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IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BARNWELL COUNTY
Court of Common Pleas
Doyet A. Early, III, Circuit Court Judge

RECEIVED
SEP 28 2017
SC Court of Appeals

Appellate Case No. 2017-00068

Martha M. Fountain and Curtis Fountain, Plaintiffs,

v.

Fred's, Inc., and Wildevco, LLC Respondents,

v.

Tippins-Polk Construction, Inc. and Rhoad's Excavating Services, LLC Third Party
Defendants.

Of Whom Tippins-Polk Construction, Inc. is the Appellant.

RESPONDENT' FRED'S, INC.'S MOTION TO STRIKE

Respondent, Fred's, Inc., hereby moves the Court for an Order striking a section of Appellant's Initial Brief as addressing an issue not in evidence in the underlying adjudication of this matter.

Specifically, subsection f. of Appellant's Initial Brief titled "Fred's knew or should have known about the condition that caused Plaintiff's injuries because a prior similar incident occurred at a Fred's store in a neighboring county" contains information that was excluded from evidence in the underlying trial. During the underlying trial counsel for Appellant sought to question a witness for Respondent Wildevco regarding any visits made to Respondent Fred's

store located in Barnwell to which Respondent's counsel objected. The Court sustained the aforementioned objection by counsel as "not relevant." *See Trial Transcript* P. 129, ll.18-22. Counsel for Appellant then sought to question the same witness on his knowledge of a purported trip-and-fall at Respondent Fred's store located in Barnwell to which Counsel objected. Again the Court sustained Counsel's objection noting this question was not relevant and further explaining there was no foundation that had previously been laid "for other similar instances or anything else or that there's any similarity if there were any falls." *See Trial Transcript* P. 129-30, ll.24-25, 1-8.

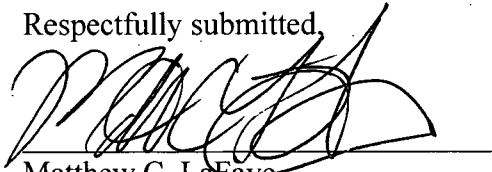
Finally, during the direct examination of its own witness, Counsel for Appellant sought again to inquire about another alleged trip-and-fall occurring at a store location for Respondent Fred's. Specifically, Counsel asked Mr. Rhett Polk if he had ever visited Respondent Fred's store located in Varnville, South Carolina. The foregoing question was immediately objected to by Counsel for Respondent Fred's and sustained by the court as have "nothing to do with this case." *See Trial Transcript 2* P. 51, ll.14-18. In light of the Court's objection Counsel for Appellant requested the opportunity to do a proffer as an alleged incident that occurred December 20, 2009 at Respondent Fred's store located in Varnville, South Carolina. In response to this request Counsel for Respondent Fred's pointed out to the Court that another alleged occurrence, standing alone, does not provide sufficient information to establish the requisite similarities to render the other occurrence admissible. The Court ultimately sustained the position taken by Respondent Fred's and refused to admit any evidence regarding other alleged incidents. *See Trial Transcript 2* P. 51-53, ll.21-25, 1-25, and 1-10.

In light of the underlying rulings by the Court in refusing to admit any evidence relative to any prior alleged incidents at alternative stores the reliance by Appellant, as has been

exhibited in the challenged section is wholly improper. Appellant has even gone so far in their initial brief as to describe “an identical trip and fall which occurred at a Fred’s store in Varnville three months prior” despite their not having entered any evidence to establish any purported similarities. Therefore, the undersigned, on behalf of Respondent Fred’s respectfully requests an Order from this Honorable Court striking section f as it contains references to information not introduced as evidence and wholly outside the record of this case.

September 27, 2017

Respectfully submitted,



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ATTORNEY FOR RESPONDENT, FRED’S, INC.

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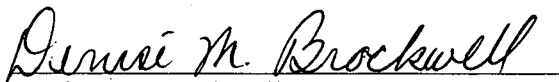
Tippins-Polk Construction, Inc. and Rhoad's Excavating Services, LLC Third Party
Defendants.

Of Whom Tippins-Polk Construction, Inc. is the Appellant.

PROOF OF SERVICE

I certify that I have served the Respondent Fred's, Inc.'s Motion to Strike on the Appellant by depositing a copy of it in the United States Mail, postage prepaid, on September 27, 2017, addressed to its attorney of record, Morgan S. Templeton, Esquire, Post Office Box 1200, Charleston, South Carolina 29402.

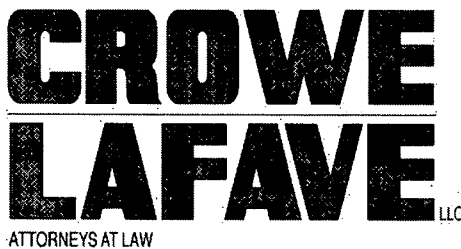
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SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Martha M. Fountain v. Fred's, Inc., et al.
Case No. 2017-00068

Dear Ms. Kitchings:

Please find enclosed for filing an original and one copy of the Respondent Fred's, Inc.'s Motion to Strike relative to the above-referenced matter. Also enclosed is a check in the amount of \$25.00 representing the filing fee. Once filing is complete, please return the clocked copy to us in the enclosed self-addressed, stamped envelope.

By copy of this correspondence to the attorneys of record, I am hereby serving upon them a copy of this Motion. Should you have any questions or concerns, please do not hesitate to contact us.

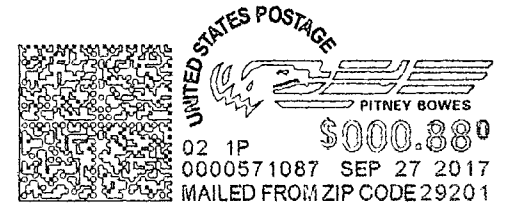
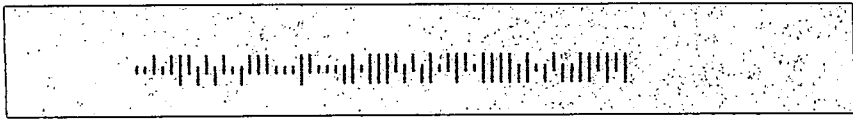
Sincerely yours,

A handwritten signature in black ink that reads "Denise M. Brockwell".

Denise M. Brockwell
Paralegal

/dmb
Enclosures

cc: Morgan S. Templeton, Esquire
Regina Hollins Lewis, Esquire



Crowe LaFave, LLC
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