THE STATE OF SOUTH CAROLINA
In The 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.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

Did the trial court err in prematurely granting summary judgment against BI-LO on its cross claim for contractual indemnity?

STATEMENT OF THE CASE

Plaintiff Mary Black ("Black") initiated this personal injury action against Defendant-Appellant BI-LO, LLC ("BI-LO") and Defendant-Respondent UniFirst Corporation ("UniFirst"). BI-LO operates a grocery store near Winnsboro, South Carolina and UniFirst leases mops, garments, mats and other items to BI-LO and other retailers. Black alleged that on October 4, 2010, she "tripped and fell on a defective and/or dry-rotted mat improperly and inappropriately placed at the entrance/exit-way area" of the Winnsboro BI-LO. Compl. ¶6; R. 16. Black brought a premises liability claim against BI-LO and alleged that UniFirst failed "to provide safe, intact and secure mats" and "adequately discover and correct any dangerous conditions," among other allegations. Compl. ¶11; R. 16-18. The defendants filed cross-claims, including BI-LO's cross-claim for contractual indemnification which asserted that UniFirst breached its agreement to "defend, indemnify and hold harmless BI-LO, LLC" as manifested in their Textile Rental Service Agreement ("TRSA"). BI-LO Ans. ¶36; R. 34-35; TRSA ¶9; R. 146-47.

UniFirst filed a motion for summary judgment as to Black's negligence claims. The Honorable Ernest J. Kinard granted UniFirst's motion, holding that UniFirst owed no duty to Black under a premises liability theory nor had she presented any evidence that the mat was defective or unreasonably dangerous. Order of October 14, 2013, pp. 3, 4; R. 11-12.

UniFirst filed a subsequent motion for summary judgment as to BI-LO's cross-claims. The Honorable R. Knox McMahon granted UniFirst's motion. The Court's grant of summary judgment on BI-LO's contractual indemnification cross-claim was narrowly based on an

exception to UniFirst's indemnification agreement – i.e. that "the contract between UniFirst and BI-LO does not purport to indemnify and defend BI-LO for its own negligence." Order of Jan. 23, 2014, p. 2; R. 4. At the time of the trial court's order, there had been no determination that BI-LO was negligent in any way. Indeed, the trial court acknowledged as much, stating that "the only party that can be found negligent in this matter is BI-LO." Id. at 5-6 (emphasis added); R. 7-8. BI-LO still has not been shown to be negligent in any regard.

BI-LO moved the trial court to alter or amend its January 23 Order; R. 58-60. The trial court denied the motion to consider. Order of Apr. 25, 2014; R. 1-2.

FACTS

On April 20, 2007, BI-LO and UniFirst entered a contract entitled the "Textile Rental Service Agreement" ("TRSA"). The TRSA was, through several amendments, in effect until at least April 30, 2014. As its title implies, the TRSA provided that UniFirst would lease to BI-LO various items of clothing and equipment, including, *inter alia*, various uniform garments, mops, and mats. For present purposes two provisions of the TRSA are pertinent. The provision wherein UniFirst agrees to indemnify BI-LO is set forth in pertinent part as follows:

> 9. Company [UniFirst] shall *indemnify* and *defend* customer [BI-LO] against *any liability* arising out of *any act* of Company, its employees or agents in connection with this Agreement, except to the extent caused by the negligence of Customer. Company shall be solely responsible for, and shall indemnify and defend Customer against all claims arising out of property damage to any location or personal injury or death to any employee of Company, its agents and subcontractors in connection with the provision of Services under this Agreement. Neither party shall be liable to the other party for any special, incidental, or consequential damages, even if the other party shall have knowledge or been advised of the possibility of such potential damages or loss caused, directly or indirectly, by the Merchandise or Services or any inadequacy thereof for any purpose, or any deficiency or defect, therein, or the use or maintenance thereof, or any repairs, cleaning or laundering, or any delay in providing or failure to provide any of the foregoing, or any interruption or loss of service or use thereof, or any loss of business, or any damage

> whatsoever and howsoever caused, provided that **nothing in this sentence shall be deemed to limit one party's obligations to indemnify the other party in accordance with this Agreement**. R. 146-47 (emphasis added).

The relevant portion of the second pertinent provision, under which UniFirst contracted to make BI-LO an additional insured under its liability policy, is as follows:

> 14. For as long as this Agreement is in effect, Company shall maintain insurance for general liability (including products liability), auto liability, and employer's liability with coverage of a minimum of $1,000,000 per occurrence, Excess Liability (umbrella form) of at least $5,000,000 per occurrence and such workers' compensation insurance as is required by state or federal law. Company shall (i) add "LSF5 BI-LO Holdings, LLC" as additional insured, (ii) contemporaneously with executing this Agreement, provide a Certificate of Insurance evidencing the same and the above-referenced coverage, (iii) within five (5) calendar days following receipt of a request, provide a copy of the underlying policies to Customer, and (iv) provide Customer with 30 days advance written notice prior to any cancellation of or reduction in coverage. Company's liability is not limited to the amount insured. R. 148.

Based on this TRSA, BI-LO propounded a cross-claim against UniFirst for contractual indemnity as follows:

> 36. Defendant, BI-LO alleges that, as a condition of its employment of UniFirst Corporation to provide mats and other services to it, UniFirst Corporation agreed that it would provide reasonably safe materials and conduct its operations in a reasonably safe manner, that it would defend, indemnify and hold harmless BI-LO, LLC, for any breach of said agreement, and that it would obtain insurance to guarantee the execution of said obligations. R. 34-35.
>
> 37. Defendant BI-LO alleges that, if the Plaintiff is entitled to any recovery whatsoever in this action from Defendant BI-LO, said entitlement arises from breach of UniFirst Corporation's obligations to BI-LO in the conduct of its activities under the contract (which is not admitted but is pled herein only as an alternative defense), for which reason Defendant BI-LO is entitled to contractual indemnity over and against Defendant UniFirst Corporation for all costs, liability, and attorneys' fees arising from this matter. R. 35.

UniFirst moved for summary judgment as to BI-LO's cross claims. The motion was granted. Order of January 23, 2014; R. 3-8. It is the Order granting UniFirst's motion for

summary judgment that is hereby appealed. The fundamental errors that BI-LO considers to have been made are encompassed within the Issue on Appeal, cited in the Standard of Review, and addressed below.

ARGUMENT

I. THE STANDARD OF REVIEW.

Our Supreme Court has articulated quite comprehensibly the standard of review to be applied by an appellate court regarding a grant of summary judgment. Evening Post Pub. Co. v. Berkeley County School Dist. 392 S.C. 76, 708 S.E.2d 745 (2011). The Court held:

> When reviewing the trial court's decision to grant summary judgment, an appellate court applies the same standard applied by the circuit court. Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party is entitled to prevail as a matter of law. In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. **Because summary judgment is a drastic remedy, it must not be granted until the opposing party has had a full and fair opportunity to complete discovery. Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law.**

Id., 392 S.C. at 81-2, 708 S.E.2d 748 (emphasis added), citing Lanham v. Blue Cross & Blue Shield of S.C., Inc., 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002); Rule 56(c), SCRCP; Hancock v. Mid–South Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009) ("[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment."); David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006); Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003).

II. GRANTING SUMMARY JUDGMENT ON UNIFIRST'S CROSS CLAIM WAS PREMATURE FOR TWO REASONS.

A. Summary Judgment was premature because BI-LO had not had a "Full and Fair" Opportunity for Discovery.

UniFirst's Motion for Summary Judgment on BI-LO's cross-claims was heard on January 9, 2014. Approximately thirty days previously, counsel for BI-LO contacted UniFirst's counsel seeking dates for the depositions of UniFirst's corporate representative(s). Email dated December 19, 2013; R. 139. At the hearing on January 9, 2014, BI-LO's counsel informed the court that, "we're in the process of trying to schedule some depositions of UniFirst and its employees. It's very possible during those depositions we will learn some information, and there may be some acts . . . in the transcript that will trigger this indemnification clause." Transcript, pp. 9-10; R. 98-99.[1] The clear implication of counsel's statement is that adequate discovery had not been conducted – not even one of UniFirst's employees had been deposed. This fact was also mentioned in the memorandum provided to the court to oppose UniFirst's motion for summary judgment. Memorandum in Opposition, p. 6; R. 54; Transcript p. 9-10; R. 98-99. The court, nonetheless, very shortly thereafter, granted UniFirst's motion for summary judgment. Transcript p. 11; R. 100.

The deposition of a UniFirst employee, Christopher Stone, was taken on March 14, 2014 – sixty-four days after the court granted summary judgment from the bench. Mr. Stone was the Route Sales Representative who represented UniFirst to the relevant BI-LO store. Deposition of Stone, pp. 8, 15-16; R. 103, 110-11. He testified as follows regarding the duties he performed on his regular weekly visits to BI-LO:

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[1] When the court was informed that depositions of UniFirst had not yet been taken, it should have inquired further. The e-mail correspondence between counsel supports BI-LO's second point in this brief – that the trial court did not make the appropriate "further inquiry into the facts of the case . . . ." Evening Post, *supra*. 392 S.C. at 82, 708 S.E.2d at 748.

Q. Okay. So when you get to the customer you look at the invoice and then pick the things that are listed on the invoice?
A. Correct.
Q. Okay. What type of items would you take to the BI-LO in Winnsboro?
A. Mats, dust mops, and butcher coats.

Stone Dep. p. 17, line 25 – p. 18, line 6; R. 112, line 25-113, line 6.

Q. Be as specific as you can. I'm interested in the many details. You're an expert in this. I'm not. So I just want to hear your perspective on it.
A. Okay. When I pull in the back of the BI-LO I grab the mats that are on the invoice, the different size mats.
Q. And you're grabbing those from the truck?
A. My buggy, yes.
Q. Okay.
A. Take them, load them on my cart along with the butcher coats and the mops that are in the bag, take them up, wait for the DSD receiver to open the door. . . .

Id., p. 18, line 16 – p. 19, line 3; R. 113, line 16 – 114, line 3.

Q. What kind of cart is that?
A. A little four-wheel lay down cart.
Q. Okay. And you stack everything you need to bring in on top of that cart?
A. I lay it flat where the mats are laying flat.
Q. Okay.
A. So I can't stand them up on there. It's laying flat.
Q. You roll them out?
A. No. They are still rolled up. They are just stacked in layers.
Q. Okay. And so you actually go through the sales floor and replace the mats; is that right?
A. Correct.

. . .

Q. Okay. So you go around once where you're pulling away the dirty ones and replacing them with clean mats, right?
A. Yes, sir.
Q. And then you come back around a second time to pick up the dirty mats?
A. Correct.

Id., p. 19, line 21– p. 20, line 22; R. 114, line 21-115, line 22.

Q. All right. Based on these invoices how many mats would have been brought to the BI-LO in Winnsboro on September 30, 2010?
A. Eight.
Q. Okay. And are those of different sizes?
A. Correct. Yes.

Q. Okay. Off the top of your head do you – can you tell me where those mats are located in the store?
A. To my knowledge, the two four-by-six were at the front door. The three – I'm sorry. The five three-by-ten were laid out in the produce section. And from my knowledge, at this location a three-by-five, I couldn't tell you exactly. If I remember correctly, it was also in the produce area.

Id., p. 21, line 19 – p. 22, line 8; R. 116, line 19-117, line 8.

Q. Okay. Now look over at Exhibit 2 with me, if you would, which is October 7. Would that have – would Exhibit 2 have been the next invoice after Exhibit 1?
A. Yes.
Q. Okay. And how many mats are indicated on Exhibit 2?
A. The same. Eight.
Q. That's the same number of mats as on Exhibit 1?
A. Yes.

Id., p. 22, line 17 – p. 23, line 2; R. 117, line 17-118, line 2.

Q. Okay. Would you ever make notes on the invoices if any of the merchandise was damaged in any way?
A. No.
Q. Okay. Would you make note of that information anywhere?
A. If the product was damaged and I saw it damaged, I would get it out of the store.
Q. Okay. And then what happens to that merchandise?
A. We take it back. And pertaining to a mat, we would cut it up and destroy it and get it out of the cycle.
Q. Okay. What does it take for a mat to be removed from the cycle?
A. A mat falling apart, a mat has a tear in it, a mat that doesn't lay out properly.
Q. Okay. What does it look like when a mat doesn't lay out properly?
A. It's old.
Q And you've had mats that you've considered old that you take out of the cycle, right?
A. Yes.
Q. And you've had mats that needed to be cut up, as you say, right?
A. Yes.

Id., p. 24, line 2 – p. 25, line 2; R. 119, line 2-120, line 2.

Q. Okay. Do you have any standards at UniFirst for what condition that [rubber mat] border needs to be in?
A. Lay flat.
Q. Okay. How flat is flat to you?

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

Id., p. 25, lines 12-17; R. 120, lines 12-17.

Q. Have you ever arrived at a customer and found that there was maybe a hidden problem or anything with any of your merchandise, like either a stain or a cut or anything like that?
A. When I went back the next week?
Q. No. When you initially arrive at the location?
A. And when I went to deliver?
Q. Correct. Before you go in the store?
A. Yes.

Id., p. 34, line 25 – p. 35, line 9; R. 129, line 25-130, line 9.

Q. Okay. What kind of complaints have you had in the past about mats, if any?
A. Some about not sticking properly. Some being won't lay flat.

Id., p. 39, lines 15-18; R. 134, lines 15-18.

Q. When you are picking up and dropping off with a customer are you typically supervised in what you do by the customer or are you kind of given discretion and go about your way?
A. Kind of given discretion to go about my way.
Q. Nobody really bothers you?
A. And it varies with different customers. Sometimes, yes, they are standing there counting. Other ones, they let me go do my thing, come back.
Q. Think back, if you would, to BI-LO in Winnsboro when you had that account. Were they ones that would stand over you or were they ones that would kind of let you do your business?
A. Let me do my business.

Id., p. 44, line 22—p. 45, line 11; R. 137, line 22-138, line 11.

If BI-LO had been able to conduct this discovery, it is very unlikely that summary judgment would have been granted. It was UniFirst that retrieved and delivered mats to BI-LO on a regular basis. It was UniFirst's duty to deliver mats to BI-LO that were undamaged and lay flat. It was UniFirst that had the responsibility to take mats that did not lie flat out of service.

UniFirst's employee, moreover, was given significant discretion in whether to place a certain mat at this BI-LO store.

The trial court was made aware that BI-LO had sought to take depositions such as Mr. Stone's. Transcript, pp. 9-10; R. 98-99. It was, therefore, an error of law to grant summary judgment inasmuch as BI-LO had not had "a full and fair opportunity to *complete* discovery." Evening Post, *supra.*, 392 S.C. at 82, 708 S.E.2d at 748 *quoting* Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2013) (emphasis added).

B. The Trial Court's Grant of Summary Judgment was also Premature because Further Inquiry into the Facts of the case was necessary to clarify the Application of our Law.

As pointed out above regarding the complete lack of any deposition testimony from UniFirst, there were pertinent facts about who did what with the mats that were completely unknown by the court. Many of the unknown facts – provided by a post-summary judgment deposition – are presented *supra.* Summary judgment should not have been granted until the court was cognizant of the referenced facts. The fact that UniFirst had previously obtained summary judgment against the plaintiff did not obviate the need to determine whether UniFirst was negligent toward BI-LO or that it had failed to comply with the TRSA. There had been – and has been – no determination that BI-LO was negligent in any regard.

Further inquiry into the terms of UniFirst's contractual duties to BI-LO should certainly have been conducted before summary judgment was granted on the cause of action for contractual indemnity.

As quoted, *supra.* p. 3, BI-LO's cross-claim for contractual indemnity included allegations based solely on the contractual obligations undertaken by UniFirst. Whether UniFirst is absolved of negligence toward Ms. Black is not a necessary part of the equation.

BI-LO seeks indemnity from UniFirst for any breach of their contract – and it is not contingent on UniFirst having been negligent toward Plaintiff Black. UniFirst can breach duties toward BI-LO, in either tort or contract, without being negligent toward Black. Those duties are articulated in the previously-cited Textile Rental Service Agreement, especially in paragraphs 9 and 14, quoted in full, *supra*., p. 3.

The trial court's order basically assumes that BI-LO must be negligent because UniFirst had been determined – because of the lack of expert testimony – not to be negligent, saying, "[s]ince there is no act upon which UniFirst can be liable to BI-LO for contractual indemnity as Plaintiff's claims against UniFirst have been dismissed, the only party that can be found negligent in this matter is BI-LO." Order of January 23, 2014, pp. 5-6; R. 7-8.

The trial court failed to inquire further into UniFirst's duties to BI-LO. Primary among these duties is the duty UniFirst undertook to defend BI-LO, to include naming BI-LO as an additional insured under its insurance policy. *See* TRSA paragraphs 9 and 14, p. 3, *supra*. The duty to defend would have been triggered when Ms. Blacks' Complaint was filed on July 31, 2012. It raised the possibility of coverage, alleging negligence by both UniFirst and BI-LO, so the insurer's duty to defend was implicated. City of Hartsville v. South Carolina Mun. Ins. & Risk Financing Fund, 382 S.C. 535, 547, 677 S.E.2d 574, 580 (2009). There is no evidence in the record that UniFirst fulfilled its duty to defend either directly or via its insurance company. Further inquiry into whether BI-LO was entitled to contractual indemnification based on UniFirst's contractual agreement to defend should have been conducted. The trial court erred in not doing so.

The need to conduct further inquiry into whether UniFirst had breached its contractual duties to BI-LO was raised to the trial court in BI-LO's Motion to Alter or Amend. R. 58-60.

That motion pointed out that the court "did not address the applicability of the 'any act' language and whether it triggered any contractual duties of UniFirst which would have sustained BI-LO's contractual indemnity claim," R. 59, and pointed out that there had been no determination that BI-LO had been negligent in any regard. R. 59. The court's assumption of negligence by BI-LO deterred it from making the requisite further inquiry.

Further inquiry would have allowed the trial court to discern that there was, in the record, evidence of an existing disputed issue of material fact between UniFirst and BI-LO: whether UniFirst had fulfilled its obligations under the TRSA. BI-LO, in its cross-claim, as quoted *supra.*, p. 3, had alleged that UniFirst had agreed that it "would defend, indemnify and hold harmless BI-LO . . . and that it would obtain insurance to guarantee the execution of said obligations," and that BI-LO was "entitled to contractual indemnity over and against Defendant UniFirst Corporation for all costs, liability and attorneys' fees arising from this matter." BI-LO Cross-claim ¶¶ 36, 37; R. 34-35. In UniFirst's Answer and Cross claim, it *denied* both of these allegations, thereby creating a clear disputed issue of material fact. UniFirst Answer and Cross-claim, ¶¶ 8, 9. Supp. R. 2. This disputed issue, which was present in the record, should have precluded the trial court from granting summary judgment.

Because UniFirst, moreover, delivered a set of mats to the BI-LO store every week, the most reasonable inference is that any defect in the mat is the responsibility of UniFirst. Stone Dep., pp. 23, 27, 33; R. 118, 122, 128.

Further inquiry should also have been conducted to determine the status of the parties if no negligence by BI-LO was established or if BI-LO settled the case with the Plaintiff with no admission of liability. The latter scenario is precisely what has transpired. BI-LO settled with

the Plaintiff,[2] even though it denied liability. Stipulation of Dismissal, R. 187. The trial court's assumption of BI-LO's negligence – and that BI-LO was, therefore, seeking indemnity for its own negligence – is incorrect. The trial court should have inquired more fully into this possibility rather than granting summary judgment and foreclosing BI-LO's right to pursue contractual indemnity. Our law holds that "settlement alone does not preclude indemnification when there is . . . evidence to support a finding of . . . lack of fault by the indemnitee." Inglese v. Beal, 403 S.C. 290, 301, 742 S.E.2d 687,692 (Ct. App. 2013) *quoting* Walterboro County Hosp. v. Meacher, 392 S.C. 479, 487-88, 709 S.E.2d 71, 75 (Ct. App. 2011). The trial court erred in foreclosing BI-LO's right to establish that it was entitled to indemnification from UniFirst. This Court should rectify that error.

The error is particularly noteworthy because the basis for BI-LO's cross-claim against UniFirst was based on a "breach of UniFirst Corporation's obligation to BI-LO in the conduct of its activities under the contract…." BI-LO Cross-Claim, ¶37; R. 35. (quoted *supra*, p. 3).

To the extent the lower court considered the TRSA to be ambiguous regarding UniFirst's contractual obligation to defend and indemnify BI-LO,[3] as may be inferred from its discussion of the document not providing indemnity for "[BI-LO's] own negligence," summary judgment should not have been granted. Allegheny Casualty Co. v. Netmoco, Inc., Op. No. 2013-UP-097, 2013 WL 8482391, at 3 (S.C. Ct. App. 2013), citing Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2008) ("…summary judgment is improper when an ambiguous contract is at issue because the court cannot clearly ascertain the parties' intent from the instrument's four corners.").

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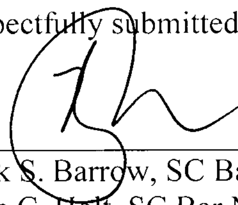
[2] There are no remaining claims by Plaintiff Black against either BI-LO or UniFirst.

[3] BI-LO does not believe that the TRSA is ambiguous, but clearly requires UniFirst to defend(via an insurance company) BI-LO, and indemnify it for any obligation "arising out of *any* act" of UniFirst or its employees.

CONCLUSION

This Court should reverse the grant of summary judgment and remand this case to the trial court for further adjudication of the issues between BI-LO and UniFirst. The grant of summary judgment was premature for two reasons: 1) BI-LO had not had a "full and fair opportunity to complete discovery"; and 2) further inquiry was required into the contractual relationship and actions between BI-LO and UniFirst. The "drastic remedy" of summary judgment was not appropriate in this situation. This court should rectify the situation.

Respectfully submitted,



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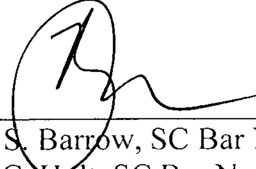
CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

October 1, 2014



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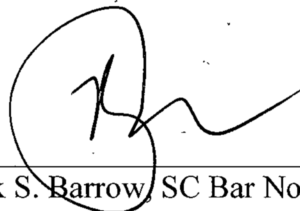
PROOF OF SERVICE

I certify that I have served the Final Brief and Final Reply Brief of Appellant depositing a copy of each brief in the United States Mail, postage prepaid, on October 1, 2014 addressed to their attorney of record, Gray T. Culbreath, Esquire, Post Office Box 7368, Columbia, SC 29202.

October 1, 2014.



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