

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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AUG 22 2014

SC Court of Appeals

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

The Honorable R Knox McMahon, Circuit Court Judge

Civil Action No. 2012-CP-20-316

Appellate Case No 2014-001153

Mary Wall Black,

Plaintiff

v.

BI-LO, LLC and Unifirst Corporation,

Defendants,
Of which BI-LO, LLC is the Appellant,
and Unifirst is the Respondent

**APPELLANT'S RETURN AND MEMORANDUM TO RESPONDENT'S MOTION TO
STRIKE**

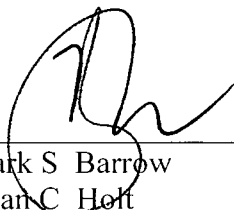
Comes now the Appellant, BI-LO, LLC, which hereby submits this Return to Respondent's Motion to Strike, served on August 19, 2014. Respondent asserts that Items 12, 13, and 14 of the Record on Appeal should not be considered by the Court.

"In an action granting summary judgment, an appellate court reviews the record under the same standard applied by the trial court under Rule 56, SCRPC." Thomas Sand Co. v. Colonial Pipeline Co., 349 S.C. 402, 407, 563 S.E.2d 109, 112 (Ct. App. 2002). As indicated in Appellant's Initial Brief, and to be reiterated in its Reply Brief, the trial court acted prematurely in granting summary judgment. Further, the trial court failed to consider certain information and inquire further into the extent of discovery that had taken place prior to the summary judgment hearing. The trial court did not employ the standard of review required before the issuance of

summary judgment, and this Court is held to the same standard of review irrespective of whether the trial court employed it.

The deposition transcript of Christopher Stone (Desg No 12) (Excerpts at Exhibit 1) is not offered as material which served as the basis for the trial court's decision. Rather, the deposition transcript suggests the fruit that would have yielded had the trial court not issued the drastic remedy of summary judgment. The emails between counsel (Desg Nos 13, 14) (Exhibits 2, 3) were directly referred to in the transcript of the summary judgment hearing when counsel for BI-LO indicated that there had been efforts to schedule additional depositions. Tr p 9 (Exhibit 4). The material at Designation Numbers 12-14 allows this Court a more adequate review of the case and reveals that Appellant was not dilatory in discovery, which eventually provided more fruitful information into the inquiry concerning the responsibilities of Unifirst under the indemnity provision.

For these reasons, Appellant respectfully requests that Respondent's Motion to Strike be denied.



Mark S. Barrow
Ryan C. Holt
1515 Lady Street
Post Office Box 12129
Columbia, South Carolina 29211
Attorneys for BI-LO, LLC

1 A. Yes.

2 Q. Okay. Would you ever make notes on the
3 invoices if any of the merchandise was damaged in
4 any way?

5 A. No.

6 Q. Okay. Would you make note of that
7 information anywhere?

8 A. If the product was damaged and I saw it
9 damaged, I would get it out of the store.

10 Q. Okay. And then what happens to that
11 merchandise?

12 A. We take it back. And pertaining to a mat,
13 we would cut it up and destroy it and get it out of
14 the cycle.

15 Q. Okay. What does it take for a mat to be
16 removed from the cycle?

17 A. A mat falling apart, a mat has a tear in
18 it, a mat that doesn't lay out properly.

19 Q. Okay. What does it look like when a mat
20 doesn't lay out properly?

21 A. It's old.

22 Q. And you've had mats that you've considered
23 old that you've taken out of cycle, right?

24 A. Yes.

25 Q. And you've had mats that needed to be cut

1 up, as you say, right?

2 A. Yes.

3 Q. All right. Describe the mat for me in
4 terms of its material composition.

5 A. Carpet on top, rubber on the bottom.

6 Q. Okay. And does the rubber extend beyond
7 the carpet a little?

8 A. The border, yes.

9 Q. Okay. And do you have a name for that
10 border or you just call it a border?

11 A. I just call it a border.

12 Q. Okay. Do you have any standards at
13 UniFirst for what condition that border needs to be
14 in?

15 A. Lay flat.

16 Q. Okay. How flat is flat to you?

17 A. Where there's no creases, no bubble.

18 Q. Okay. And again you may have answered
19 this, but would you have noted on any of the
20 invoices whether a mat was of the condition that it
21 needed to be taken out of the cycle?

22 A. No.

23 Q. Okay. If a mat is in the cycle, once you
24 pick it up from a location what happens to it next?

25 A. Repeat the question. I'm sorry.

1 Q. Okay. Do you know anything about the
2 contract between UniFirst and Bi-Lo?

3 A. No.

4 Q. Okay. What is a great impression mat?

5 A. That's a specific mat. They are gray and
6 they are pretty much heavy duty.

7 Q. Is that the kind of mat you described to
8 me a moment ago that would have been delivered to
9 Bi-Lo?

10 A. Yes.

11 Q. Okay. What are some other types of mats
12 that you had?

13 A. That's basically all I have. I have --
14 I'm sorry. I have what we call the Food Lion mats.
15 Food Lion has their own mats.

16 Q. What's the difference between a dust
17 control mat and a regular mat?

18 A. Dust control mat? To my knowledge,
19 nothing.

20 Q. Have you ever had a situation where when
21 you arrived at a customer's location you went to get
22 your inventory and found that it was damaged in your
23 vehicle?

24 A. Damaged in my vehicle, no.

25 Q. Have you ever arrived at a customer and

Ryan C. Holt

From: Ryan C Holt
Sent: Thursday, December 19, 2013 2 12 PM
To: ljoyner@GWBlawfirm.com
Cc: Zack Atkinson (zatkinson@staclaw.com), gculbreath@gwblawfirm.com, Cristal D Strauser, Mark S Barrow
Subject: Black v BI-LO v Unifirst

Lindsay,

We would like to take the deposition of Unifirst's 30(b)(6) designee as well as the employee(s) who serviced the Winnsboro store during the week of the incident, the week before, and the week afterward

The 30(b)(6) topics of familiarity are tentatively as follows

- 1 The BI-LO "account" with Unifirst
- 2 Mat collection, delivery, repurposing, manufacture, cleaning
- 3 Unifirst invoices to BI-LO
- 4 Knowledge of employees who served the BI-LO "account"
- 5 The textile rental service agreement between Unifirst and BI-LO
- 6 What insurance is maintained by Unifirst in compliance with the textile rental service agreement

I have copied Cristal in my office on this Please have your staff get in touch with her for scheduling



Ryan C Holt | Attorney
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From: Ryan C Holt
Sent: Thursday, January 02, 2014 4:27 PM
To: 'ljoyner@GWBlawfirm.com'
Cc: 'Zack Atkinson (zatkinson@staclaw.com)', 'gculbreath@gwblawfirm.com', Cristal D Strauser, Mark S Barrow
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To: Ryan C. Holt
Cc: Zack Atkinson (zatkinson@staclaw.com), Gray Culbreath, Cristal D. Strauser, Mark S. Barrow
Subject: RE: Black v. BI-LO v. Unifirst

Ryan,

Thank you for your email. I will discuss with Gray, our staff, and our client regarding availability and will be in touch with Cristal regarding the same.

Thanks,
Lindsay



Gallivan, White & Boyd, P.A.
— ATTORNEYS AT LAW —

Lindsay Anne Joyner
Associate
ljoyner@GWBlawfirm.com

Gallivan, White & Boyd P.A.
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Ryan,

Thanks for the follow up and for looking out for our availability. We are in the process of getting the designee and employees' availability together for you. I will be in touch as soon as we have it.

Thanks,
Lindsay



Gallivan, White & Boyd, P.A.
— ATTORNEYS AT LAW —

Lindsay Anne Joyner
Associate
ljoyner@GWBlawfirm.com

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in an indemnification provision, which they say is broader than simple negligence.

So of course, some of these contracts, from time to time you'll read them, and they say that the company shall indemnify and defend customer against any liability arising out of its negligence. That's not how it is here. The party specifically stated that any act could give rise to the indemnification provision in this case.

Of course, Judge Kinard's order for summary judgement only addressed negligence. It only addressed the fact that the plaintiff had brought certain claims against UniFirst, and had granted summary judgement to UniFirst on those negligence-type claims.

Of course, it didn't address all acts that would have occurred. That's something that needs to come up at the trial of the case, which is imminent, Your Honor.

So for that reason, we submit that the motion for summary judgement on the contractual indemnity claims fail, because there's been no ruling to state that UniFirst has been deemed to not have acted in any way that would trigger the indemnification clause.

And as an added note, Your Honor, we're in the process of trying to schedule some depositions of UniFirst and their employees. It's very possible during those depositions we will learn some information, and there may

EXHIBIT**4**

tabbles

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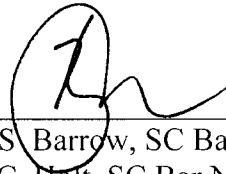
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PROOF OF SERVICE

I certify that I have served Appellant's Return and Memorandum to Respondent's Motion to Strike by depositing a copy of said document in the United States Mail, postage prepaid, on August 20, 2014 addressed to their attorneys of record, Gray T. Culbreath, Esquire, Post Office Box 7368, Columbia, SC 29202 and Zack O. Atkinson, Esquire, Post Office Drawer 100, Camden, SC 2902.

August 21, 2014



Mark S. Barrow, SC Bar No. 7821
Ryan C. Holt, SC Bar No. 78338
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ATTORNEYS FOR APPELLANT

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SWEENY WINGATE & BARROW P.A.

August 21, 2014

Reply to Main Office

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The Honorable Jenny Abbott Kitchings
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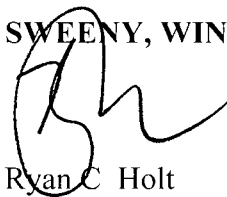
RE Mary Wall Black v BI-LO, LLC and UniFirst Corporation
Civil Action No 12-CP-20-316
Our File 4599-8557
Appeal Tracking Number 2014-001153

Dear Ms Kitchings

Enclosed please find the original and six copies each of Appellant's Return and Memorandum to Respondent's Motion to Strike and Proof of Service in the above-referenced appeal. Please file the originals and return the copies in the enclosed self-addressed stamped envelope. If you have any questions, please do not hesitate to contact me.

Yours truly,

SWEENY, WINGATE & BARROW, P.A.



Ryan C Holt

RCH/bjp

Enclosures

cc Gray T Culbreath, Esquire, Gallivan, White & Boyd, P A
Zack O Atkinson, Esquire, Speedy, Tanner & Atkinson, LLC

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4599-8557