2] The State proffered testimony from Dr. Gordon Edward Brown, Jr., an actuarial measures forensic psychologist for the Department. Following the proffered testimony and arguments by the parties, the trial court denied Ridley's motion and permitted Dr. Brown to provide expert testimony regarding the diagnosis before the jury.

During trial, the court qualified Dr. Brown as an expert in forensic psychology, and he provided testimony summarizing his evaluation of Ridley and opining that Ridley suffered from OSPD – Biastophilia/Non-Consent and APD with Narcissistic Traits. Ridley presented expert testimony from Dr. Selman Watson, a forensic psychologist, who opined that OSPD – Biastophilia/Non-Consent was not a valid diagnosis for the purposes of commitment under the Act.

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[1] S.C. Code Ann. §§44-48-10 to -170 (2018).

[2] Ridley did not challenge his diagnosis of APD with Narcissistic Traits at trial and does not challenge the diagnosis on appeal.

At the close of trial, the jury found beyond a reasonable doubt that Ridley still posed a danger to society.[3] The trial court subsequently filed an order of continued commitment. This appeal followed.

ISSUE ON APPEAL

Did the trial court err in admitting Dr. Brown's expert testimony?

STANDARD OF REVIEW

"A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion." *State v. Prather*, 429 S.C. 583, 598, 840 S.E.2d 551, 559 (2020) (quoting *State v. Chavis*, 412 S.C. 101, 106, 771 S.E.2d 336, 338 (2015)). "A trial court's ruling on the admissibility of expert testimony constitutes an abuse of discretion whe[n] the ruling is unsupported by the evidence or controlled by an error of law." *State v. Jones*, 423 S.C. 631, 636, 817 S.E.2d 268, 270 (2018).

LAW/ANALYSIS

Ridley argues the trial court erred in admitting Dr. Brown's expert testimony regarding his diagnosis of Ridley with OSPD – Biastophilia/Non-Consent. We disagree.

Pursuant to the Act, an individual is considered an SVP if (1) he "has been convicted of a sexually violent offense" and (2) "suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment." § 44-48-30(1). Ridley asserts Dr. Brown's testimony was improper because OSPD – Biastophilia/Non-Consent is scientifically unreliable and thus cannot serve as a predicate diagnosis under the Act.

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[3] *See* § 44-48-120(B) ("The burden of proof is upon the [State] to show beyond a reasonable doubt that the petitioner's mental abnormality or personality disorder remains such that the petitioner is not safe to be at large and, that if released, is likely to commit acts of sexual violence.").

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Rule 702, SCRE. "Before admitting expert testimony, a trial court must qualify the expert and determine whether the subject matter of the expert's proposed testimony is reliable, as required by Rule 702, SCRE." *Prather*, 429 S.C. at 599, 840 S.E.2d at 559. "The trial [court] should apply the *Jones*[4] factors to determine reliability." *State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999).

> The *Jones* reliability factors take into consideration:
> (1) the publications and peer reviews of the technique;
> (2) prior application of the method to the type of evidence involved in the case;
> (3) the quality control procedures used to ensure reliability; and
> (4) the consistency of the method with recognized scientific laws and procedures.

State v. Jones, 343 S.C. 562, 573, 541 S.E.2d 813, 819 (2001). "Once the evidence is admitted under these standards, the jury may give it such weight as it deems appropriate." *Council*, 335 S.C. at 20–21, 515 S.E.2d at 518.

During the pretrial hearing, the parties stipulated Dr. Brown's expert qualifications, and the State proffered his testimony for the trial court to perform its gatekeeping duties. Dr. Brown testified he evaluated Ridley for his annual review in 2017. In performing his evaluation, Dr. Brown testified he conducted a series of clinical interviews of Ridley and thoroughly reviewed Ridley's records, including his criminal records, prior evaluations, and treatment records. Dr. Brown confirmed the records he reviewed were those typically and reasonably relied upon by other experts in his field. Dr. Brown testified that after conducting the annual review, he diagnosed Ridley with two diagnoses: OSPD – Biastophilia/Non-Consent and APD with Narcissistic Traits. Dr. Brown explained that in diagnosing Ridley, he used the fifth edition of the Diagnostic Manual of Mental Disorders (DSM-V), which is the official, peer reviewed publication of the American Psychiatric Association.

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[4] *State v. Jones*, 273 S.C. 723, 259 S.E.2d 120 (1979).

In its chapter on paraphilic disorders, the DSM-V lists eight specific paraphilic disorders but also includes two additional categories: other specified paraphilic disorders (OSPD) and unspecified paraphilic disorders. *See* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 685–705 (5th ed. 2013).[5] In the introduction of the chapter, it states:

> The eight listed disorders *do not exhaust the list of possible paraphilic disorders*. Many dozens of distinct paraphilias have been identified and named, and almost any of them could, by virtue of its negative consequences for the individual or for others, rise to the level of a paraphilic disorder. *The diagnoses of other specified and unspecified paraphilic disorders are therefore indispensable and will be required in many cases*.

Id. at 685 (emphases added). The DSM-V specifically describes OSPD as follows:

> This category applies to presentations in which symptoms characteristic of a paraphilic disorder that cause clinically significant distress or impairment in social, occupational, or other important areas of functioning predominate but do not meet the full criteria for any of the disorders in the paraphilic disorders diagnostic class. The [OSPD] category is used in situations in which the clinician chooses to communicate the specific reason that the presentation does not meet the criteria for any specified paraphilic disorder. This is done by recording "other specified paraphilic disorder" followed by the specific reason (e.g., "zoophilia").
>
> Examples of presentations that can be specified using the [OSPD] designation include, *but are not limited to*, recurrent and intense sexual arousal involving telephone scatologia (obscene phone calls), necrophilia

[5] The DSM-V replaced the previous designation of Not Otherwise Specified (NOS) in the DSM-IV with other specified disorder and unspecified disorder. *See Diagnostic and Statistical Manual of Mental Disorders* at 15–16.

> (corpses), zoophilia (animals), coprophilia (feces) klismaphilia (enemas), or urophilia (urine) . . . .

Id. at 705 (emphasis added).

Dr. Brown explained Biastophilia is when a person is "sexually aroused by the aspect of having nonconsensual sex with someone." He acknowledged that OSPD – Biastophilia/Non-Consent is not specifically listed as one of the OSPD examples in the DSM-V but maintained his belief that the diagnosis was valid and reliable because the DSM-V instructed that the list of examples was not exhaustive. Dr. Brown further testified biastophilia is a recognized modifier for personality disorders and mental abnormalities in his field. On cross-examination, Dr. Brown admitted there is debate within the psychological profession as to whether OSPD – Biastophilia/Non-Consent should be considered a valid predicate diagnosis under the Act because rape is considered a criminal act of control rather than the result of a mental abnormality or disorder; however, he maintained his belief that it was a valid and reliable diagnosis. He further stated practitioners, for that reason, should exercise caution in making the diagnosis and admitted it was his first time using it. Following the proffer, the trial court denied Ridley's motion, finding the disagreement within the field regarding the diagnosis did not render it scientifically unreliable for the purpose of serving as a predicate diagnosis under the Act.

We hold the trial court did not abuse its discretion in admitting Dr. Brown's testimony. *See Prather*, 429 S.C. at 598, 840 S.E.2d at 559 ("A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion." (quoting *Chavis*, 412 S.C. at 106, 771 S.E.2d at 338)). Although a contentious issue, we find the trial court properly dispensed of its gatekeeping duties in assessing the reliability of Dr. Brown's diagnosis. *See id.* at 599, 840 S.E.2d at 559 ("Before admitting expert testimony, a trial court must qualify the expert and determine whether the subject matter of the expert's proposed testimony is reliable, as required by Rule 702, SCRE."). Dr. Brown testified as to his method in diagnosing Ridley, which included standard practices within the industry such as conducting clinical interviews; thoroughly reviewing criminal, evaluation, and treatment records; and consulting the DSM-V. Accordingly, we find Dr. Brown's approach in diagnosing Ridley met the threshold of reliability for admissible evidence. *See State v. White*, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009) ("All expert testimony must satisfy the Rule 702 criteria, and that includes the trial court's gatekeeping function in ensuring the proposed

expert testimony meets a reliability threshold for the jury's ultimate consideration."); *Council*, 335 S.C. at 20, 515 S.E.2d at 518 ("The trial [court] should apply the *Jones* factors to determine reliability.").

As to whether OSPD – Biastophilia/Non-Consent is a valid predicate diagnosis under the Act, we hold the trial court properly found this was a determination within the jury's province. *See Jones*, 423 S.C. at 639–40, 817 S.E.2d at 272 ("There is always a possibility that an expert witness's opinions are incorrect. However, whether to accept the expert's opinions or not is a matter for the jury to decide. Trial courts are tasked only with determining whether the basis for the expert's opinion is sufficiently reliable such that it [may be] offered into evidence."); *see also Council*, 335 S.C. at 21–22, 515 S.E.2d at 519 ("This [c]ourt has noted that 'vigorous cross examination, presentation of contrary evidence and careful instructions on the burden of proof are the traditional appropriate means of attacking shaky but admissible evidence.'" (quoting *State v. Dinkins*, 319 S.C. 415, 418, 462 S.E.2d 59, 60 (1995))). Furthermore, as it currently stands, we find the Act and the DSM-V do not expressly prohibit a diagnosis of OSPD – Biastophilia/Non-Consent. *See McGee v. Bartow*, 593 F.3d 556, 576 (7th Cir. 2010) ("The Supreme Court's cases on this point teach that civil commitment upon a finding of a 'mental disorder' does not violate due process even though the predicate diagnosis is not found within the four corners of the DSM."); *see also In re Snow*, 425 S.C. 544, 549, 551, 823 S.E.2d 467, 469–71 (2019) (holding the diagnosis of other specified personality disorder was a legally sufficient predicate diagnosis under the Act). Therefore, we hold the trial court did not err in denying Ridley's motion in limine and admitting Dr. Brown's testimony.

CONCLUSION

Based on the foregoing, Ridley's commitment is

AFFIRMED.

HUFF and GEATHERS, JJ., concur.