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SC Court of Appeals
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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

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.

CONSENT MOTION TO AMEND FINAL BRIEF OF APPELLANT

The Parties to this matter petition this Court, pursuant to Rule 240, SCACR, for an Order permitting certain agreed upon changes to the Final Briefs to be submitted pursuant to Rule 211(B), SCACR.

Upon receipt of the Initial Brief of Appellant Counsel for Respondent, Fred's, Inc. presented a concern with a particular subsection. Specifically, Counsel for Respondent, Fred's, Inc. took issue with subsection f of Section II, which was titled **Fred's knew or should have known about the condition that caused Plaintiffs' injuries because a prior similar incident occurred at a Fred's store in a neighboring county.** Respondent's Counsel contended that the

presentation of the subsection seemed to imply that certain evidence was introduced during trial though it was not. Following a discussion with Appellant's Counsel it was agreed that subsection f was in need of reformation so as to ensure it was consistent with the admitted evidence and issues preserved for appeal.

Appellant following the discussion with Respondents Counsel agreed to and has presented a proposed revision to subsection f, as attached hereto. Respondents have reviewed the attached and find that it is consistent with both the admitted evidence and the issues preserved for appeal. The parties hereby request that this Court accept the attachment and permit its replacement of subsection f from the Initial Brief of Appellant.

This consent motion to amend final brief of Appellant excuses Appellant's failure to respond to Respondents' motion to strike within the deadline provided by South Carolina Appellate Court Rules. Furthermore, the parties each understand that nothing about this motion shall serve to extend any additional deadlines unless the Court so deems such extensions necessary.

Respectfully submitted,

Matthew C. LaFave/DCC

October 19, 2017

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ATTACHMENT

Proposed Revision to Subsection F

V. The trial court abused its discretion in refusing to consider evidence of a prior similar incident that occurred at a Fred's store in a neighboring county, which was relevant to whether Fred's had actual or constructive notice of the dangerous condition that is the subject of this litigation.

Evidence of similar acts is admissible where there is some special relation between them which would tend to prove or disprove some fact in dispute. Oconee Roller Mills, Inc. v. Spitzer, 300 S.C. 358, 360 (Ct. App. 1990) (citing Reed v. Clark, 277 S.C. 310 (1982)). "It is simply a rule of relevance, logic, and common sense." Brewer v. Morris, 269 S.C. 607, 610 (1977). Evidence is relevant and admissible if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rules 401, 402, SCRE. "The admission of evidence is within the [circuit] court's discretion." R&G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 439 (Ct. App. 2000). "The court's ruling to admit or exclude evidence will only be reversed if it constitutes an abuse of discretion amounting to an error of law." Id.; see Gamble v. Int'l PaPer Realty Corp. of S.C., 323 S.C. 367, 373 (1996) (noting that a ruling on the admission or exclusion of evidence will not be disturbed on appeal absent a clear abuse of discretion).

Here, the trial court erred in refusing to admit evidence pertaining to a similar incident that occurred roughly three months before the incident at issue at a Fred's store in a neighboring county (hereinafter referred to as "the Varnville store"). As was argued at trial in response to opposing counsel's objection, as a patron was approaching the entrance at the Varnville store, she tripped on the same type of curb/ramp transition on which the Plaintiff tripped as she entered the Williston store. While evidence of this prior accident may not be admitted for the purpose of establishing negligence, such evidence nonetheless is admissible and should have been considered to establish the existence of a similar danger or defect at another Fred's store that would have put representatives of Fred's on actual or constructive notice of the danger or defect

at issue. One fact in dispute in this matter is whether Fred's was aware that the sub/ramp transition at the entrance of the Williston store was a potential tripping hazard. If Fred's was aware of a similar trip and fall at the Varnville store, then Fred's should have been put on actual or constructive notice of the danger or defect at the Williston store, since the two curb/ramp transitions were substantially similar to each other. Furthermore, with actual or constructive notice of the danger or defect, Fred's should have warned or eliminated the condition prior to Plaintiff's trip and fall.

The prior accident was substantially similar and not too remote from the accident in question, and should have been admitted to prove Fred's actual or constructive notice. As a result of their actual or constructive notice of the danger or defect, under South Carolina premises liability law, Fred's is liable for failing to warn of or correct the condition prior to Plaintiff's trip and fall. Accordingly, had the evidence been admitted, it should have been considered in the allocation of fault between the parties. However, Judge Early would not even allow trial counsel to proffer such evidence at trial.

Therefore, for the foregoing reasons, the trial court abused its discretion in excluding relevant evidence of a prior similar incident.

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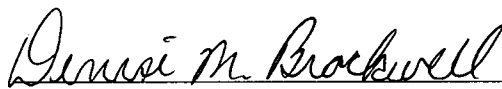
Tippins-Polk Construction, Inc. and Rhoad's Excavating Services, LLC Third Party
Defendants.

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

PROOF OF SERVICE

I certify that I have served the Consent Motion to Amend Final Brief of Appellant on the Appellant by depositing a copy of it in the United States Mail, postage prepaid, on October 19, 2017, addressed to its attorney of record, Morgan S. Templeton, Esquire, Post Office Box 1200, Charleston, South Carolina 29402.

October 19, 2017


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SC Court of Appeals

October 19, 2017

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

Re: Martha M. Fountain and Curtis Fountain v. Fred's, Inc., and Wildevco, LLC v.
Tippins-Polk Construction, Inc.
Case No. 2017-00068

Dear Ms. Kitchings:

Please find enclosed for filing an original and one copy of the Consent Motion to Amend Final Brief of Appellant in the above-referenced matter. 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 attorney for the Appellant, I am hereby serving upon Mr. Templeton a copy of this Consent Motion. Should you have any questions or concerns, please do not hesitate to contact us.

Sincerely yours,



Denise M. Brockwell
Paralegal

/dmb
Enclosures

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