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

Case No. 2012-CP-20-00316
Appellate Case No. 2014-001153

Mary Wall Black, ...Plaintiff,

v.

BI-LO, LLC and Unifirst Corporation . . . . .Defendants,

Of Which

BI-LO, LLC is . . . . .Appellant

And Unifirst Corporation is. . . . .Respondent.

FINAL BRIEF OF RESPONDENT UNIFIRST CORPORATION

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STATEMENT OF ISSUES ON APPEAL

I. DID THE CIRCUIT COURT PROPERLY GRANT SUMMARY JUDGMENT TO UNIFIRST CORPORATION AS TO BI-LO'S CROSS-CLAIM FOR CONTRACTUAL INDEMNITY?

INTRODUCTION

This matter arises from an alleged trip and fall in a BI-LO, LLC ("BI-LO") grocery store located in Winnsboro, South Carolina. On its face, the Complaint of the Plaintiff in the underlying litigation, Mary Black (hereinafter referred to as "Black" or "Plaintiff Black"), alleged that she was injured while exiting the store because she tripped and fell over the mat placed in front of a sliding door which acts as both the entrance and exit to the store.

Pursuant to a Textile Rental Service Agreement ("Agreement"), Unifirst Corporation ("Unifirst") provided the mats to the BI-LO store where the alleged incident occurred, and Plaintiff Black alleged Unifirst failed to properly supply mats, provide safe mats, replace the mats in a timely manner, and warn customers of the danger created by the mats. Plaintiff Black asserted that BI-LO was negligent for having a defective mat in the entrance, failing to keep the entrance safe for customers, failing to provide safe conditions for customers, failing to correct dangerous conditions, failing to warn customers, failing to train or supervise employees, and failing to staff the store properly.

By the time of this appeal, Plaintiff's claims had been dismissed. Plaintiff's claims against Unifirst were dismissed as a matter of law following the granting of Unifirst's summary judgment motion. BI-LO and Plaintiff have since resolved Plaintiff's claims against BI-LO by way of settlement.

As part of this litigation, BI-LO and Unifirst asserted cross-claims against one another. While initially BI-LO alleged causes of action for contribution, equitable indemnification, and contractual indemnification for any negligence found, BI-LO did

not request the circuit court alter or amend anything about the rulings as to the claims for contribution and equitable indemnity. Additionally, BI-LO has not raised these issues on appeal; therefore, those issues have been abandoned. This appeal is limited solely to BI-LO's cross-claim for contractual indemnity.

STATEMENT OF THE CASE

Plaintiff filed the underlying suit in this matter on July 31, 2012 in Fairfield County against Defendants BI-LO and Unifirst. Plaintiff alleged that on October 4, 2010, she was injured while leaving a BI-LO grocery store when she tripped and fell on "a defective and/or dry-rotted mat improperly and inappropriately placed at the entrance/exit-way area" of the store. (R. pp. 16, 18, paras. 6, 12). Plaintiff's causes of action against Unifirst were based in negligence and gross negligence. (R. pp. 16-18, para. 11). Plaintiff also alleged Unifirst knew or should have known of the unsafe condition of the premises. (R. p. 18, para. 13). Finally, Plaintiff claimed this conduct proximately caused her to suffer severe and permanent injuries, and the resulting damages include past, present, and future pain, medical expenses, suffering, lost wages, mental and emotional anguish and illness and loss of enjoyment of life. (R. p. 18, para. 16).

By Order dated October 14, 2013, the Court granted Unifirst's Motion for Summary Judgment as to Plaintiff's claims against it. In granting Unifirst's Motion for Summary Judgment, the Court found that there was no issue of material fact regarding Plaintiff's claims against Unifirst. (R. p. 11). Specifically, the Court found Unifirst owed no duty to Plaintiff and therefore could not sustain a premises liability negligence claim against Unifirst. (R. p. 11). Moreover, the Court determined there was no evidence "of a defective condition created by the mat or that Unifirst created or had notice of a defective condition, and without such evidence, Plaintiff's claims against Unifirst fail[ed] as a matter of law." (R. p. 11). The Court found that the testimony only

revealed that there were no witnesses to the alleged incident who could speak to the cause of the fall or that noticed anything suspicious about the mat before the fall especially since neither Plaintiff nor her husband noticed anything unusual about the mat before she fell. (R. p. 12). Finally, the Court found that Plaintiff could not sustain a products liability cause of action against Unifirst because there was no evidence that there was anything unusual about the mat before the incident and no evidence the mat was in a defective condition, unreasonably dangerous to the user. (R. p. 12).

By way of cross-claims, BI-LO asserted Unifirst was liable to it for contribution under S.C. Code Ann. § 15-38-20 because to the extent BI-LO was found negligent, the "said negligence was jointly committed with acts of negligence of" Unifirst. (R. p. 33, paras. 29-31). Additionally, BI-LO claimed it was entitled to equitable indemnity "only because of the alleged negligence of Unifirst . . . arising from [Unifirst's] special relationship with" BI-LO. (R. p. 34, paras. 32-34). Finally, BI-LO alleged the indemnification clause in its contract with Unifirst entitled it to indemnity "for any breach of said agreement" and that any liability that was attributed to BI-LO arose from Unifirst's conduct such that Unifirst must indemnify and hold BI-LO harmless. (R. pp. 34-35, paras. 35-37).

BI-LO's cross-claims were severed from the underlying action by the Court's October 14 Order. The October 14 Order held the cross-claims should be severed because they arise after liability is found in the underlying action and severing such claims avoided prejudice to Unifirst and was conducive to the parties' convenience and judicial economy. (R. p. 13).

Given the dismissal of Plaintiff's claims against it, on October 22, 2014, Unifirst moved for summary judgment as to all of BI-LO's cross-claims. In its motion, Unifirst argued there could be no cause of action for contribution by BI-LO since Plaintiff's claims against Unifirst were dismissed as a matter of law. (R. pp. 38, 44-45). Additionally, Unifirst argued BI-LO could not maintain its claim for equitable indemnity, and it must fail because Unifirst could not be found liable for causing Plaintiff's damages. (R. pp. 39, 45-46). Finally, Unifirst argued BI-LO's contractual indemnity claim must also fail. Specifically, Unifirst asserted that because Plaintiff's causes of action against it were dismissed such that it could not be found liable to Plaintiff, the only party who could be found negligent in the incident was BI-LO. (R. pp. 39, 46-48). Since the agreement between Unifirst and BI-LO did not purport to indemnify BI-LO for its own negligence, Unifirst did not have a duty to indemnify BI-LO under the contract. (R. pp. 39, 47-48).

In opposition to Unifirst's Motion for Summary Judgment, BI-LO argued that the contractual indemnity owed by Unifirst to BI-LO was not affected by the findings made by the circuit court in granting Unifirst's Motion for Summary Judgment as to Plaintiff's claims. (R. p. 51). BI-LO also argued that the language of the agreement's indemnification clause created a broader contractual duty such that there was a scintilla of evidence existed based on the testimony of Plaintiff Black. (R. p. 51). BI-LO asserted that "[e]ven an act which might be innocent or reasonable in everyday life would still trigger Unifirst's duty to indemnify if that act caused BI-LO to incur loss." (R. pp. 52-53). As to its equitable indemnification claim, BI-LO asserted that "a jury could certainly

find that an act alleged to have been committed by BI-LO was actually committed by Unifirst," making it claim proper even though Plaintiff's claims against Unifirst had been dismissed. (R. p. 54). Finally, as to BI-LO's claim for contribution, it argued that summary judgment was not proper because a jury could hold BI-LO liable for acts which were committed by Unifirst and that a special interrogatory could be used to show that Unifirst was a joint tortfeasor. (R. p. 54).

A hearing was held as to Unifirst's Motion on January 9, 2014. Following arguments by counsel, the circuit court granted Unifirst's motion, dismissing all of BI-LO's cross-claims as a matter of law. The court's Order held BI-LO's cross-claims could not be sustained because there was no genuine issue of material fact that "(1) the right of contribution d[id] not exist under the facts of this case; (2) the elements necessary for equitable indemnity [we]re not present in this case; and (3) the contract between Unifirst and BI-LO d[id] not purport to indemnify and defend BI-LO for its own negligence."[1] (R. p. 4). Specifically, the Court found that an exception exists in the contract between Unifirst and BI-LO which provides that Unifirst does not have to indemnify BI-LO for BI-LO's own negligence. (R. p. 7). Therefore, the Court determined that since there was no act upon which Unifirst could be found liable to Plaintiff, there was no act upon which Unifirst could be found liable to BI-LO for contractual indemnity since the only party that could be found liable to Plaintiff for negligence in the underlying lawsuit was BI-LO. (R. pp. 7-8).

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[1] As mentioned in the Introduction, *supra*, this appeal is limited only to BI-LO's cause of action for contractual indemnity.

On the same day as the January 9, 2014 hearing, BI-LO filed a separate declaratory judgment action against Unifirst in Fairfield County (Civil Action Number 2014-CP-20-011). In that suit, which is substantially similar to this case in that it is based upon the underlying litigation in this instant action and is seeking indemnity from Unifirst pursuant to the Agreement, BI-LO requests a declaratory judgment that Unifirst has a duty to defend and indemnify BI-LO, either directly or through its insurance policy, such that Unifirst would owe a duty of defense and indemnity for the lawsuit filed by Plaintiff Black.[2]

Thereafter, BI-LO filed a Motion to Alter and/or Amend on January 24, 2014, requesting that the Court amend its January Order granting summary judgment to Unifirst as to BI-LO's cross-claim for contractual indemnity. (R. pp. 59-60). BI-LO argued the Court should alter its ruling as to BI-LO's contractual indemnity claim because the contract between BI-LO and Unifirst provides for indemnification as to "any act" of Unifirst which resulted in liability. (R. pp. 59-60). In its Order filed April 25, 2014, the circuit court rejected the "any act" language argument and denied BI-LO's Motion to Alter or Amend and "reaffirmed its prior ruling in toto." (R. pp. 1-2). Plaintiff filed the Notice of Appeal with this Court on May 23, 2014.

The underlying litigation between Plaintiff Black and BI-LO was resolved by an undisclosed settlement after the Order of the circuit court denying BI-LO's Motion to

[2] Unifirst filed a Notice of Removal to the U.S. District Court for the District of South Carolina and a Motion to Dismiss, arguing res judicata and collateral estoppel, in response to this Complaint to Federal Court; however, the matter has been remanded due to this appeal. BI-LO has filed a Motion for Summary Judgment in this matter. The matter is currently pending.

Alter or Amend, and Plaintiff Black's claims against BI-LO have since been dismissed by stipulation of the parties.

STATEMENT OF FACTS

At the time of the alleged incident in the underlying litigation, Plaintiff Black, a resident of Winnsboro, was leaving the Winnsboro BI-LO store. Black's Complaint alleged the incident occurred when she tripped and fell on "a defective and/or dry-rotted mat improperly and inappropriately placed at the entrance/exit-way area" of the store. (R. pp. 16, 18, paras. 6, 12). Black testified that she could not say for certain what made her trip. (R. p. 57, lines 15-17). Black testified that *after her fall* the rubber border of the mat appeared to be "crinkled". (R. p.56, lines 4-10). Black also opined that the mat was "dry-rotted," but she could not describe what made her think it was dry-rotted. (R. p.56, lines 18-25). Plaintiff's husband, Earl Black, did not see her fall because he was ahead of her, but he heard her hit the ground. (2d Supp. R. p.1, lines 20-22). Amy Johnson, the only other witness identified as being at the scene following the incident, testified that she did not see Plaintiff trip on the mat and did not know what caused the fall. (2d Supp. R., p.2, line 24-p.3, line1; 2d Supp. R., p.4, lines 5-10; 2d Supp. R., p.5, lines14-15; 2d Supp. R., p.6, lines 19-21). Johnson did not know what the mat looked like before the incident. (2d Supp. R., p. 4, lines 15-18).

Unifirst provided certain rental textile items and services to BI-LO based upon a Textile Rental Service Agreement ("Agreement") which was entered into on April 30, 2007. (R. p. 145). As part of the Agreement, the parties established that the Agreement "may not be construed against any party by reason of its preparation." (R. p. 148, para. 15). Schedule 1 of the Agreement provided for the scope of the service to be performed by Unifirst and on what basis. Pursuant to the Agreement, Unifirst was to provide the

following services: (1) uniform and garment rental ("rented uniforms"); (2) floor mats, floor mops and wiping cloth(s) ("rented items"); (3) water-wash of rented uniforms and rented items; (4) personal name emblem and BI-LO emblems on rented uniforms; (5) delivery of clean rented uniforms and rented items; and (6) remove soiled rented uniforms and rented items. (R. p. 151, para. 1). The Agreement provided for the service to occur on a weekly basis. (R. p. 151, para. 1). Under the Agreement, BI-LO was responsible for any merchandise provided by Unifirst that was damaged except through normal wear and tear. (R. p. 152, para. 9).

The Agreement also contained an indemnification clause concerning different types of situations such as liability, property damage to the BI-LO store, manufacturer's warranties, and consequential, incidental, or special damages. Specifically, the clause provides: "Company [Unifirst] shall indemnify and defend Customer [BI-LO] against any liability arising out of any act of Company [Unifirst], its employees or agents in connection with this Agreement, *except to the extent caused by the negligence of Customer* [BI-LO]." (Emphasis added). (R. p.146-147, para. 9).

ARGUMENT

I. Standard of Review

On appeal, the Court applies the same standard as the trial court pursuant to Rule 56(c), SCRCP. *Turner v. Millman*, 392 S.C. 116, 121-122, 708 S.E.2d 766, 769 (2011); *Fleming v. Rose*, 350 S.C. 488, 493-494, 567 S.E.2d 857, 860 (2002) (citing *Peterson v. West Am. Ins. Co.*, 336 S.C. 89, 94, 518 S.E.2d 608, 610 (Ct. App. 1999)). Summary judgment is appropriate where, as here, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(e), SCRCP; *Baughman v. American Telephone & Telegraph Co.*, 306 S.C. 101, 111, 410 S.E.2d 537, 545 (1991). Moreover, "[a] party opposing summary judgment must do more than rely on mere allegations." *Walton v. Mazda of Rock Hill*, 376 S.C. 301, 307, 657 S.E.2d 67, 70 (Ct. App. 2008) (citing *Dyer v. Moss*, 208 S.C. 208, 211, 325 S.E.2d 69, 70 (Ct. App. 1985)).

If a genuine issue of fact is not established as to one essential element necessary to the cause of action, the existence of factual issues relating to other elements becomes immaterial and therefore subject to summary judgment. *Baughman*, 306 S.C. at 114-16, 410 S.E.2d at 545-46; *see also Rohrbough v. Wyeth Laboratories, Inc.*, 916 F.2d 970 (4th Cir. 1990) (finding a party "will not be permitted to manufacture a genuine issue of material fact to survive a motion for summary judgment").

II. The Circuit Court Judge Properly Granted Summary Judgment To Unifirst Corporation as to BI-LO's Cross-Claim for Contractual Indemnity.

The circuit court appropriately found there was no issue as to material fact that the contract between BI-LO and Unifirst does not entitle BI-LO to indemnity.[3] Accordingly, Unifirst has met its burden, and the Order of the circuit court should be affirmed.

A. BI-LO's Argument That Summary Judgment Was Not Proper Because Discovery Was Incomplete Is Not Preserved For Review.

The Court should not consider BI-LO's argument that summary judgment was not proper because discovery was incomplete because it was neither raised to nor ruled upon by the circuit court, and even if it was deemed raised to the circuit court, it was not ruled upon, and BI-LO failed to renew the argument in its Motion to Alter or Amend. Thus, it is still not preserved for review.

In its brief, BI-LO argues summary judgment was not proper because discovery was not complete. (App. Br., pp. 5-9). To support that argument, BI-LO points to a comment during the hearing concerning scheduling the deposition of a Unifirst employee, emails between counsel regarding scheduling, the deposition transcript of a Unifirst employee taken after the hearing, and a phrase in the conclusion of its memorandum in opposition to Unifirst's Motion for Summary Judgment. *Id.* The reference during the

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[3] As previously stated, BI-LO did not appeal the circuit court's granting of summary judgment as to its claims for contribution and equitable indemnity against Unifirst; thus, those issues have been abandoned and their dismissal has become the law of the case. *See Judy v. Martin,* 381 S.C. 455, 459, 674 S.E.2d 151, 153 (2009) (citing *In re Morrison,* 321 S.C. 370 n. 2, 468 S.E.2d 651 n. 2 (1996) (noting that an unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal)); *Cannon v. Cannon,* 321 S.C. 44, 467 S.E.2d 132 (Ct. App. 1996) (issue not argued in brief is deemed abandoned on appeal).

summary judgment hearing only mentions the fact that BI-LO was "trying to schedule some depositions" from which there may be some information that could potentially trigger the "any act" language in the indemnity clause of the Agreement. (R. pp. 98-99). The "argument" provided in its memorandum in opposition to Unifirst's motion appeared solely in the conclusion and states, "*and because depositions of Unifirst's employees have not yet been scheduled*," the motion should be denied. (R. p. 55). No reference to the depositions of Unifirst employees can be found anywhere else in the memorandum. Additionally, the emails cited to this Court were never before the circuit court; rather, they were used as an exhibit in BI-LO's substantially similar declaratory judgment action filed against Unifirst. On appeal, however, BI-LO asserts these conclusory references were a "clear implication" that adequate discovery had not been conducted. (App. Br., p. 5).

Importantly for the analysis of this appeal, no argument was ever verbalized or written by BI-LO stating that summary judgment should not be granted as to BI-LO's claim for contractual indemnity *because* discovery was not complete. No law was ever cited to the circuit court by BI-LO for the proposition that summary judgment is inappropriate if discovery is incomplete. Instead, BI-LO should have properly raised this argument by filing an affidavit stating that discovery was not complete and then requesting, pursuant to Rule 56(f), SCRCP,[4] that the court refuse the application for

[4] Rule 56(f), SCRCP, provides that "[s]hould it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just."

judgment or order a continuance until such depositions could be completed. *See e.g.*, *Doe ex rel. Doe v. Batson*, 345 S.C. 316, 320-321, 548 S.E.2d 854, 856-857 (2001) (finding that Rule 56(f) "requires the party opposing summary judgment to at least present affidavits explaining why he needs more time for discovery"). Accordingly, the vague references to scheduling depositions are not enough, and since BI-LO neither raised this argument to the circuit court nor filed an opposing affidavit and pled Rule 56(f), SCRCP, the argument is not preserved for review by this Court. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (stating an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review).

Furthermore, even giving deference to BI-LO by considering the reference to scheduling depositions during the hearing and conclusion in the memorandum as sufficient to have raised the argument, the issue was not ruled upon, and BI-LO failed to assert the argument in its Rule 59(e), SCRCP, Motion to Alter or Amend. Therefore, even if it was deemed raised, this issue is not preserved for review by this Court. *See Shealy v. Doe*, 370 S.C. 194, 205, 634 S.E.2d 45, 51 (Ct. App. 2006), *Noisette v. Ismail,* 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (finding where "the circuit court did not explicitly rule" on an argument, and no Rule 59(e) motion was made, "the issue was thus not properly before the Court of Appeals and should not have been addressed"); *Jones v. State Farm Mut. Auto. Ins. Co.,* 364 S.C. 222, 235, 612 S.E.2d 719, 726 (Ct. App. 2005) ("An issue is not preserved where the trial court does not explicitly rule on an argument and the appellant does not make a Rule 59(e) motion to alter or amend the judgment.");

McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 381, 597 S.E.2d 181, 186 (Ct. App. 2004) (holding an issue must be raised to and ruled upon by the trial court to be preserved for appellate review).

Finally, in addition to the fact that BI-LO's arguments about the completeness of discovery are not preserved for review, both the emails between attorneys Holt and Joyner regarding scheduling the depositions and the deposition transcript of Christopher Stone, portions of which are presented by BI-LO to argue that summary judgment should not have been granted because discovery was not complete, are not properly before this Court and cannot be given efficacy. Specifically, "only documents that were presented to the circuit court [may] properly be included in the record on appeal under the South Carolina Appellate Court Rules." *Auto Pro of Goose Creek v. Barnes*, 2004 WL 6336772, at * 4 (S.C. Ct. App. Oct. 20, 2004); *see also* Rule 210 (c), SCACR (advising "[t]he Record shall not, however, include matter which was not presented to the lower court or tribunal"); *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23-24, 602 S.E.2d 77, 779-780 (2004) (citing Rule 210(c), SCACR as an example of the proposition that "a great number of reported cases in South Carolina for at least four generations, and more recently the appellate court rules and rules of civil procedure, have emphasized the importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for its consideration"); *Ffrench v. Ffrench*, 2006 WL 7285695, at *3, n.3 (S.C. Ct. App. Feb. 10, 2006) (refusing, pursuant to Rule 210(c), SCACR, to give an affidavit any efficacy because it was not presented to the lower court or tribunal).

Accordingly, this Court must disregard BI-LO's arguments that summary

judgment was premature because discovery had not been completed and should refuse to consider either the emails between attorneys Holt and Joyner regarding scheduling of those depositions or Christopher Stone's deposition testimony as they are not properly before this Court.

B. BI-LO's Arguments As To The Duty Of The Circuit Court To Inquire Further Into The Facts Of The Case Is Not Preserved For Review.

Despite BI-LO's assertion to the contrary, its argument that the circuit court should have inquired into the facts of the case further must not be considered by the Court beyond the argument the "any act" language of the Agreement creates a material issue of fact, making summary judgment inappropriate.

In its memorandum in opposition to Unifirst's motion, arguments at the hearing on Unifirst's motion, and motion to alter or amend, BI-LO maintained the Agreement provides for indemnification as to "any act" of Unifirst which resulted in liability. (R. pp. 8, 51, 59-60). BI-LO also argued that the language of the agreement's indemnification clause created a broader contractual duty such that a scintilla of evidence existed based on the testimony of Plaintiff Black. (R. p. 51). BI-LO asserted that "[e]ven an act which might be innocent or reasonable in everyday life would still trigger Unifirst's duty to indemnify if that act caused BI-LO to incur loss." (R. pp. 52-53). Further, BI-LO argued that the contractual indemnity owed by Unifirst to BI-LO was not affected by the findings made by the circuit court in granting Unifirst's Motion for Summary Judgment as to Plaintiff's claims. (R. p. 51).

However, to this Court, BI-LO expands its arguments beyond those which were

argued below such that they are not properly before this Court. Specifically, it asserts that the circuit court should have considered section 14 of the Agreement, a section that was never argued to the circuit court and which creates a duty on the part of Unifirst to maintain a certain level of insurance and make BI-LO an additional insured on its insurance policy. (App. Br. p. 10). BI-LO also argues the circuit court erred because given the duty to add BI-LO as an additional insured, Unifirst's duty to defend BI-LO began on the date Plaintiff's Complaint was filed. *Id.* Additionally, BI-LO argues that the circuit court should have looked to Unifirst's Answer and Cross-claims to show that there was a disputed issue since it denied BI-LO's cross-claim allegations. *Id.* at 11. BI-LO also points to the deposition transcript of Christopher Stone as evidence that defects in the mats were the responsibility of Unifirst. *Id.* BI-LO further asserts that the court should have looked into what would happen if there was no negligence by BI-LO or if BI-LO settled. *Id.* Finally, BI-LO argues that to the extent the circuit court considered the Agreement ambiguous, it should not have granted summary judgment. *Id.* at 12.

As is evidenced by BI-LO's memorandum in opposition to Unifirst's Motion for Summary Judgment, the hearing transcript, and BI-LO's Motion to Alter or Amend, each of the arguments in the paragraph *supra* that was raised in BI-LO's brief to this Court was neither raised to nor ruled upon by the circuit court. In its Answer and Cross-claims, BI-LO did not mention section 14 of the Agreement as a reason BI-LO was entitled contractual indemnity or that the Agreement could be deemed ambiguous. Instead, the argument concerning section 14 of the Agreement, the duties created by it, and the potential ambiguity of the Agreement are the arguments BI-LO makes in its declaratory

judgment action. Thus, these arguments cannot be deemed to have been raised in the instant action because they do not naturally flow from the only arguments made by BI-LO, namely that the "any act" language of the Agreement creates a duty for Unifirst beyond whether it was negligent and that a scintilla of evidence was created by Plaintiff Black's testimony. *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011) (finding that although a party is not required to use the same wording in order to preserve the issue, "the issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge"). Accordingly, those arguments are not preserved for review and should not be considered by the Court. *See id.* at 465, 719 S.E.2d at 642 (stating an issue cannot be raised for the first time on appeal); *Wilke*, 330 S.C. at 76, 497 S.E.2d at 733 ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

C. The Circuit Court Properly Granted Summary Judgment To Unifirst Because The Agreement Does Indemnify BI-LO For Its Own Negligence And Unifirst Cannot Be Found Liable to Plaintiff For Any Act.

Under the agreement between Unifirst and BI-LO and the facts of this case, there is no evidence of an act of Unifirst which could cause liability to BI-LO such that it should be liable for contractual indemnity; therefore, the circuit court properly granted Unifirst's motion for summary judgment as to BI-LO's cross-claim for contractual indemnity. Even assuming the "any act" language in the Agreement contemplates more than those acts complained of by Plaintiff as part of the "liability" that would give rise to

the indemnification, there is no actual evidence from which it can be reasonably inferred that the liability complained of arose from an *act* of Unifirst.

The purpose of indemnity is to shift the entire loss from one party to another. *Myrtle Beach Pipeline Corp. v. Emerson Elec. Co.*, 843 F. Supp. 1027, 1063 (D.S.C. 1993). Indemnity may be based in contract and is a type of "compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party." *Vermeer Carolina's. Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 60, 518 S.E.2d 301, 305 (Ct. App. 1999); *see also Emerson Elec. Co.*, 843 F. Supp. at 1063. Contractual indemnity contemplates "a transfer of risk for consideration" through an agreement between the parties. *Rock Hill Telephone Co, Inc. v. Globe Communications, Inc.*, 363 S.C. 385, 389, 611 S.E.2d 235, 237 (2005). "A contract of indemnity [is] construed in accordance with the rules for the construction of contracts generally." *Fed. Pacific Elec. v. Carolina Production Enterprises*, 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989) (construing the agreement that the indemnitor/lessee would "indemnify [the indemnitee/landlord]... against any damage suffered or liability incurred ... or any loss or damage of any kind in connection with the Leased Premises during the term of [the] lease" against the indemnitee/landlord since it did not "disclose an intention to indemnify for consequences arising from [the indemnitee/landlord's] own negligence"). Therefore, if the contract is unambiguous, "the language alone determines the force and effect of the agreement." *Campbell v. Beacon Manuf. Co., Inc.*, 313 S.C. 451, 453, 438 S.E.2d 271, 272 (Ct. App. 1993).

Courts strictly construe "a contract containing an indemnity provision that purports to relieve an indemnitee from the consequences of its own negligence" so that such contracts are not construed to indemnify "the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in clear and unequivocal terms." *Fed. Pacific Elec.*, 298 S.C. at 26, 378 S.E.2d at 57 (citing *Univ. Plaza Shopping Ctr., Inc. v. Stewart*, 272 So.2d 507 (Fla.1973); *Cox v. E.I. Du Pont de Nemours and Co.*, 39 F.R.D. 47 (W.D.S.C.1965); *Murray v. The Texas Co.*, 172 S.C. 399, 402, 174 S.E. 231, 232 (1934) ("[A] provision [in] a contract relieving one of the parties thereto from liability for ... its own negligence should be *clear and explicit*.")).

Under the Agreement and the facts of this case, there is no evidence of an act upon which Unifirst could be liable to BI-LO for contractual indemnity. The Agreement provides that "Company [Unifirst] shall indemnify and defend Customer [BI-LO] against any liability arising out of any act of Company [Unifirst], its employees or agents in connection with this Agreement, *except to the extent caused by the negligence of Customer* [BI-LO]." (R. pp. 146-147, para. 9) (emphasis added). After Plaintiff Black's claims against Unifirst were dismissed and that dismissal was not appealed, the only party whose acts could be found to be negligent were those of BI-LO. Unlike *Fed. Pacific Elec.*, the Agreement specifically excepts indemnification for BI-LO's own negligence. *Fed. Pacific Elec.*, 298 S.C. at 27, 378 S.E.2d at 58. Moreover, even without the exception, the Agreement does not actually state it will indemnify BI-LO's own negligence; therefore, the Agreement would be strictly construed *against* indemnification. *Id.* at 26, 378 S.E.2d at 57. Given that the Agreement does not provide

for indemnification of BI-LO's own negligence and the circuit court found as a matter of law that Unifirst was not liable to Plaintiff such that BI-LO was the only remaining party that *could* be found liable, the circuit court was correct that BI-LO's cross-claim for contractual indemnity failed as a matter of law.

BI-LO relies on *Otis Elevator, Inc. v. Hardin Const. Co. Grp., Inc.*, 316 S.C. 292, 450 S.E.2d 41 (1994) for the proposition that when the phrase "acts or omissions," which BI-LO argues is comparable to the "any act" language in the Agreement, is used in contracts, the possible liability and indemnification thereof is broader than negligence. (R. pp. 52, 59). However, the Court in *Otis* did not specifically analyze the meaning of the terms but rather made the *narrow* holding that a jury instruction on the specific law applicable to negligence, strict liability, and breach of warranty was unnecessary given the special interrogatory, which specifically asked whether the loss or damage was "occasioned by [Otis Elevator's] acts or omissions." *Id.* at 299, 450 S.E.2d at 45. While the *Otis* Court commented that the language of the special interrogatory was broader than Otis' liability under theories of negligence, strict liability, and breach of warranty; however, its holding does not purport to define the terms "acts or omissions" for all contracts as suggested by BI-LO. [5] *Id.* Under the plain language of the Agreement,

[5] Moreover, *Otis* is distinguishable from the facts of this case. In *Otis*, Otis, as the elevator subcontractor for general contractor Hardin Construction Company Group, Inc. ("Hardin"), signed an agreement upon the completion of the installation of the elevators on a project that permitted Hardin to use the elevators on a temporary basis. 316 S.C. at 294-95, 450 S.E.2d at 43. The agreement provided that Hardin would "indemnify and save [Otis Elevator] harmless against all loss, damage, claims, liability, or expenses arising therefrom, except such loss, damage, claims, liability or expenses as may be occasioned by [Otis Elevator's] acts or omissions." *Id.* at 294, 450 S.E.2d at 43. Therefore, Otis was the indemnittee and not the indemnitor, which is the position BI-LO

Unifirst owes BI-LO indemnification under the Agreement for liability which comes from an act of Unifirst and not from any negligence of BI-LO.[6] Liability for Plaintiff Mary Black's injuries cannot come from an act of Unifirst because the Court dismissed Plaintiff's claims against Unifirst with prejudice, and BI-LO cannot point to another act of Unifirst which would cause it liability.

Rather, this case is more comparable to *Penton v. J.F. Cleckley & Co.*, 326 S.C. 275, 486 S.E.2d 742 (1997), wherein the Supreme Court held that a contractor ("Cleckley") was not liable to the South Carolina Department of Transportation ("SCDOT") for indemnity under a resurfacing contract between the parties. The indemnification clause in *Penton* required Cleckley to indemnify the SCDOT "from all suits or claims of any character brought because of any injuries or damage received or sustained by any person, persons, or property on account of ... *any act or omission*, neglect, or misconduct of" Cleckley. *Id.* at 282, 486 S.E.2d at 746 (emphasis added). The Court held Cleckley was not required to indemnify the SCDOT because under the contract terms the SCDOT could only seek indemnification when a claim is made for

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is arguing Unifirst is in here. In *Otis*, another subcontractor was injured using the elevator. *Id.* at 295, 450 S.E.2d at 43. At trial, Otis settled with the plaintiff, and following the trial, Otis sought indemnification from Hardin. *Id.* In that action for indemnification, the jury found by special interrogatory that no act or omission of Otis caused the injuries to the plaintiff in the underlying action. *Id.* The Supreme Court found that the evidence supported that finding because by the jury because the evidence indicated that based on the plaintiff's allegations against Otis, it did not have the duty to the plaintiff; rather, Hardin had the duty to the plaintiff. *Id.* at 295-96, 450 S.E.2d at 43-44.

[6] The circuit court held that an exception exists in the contract between Unifirst and BI-LO which provides that Unifirst does not have to indemnify BI-LO for BI-LO's own negligence. (R. p. 7).

injury "on account of ... any act or omission, neglect, or misconduct" of Cleckley, and the jury did not find Cleckley liable. *Id.* at 283, 486 S.E.2d at 746. Like *Penton*, Unifirst cannot be found liable to Plaintiff; therefore, under the terms of the Agreement, no act of Unifirst could create liability for BI-LO in this case. Accordingly, Unifirst's motion for summary judgment was properly granted.

D. The Circuit Court Properly Granted Summary Judgment To Unifirst Because, Even Under A Broad Reading Of Agreement, There Is No Evidence Which Creates A Genuine Issue of Material Fact.

Even if BI-LO's argument that the "any act" language of the Agreement covers acts outside of those which were dismissed by the Court when it granted Unifirst's motion for summary judgment as to Plaintiff's claims, the circuit court properly granted Unifirst's Motion for Summary Judgment because BI-LO cannot point to any evidence which creates a genuine issue of material fact that the liability of BI-LO is caused by an act of Unifirst. In its arguments to the circuit court, BI-LO pointed to the testimony of Plaintiff Mary Black describing the rubber portion of the mat as "brittle" as evidence of "any act" by Unifirst such that a genuine issue of material fact is present. However, Plaintiff's testimony that the outside rubber part of the mat was "brittle" is not a *specific fact which infers there is a genuine issue for trial. Rife v. Hitachi Const. Machinery Co., Ltd.,* 363 S.C. 209, 213-214, 609 S.E.2d 565, 568 (Ct. App. 2005) (stating that if the moving party meets its initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings; rather, the opponent must present specific facts which infer there is a genuine issue for trial) (citing *Belton v. Cincinnati Ins. Co.,* 360 S.C. 575, 602

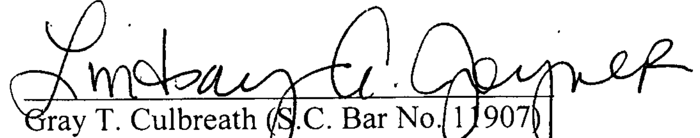
S.E.2d 389 (2004) (emphasis added); *see also* Rule 56, SCRCP; *Spencer v. Miller*, 259 S.C. 453, 455, 192 S.E.2d 863, 864 (1972) (stating that summary judgment is a "judicial determination that no factual issues need to be given to the finder of fact and that the case may be decided as a matter of law"). Rather, Plaintiff's testimony about how the mat felt is solely an observation of the way the mat felt. (R. pp.56, line 18-57, line 6). Additionally, Plaintiff could not testify as to what actually made her trip, and no other witnesses saw Black trip. (R.p.57, lines15-17; 2d Supp. R., p. 1, lines 20-22; 2d Supp. R., p.2, line 24-p.3, line:1; 2d Supp. R., p.4, lines 5-10; 2d Supp. R., p.5, lines14-15; 2d Supp. R., p. 6, lines 19-21). Thus, it is not reasonable to infer that testimony that rubber felt "brittle" was in any way related to an act by Unifirst that caused liability for Plaintiff's fall. Instead, the observation only infers how the rubber on the outside of the mat felt *to Plaintiff.* Additionally, in the October 14 Order granting Unifirst's motion for summary judgment as to Plaintiff's causes of action, the circuit court found as a matter of law there was no evidence that there was "either a defective condition created by the mat or that Unifirst created or had notice of a defective condition." (R. pp. 11-12). Since that Order was not appealed, that finding is the law of the case. *Judy,* 381 S.C. at 459, 674 S.E.2d at 153. Given there is no evidence pointing to an act by Unifirst, the circuit court correctly granted summary judgment in the instant action.

CONCLUSION

The circuit court properly granted summary judgment to Respondent Unifirst Corporation. BI-LO's cross-claim for contractual indemnity must fail because there is no act alleged of Unifirst which could make it liable to Plaintiff Black, and the agreement

specifically excepts Unifirst from indemnity for BI-LO's own negligence. Based upon the foregoing, Unifirst respectfully requests this Court to affirm.

Respectfully submitted,



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October 8, 2014

Columbia, South Carolina

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

Case No. 2012-CP-20-00316
Appellate Case No. 2014-001153

Mary Wall Black, ...Plaintiff,

v.

BI-LO, LLC and Unifirst Corporation . . . . .Defendants,

Of Which

BI-LO, LLC is . . . . .Appellant

And Unifirst Corporation is. . . . .Respondent.

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that Respondent's Final Brief complies with Rule 211(b) of the South Carolina Appellate Court Rules and the August 13, 2007, Order from the South Carolina Supreme Court titled, "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in the Appellate Court Filings."

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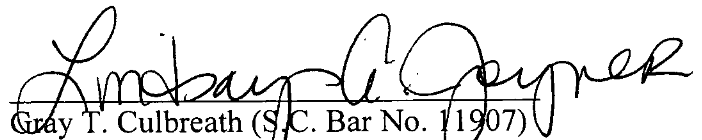
Respectfully submitted,



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PROOF OF SERVICE

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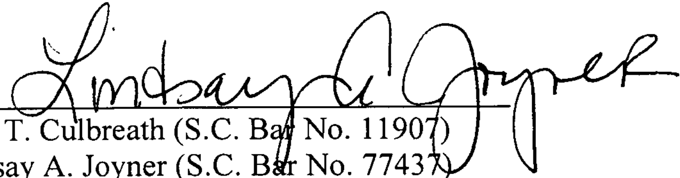

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