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
OCT 25 2017
SC Court of Appeals

Case No. 2017-000688

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.

INITIAL REPLY BRIEF OF APPELLANT

WALL TEMPLETON & HALDRUP, P.A.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. The Circuit Court erred in finding that Fred's possessed a viable cause of action for equitable indemnification against Appellant. 1

A. Fred's was potentially at fault based on its own actions or inaction, not based on imputed fault arising out of the actions of Appellant. 1

B. Fred's status as a third-party beneficiary does not give rise to a special relationship between it and Appellant such that it may maintain a cause of action for equitable indemnification against Appellant. 2

C. Appellant is merely a remote and distant contractor, and should not be subject to a claim of equitable indemnification by Fred's. 3

II. The Circuit Court erred in finding that Respondents were without fault. 4

A. The Circuit Court erred in finding Fred's was without fault. 5

B. The Circuit Court erred in finding Wildevco was without fault. 7

1. Wildevco admitted it breached the standard of care owed to Plaintiff. 7
2. Wildevco was at fault in providing defective plans. 7
3. Wildevco negligently tasked Barber, an unqualified person, to oversee construction of the Fred's store. 8

C. The settlement agreement between the Plaintiff and Respondents acknowledges that Respondents were liable for Plaintiff's injuries as "joint tortfeasors." 10

III. The Circuit Court erred in awarding attorneys' fees because the fees were speculative. 11

CONCLUSION 12

TABLE OF AUTHORITIES

Addy v. Bolton,
257 S.C. 28 (1971). 11, 12

Brewer v. Morris,
269 S.C. 607 (1977). 5

Cothran v. Brown,
357 S.C. 210 (2004). 10

Gamble v. Int'l Paper Realty Corp. of S.C.,
323 S.C. 367 (1996). 5

Garvin v. Bi-Lo, Inc.,
343 S.C. 625 (2001). 5

Inglese v. Beal,
403 S.C. 290 (Ct. App. 2013). 4

James v. Kelly Trucking Co.,
377 S.C. 628 (2008). 9

Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Cmntys., Inc.,
397 S.C. 348 (Ct. App. 2012). 8

Moore v. Moore,
360 S.C. 241 (Ct. App. 2004). 11

New Hampshire v. Maine,
532 U.S. 742 (2001). 11

O'Leary-Payne v. R.R. Hilton Head, II, Inc.,
371 S.C. 340 (Ct. App. 2006). 7

Oconee Roller Mills, Inc. v. Spitzer,
300 S.C. 358 (Ct. App. 1990). 5

R&G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.,
343 S.C. 424 (Ct. App. 2000). 5

Reed v. Clark,
277 S.C. 310 (1982). 5

Rock Hill Tel. Co. v. Globe Commc'ns, Inc.,
363 S.C. 385 (2005). 2, 3, 4

Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Se. Grp.,
413 S.C. 615 (Ct. App. 2015). 1

Stuck v. Pioneer Logging Mach., Inc.,
279 S.C. 22 (1983). 1

Town of Winnsboro v. Wiedeman-Singleton, Inc.,
307 S.C. 128 (1992). 1, 2

Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.,
336 S.C. 53 (Ct. App. 1999). 1, 4, 11

Walterboro Cmty. Hosp. v. Meacher,
392 S.C. 479 (Ct. App. 2011). 1, 4

Windsor Green Owners' Ass'n, Inc. v. Allied Signal, Inc.
362 S.C. 12 (Ct. App. 2004). 3

Wintersteen v. Food Lion, Inc.,
344 S.C. 32 (2001). 1

Appellant Tippins-Polk Construction, Inc. ("Appellant") submits this reply brief in further support of its appeal.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN FINDING THAT FRED'S POSSESSED A VIABLE CAUSE OF ACTION FOR EQUITABLE INDEMNIFICATION AGAINST APPELLANT.

South Carolina courts "have long recognized the principle of equitable indemnification." Town of Winnsboro v. Wiedeman-Singleton, Inc., 307 S.C. 128, 130 (1992). An equitable indemnity claim may arise when a third party makes a claim against the indemnity plaintiff for damages the third party sustained as a result of another's tortious conduct. Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Se. Grp., 413 S.C. 615, 625 (Ct. App. 2015); see also Stuck v. Pioneer Logging Mach., Inc., 279 S.C. 22, 24 (1983) (stating that "a right to indemnity exists whenever the relation between the parties is such that either in law or equity there is an obligation on one party to indemnify the other"). South Carolina courts have allowed equitable indemnity "in cases of imputed fault or where some special relationship exists between the first and second parties." Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 60 (Ct. App. 1999). However, as discussed below, neither applies in the instant case as between Fred's, Inc. ("Fred's") and Appellant.

A. Fred's was potentially at fault based on its own actions or inaction, not based on imputed fault arising out of the actions of Appellant.

To recover damages for injuries caused by a dangerous or defective condition on a storekeeper's premises, the plaintiff must show either (1) that the injury was caused by a specific act of the defendant which created the dangerous condition, or (2) that the defendant had actual or constructive knowledge of the dangerous condition and failed to remedy it. Wintersteen v. Food Lion, Inc., 344 S.C. 32, 35 (2001).

Here, Fred's liability was not based on imputed fault arising out of the conduct of Appellant. Rather, the only liability Fred's faced from Plaintiff's claim would have been based on whether Fred's own conduct, namely, whether it knew or should have known about the condition that caused Plaintiff's injuries. In its initial brief, Fred's incorrectly states that equitable indemnity is available under the imputed liability principle because it "was exposed to potential liability solely as a result of the wrongful act of Appellant in their negligent construction of Respondent's premises." Initial Br. of Resp. Fred's, Inc. at p.3. This is not, and has never been, the law of this State. See Rock Hill Tel. Co. v. Globe Commc'ns, Inc., 363 S.C. 385, 389 (2005) ("There must be some kind of relationship between the parties beyond the relationship established by virtue of one party alleging that he was sued because of another party's wrongdoing."). Rather, equitable indemnification based on imputed liability is reserved for cases where there is actually imputed liability, such as those involving respondeat superior or other forms of vicarious liability. See, e.g., Walterboro Cmty. Hosp. v. Meacher, 392 S.C. 479, 485 (Ct. App. 2011); see also Town of Winnsboro 303 S.C. at 56. There is no such relationship between Fred's and Appellant such that Fred's would be vicariously liable for the actions of Appellant, and simply claiming that Fred's has a right to equitable indemnification because Fred's was liable for the alleged negligent acts of Appellant is wholly improper.

Therefore, since the liability of Appellant is not imputed to Fred's, a right of equitable indemnification is not available on this basis.

B. Fred's status as a third-party beneficiary does not give rise to a special relationship between it and Appellant such that it may maintain a cause of action for equitable indemnification against Appellant.

Fred's argues, without citing any law in support, that the contract between Respondent Wildevco, LLC ("Wildevco") and Appellant was created for the direct benefit of Fred's, and,

therefore, that Fred's status as a third-party beneficiary to this contract creates a "special relationship" between it and Appellant such that it can maintain a claim for equitable indemnification against Appellant. See Initial Br. of Resp. Fred's, Inc. at p.4–5. However, Fred's argument is misguided. The doctrine of third-party beneficiary merely allows a third-party beneficiary to enforce the underlying contract which was made for the third party's benefit. The Court of Appeals in Windsor Green Owners' Ass'n, Inc. v. Allied Signal, Inc. explained as much, stating the following:

> Generally, one not in privity of contract with another cannot maintain an action against him in breach of contract, and any damage resulting from the breach of contract between the defendant and a third party is not, as such, recoverable by the plaintiff. However, if a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person.

Id., 362 S.C. 12, 17 (Ct. App. 2004). Fred's argues that, because it is a third-party beneficiary to the contract between Wildevco and Appellant, it should be afforded "the same relation to the parties of the contract. . . ." Initial Br. of Resp. Fred's, Inc. at p.5. This argument may be persuasive in the context of a contractual indemnification claim where Fred's could argue that Appellant was breaching a contractual provision providing for indemnity; however, this is a claim for equitable indemnification. There is no contractual provision providing for Appellant to indemnify Wildevco, and thereby Fred's as a third-party beneficiary. Therefore, this Court should reject Fred's argument that its status as a third-party beneficiary gives rise to a special relationship between it and Appellant in the context of equitable indemnification.

C. Appellant is merely a remote or distant contractor, and should not be subject to a claim of equitable indemnification by Fred's.

Furthermore, Fred's argues that the Rock Hill Telephone Co. case is "easily

distinguishable" from the case at bar. In Rock Hill Telephone Co., a utility company hired an independent contractor, who in turn hired a subcontractor to perform part of the work. The Supreme Court held that the relationship between the utility company and the subcontractor was too attenuated for there to be a special relationship giving rise to a claim of equitable indemnification. Id., 363 S.C. at 390. In this case, Wildevco hired Appellant to construct a building. Wildevco and Fred's entered into a separate contract for Fred's to lease the building after completion of construction. The present relationship between Fred's and Appellant is that of a tenant and a general contractor, arguably even more attenuated than that of a subcontractor performing work on property for the actual owner of the property (as in Rock Hill Telephone Co.). With regard to Fred's, Appellant is "merely a remote or distant contractor." See Rock Hill Tel. Co., 363 S.C. at 390.

Accordingly, for the reasons stated above, this Court should reverse the circuit court's finding that Fred's possessed a viable cause of action for equitable indemnification against Appellant.

II. THE CIRCUIT COURT ERRED IN FINDING THAT RESPONDENTS WERE WITHOUT FAULT.

To recover damages on a claim for equitable indemnity, the indemnity plaintiff must prove the following: (1) the indemnity defendant was at fault in causing the third party's damages; (2) *the indemnity plaintiff has no fault for those damages*; and (3) the indemnity plaintiff incurred expenses that were necessary to protect its interest in defending against the third party's claim. See Inglese v. Beal, 403 S.C. 290, 299 (Ct. App. 2013) (emphasis added). "The most important requirement for . . . equitable indemnity is that the party seeking to be indemnified is adjudged without fault and the indemnifying party is the one at fault." Walterboro Cmty. Hosp., 392 S.C. at 486; see Vermeer Carolina's, 336 S.C. at 64 ("[T]here can be no [equitable] indemnity among

mere joint tortfeasors.").

In a matter involving a purportedly dangerous or defective condition, a plaintiff must show the following to recover: (1) that the injury was caused by a specific act of the defendant which created the dangerous condition; or (2) that the defendant had actual or constructive knowledge of the dangerous condition and failed to remedy it. Garvin v. Bi-Lo, Inc., 343 S.C. 625, 628 (2001).

A. The circuit court erred in finding that Fred's was without fault.

Regardless of the above, the circuit court erred in finding that Fred's was without fault. As stated in Appellant's initial brief, the trial court erred in refusing to allow counsel for Appellant to proffer evidence involving a similar slip-and-fall that would have put Fred's on constructive notice of the dangerous condition. 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).

The circuit court erred in refusing to allow counsel for Appellant to proffer, and 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 fell in the instant case. 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 curb/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 circuit court would not even allow counsel for Appellant to proffer the evidence, and this decision was an abuse of discretion. In addition, had the evidence been proffered, it should have been admitted as relevant to proving constructive knowledge of Fred's, and, therefore, fault on the part of Fred's. 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.

Therefore, for the foregoing reasons, the trial court abused its discretion in excluding relevant evidence of a prior similar incident and in refusing to allow counsel for Appellant to proffer such evidence. This evidence should have been considered in determining the allocation of fault between the parties. Accordingly, the circuit court erred in determining Fred's to be without fault.

B. The circuit court erred in finding that Wildevco was without fault.

1. Wildevco admitted it breached the standard of care owed to Plaintiff.

Under South Carolina premises liability law, an owner/occupier owes patrons an independent, separate, and distinct duty to exercise ordinary care to keep the passageways, sidewalks, and such other parts of the premises as are ordinarily used by the customers in transacting business in a reasonably safe condition, to discover risks, and to warn of or eliminate foreseeable unreasonable risks. O'Leary-Payne v. R.R. Hilton Head, II, Inc., 371 S.C. 340, 348 (Ct. App. 2006). During trial, Wildevco's expert testified that there is a recognized safety standard for owners an occupants of public buildings to conduct inspection of the premises looking for tripping hazards similar to the condition that caused Plaintiff's injuries. R. at ____ (Trans. of Tr. June 7, 2016, at 43:14–18). Wildevco admitted that it failed to adhere to its expert's recognized safety standard of inspecting the premises to look for tripping hazards. R. at ____ (Trans. of Tr. June 6, 2016, at 123:21–23) ("Q. It would have been the reasonable thing to [conduct the inspection]? A. Yes.").

This failure is sufficient to establish that Wildevco was, at the very least, partially at fault for Plaintiff's injuries. Therefore, the circuit court erred in finding that Wildevco was without fault.

2. Wildevco was at fault in providing defective plans.

Wildevco provided the architectural plans and the site plans for the construction of the

Fred's store to Appellant, and these plans were defective. The trial court's order stated that the testimony indicated that there may have been potential areas of confusion in the drawings and plans, including a possible discrepancy between the architectural drawings and site plans. R. at ____ (Aug. 1, 2016 Order at 4). At the very least, providing defective and/or confusing plans, even if Appellant was partially at fault, constitutes negligence on the part of Wildevco and, therefore, giving Wildevco unclean hands. The testimony at trial was that the architectural plans had a sidewalk curb with handicap ramps at the doors, and the site plans had a sidewalk curb on either side of the front of the store, but gradually reduced down to being flush at the entrance of the store.

Regardless of whether Appellant was obligated to notify the engineer of discrepancies, and the fact that Appellant may have been negligent in failing to do so, the fact that Appellant was given conflicting and confusing plans by Wildevco, who oversaw the entire project, renders Wildevco at least partially at fault. The law imposes a duty upon a developer to exercise the reasonable degree of skill, care, and knowledge that is ordinarily employed by such building professionals. Allowing Wildevco to hide behind the guise of "We don't have the specialized skill and knowledge to know that the plans were conflicting or confusing" is not only patently unfair, but against the general duty of care owed by developers. See Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Cmntys., Inc., 397 S.C. 348, 370 (Ct. App. 2012) ("[A] builder who undertakes to supervise the construction of a building has a duty to exercise reasonable care.").

Therefore, Wildevco is, at the very least, partially at fault for providing conflicting and confusing plans, and, therefore, it is precluded from bringing a claim of equitable indemnification because it has unclean hands.

3. Wildevco negligently tasked Barber, an unqualified person, to oversee construction of the Fred's Store.

Wildevco tasked Tad Barber ("Barber"), an employee of Wildevco, with overseeing the construction of the Fred's store at issue, even though he was unqualified to oversee such construction. Wildevco admits in its initial brief that "it is undisputed that Mr. Barber does not have the specialized skill or knowledge that would enable him to render an opinion that the drawings of plans were defective." Initial Br. of Resp. Wildevco at 19. Further, Wildevco states the following concerning Barber's qualifications: "[A]t no time prior to [Plaintiff's] accident was [Barber] aware that the site plans called for the sidewalk area where [Plaintiff] tripped to be flush with the parking lot pavement as he was not trained to read and interpret site plans and reasonably relief on [Appellant] to do so." Id. at 10. Further, the circuit court found that Barber "had no education or formal training in construction, engineering or architecture." R. at _____ (Aug. 1, 2016 Order at 3).

"In circumstances where an employer knew or should have known that its employment of a specific person created an undue risk of harm to the public, a plaintiff may claim that the employer was itself negligent in hiring, supervising, or training the employee, or that the employer acted negligently in entrusting its employee . . . ." James v. Kelly Trucking Co., 377 S.C. 628, 631 (2008). [T]he employer's liability under such a theory does not rest on the negligence of another, but on the employer's own negligence." Id. Now, Wildevco seeks to hide behind Barber's ignorance, claiming that it should not be at fault because Barber lacked experience. This argument is akin to allowing one's five-year-old child to drive your car, then arguing that you are not at fault for the subsequent accident because the child does not know how to drive. Regardless of whether Appellant was negligent in following the plans or not requesting clarification, Wildevco was at least partially negligent in tasking (in Wildevco's own words) someone who "was not qualified and did not have the ability to determine whether or not the subject sidewalk area complied with

building codes or standards, or the site plans." Initial Br. of Resp. Wildevco at 11 n.3.

For the foregoing reasons, the circuit court erred in finding that Wildevco was not at least partially at fault.

C. The settlement agreement between the Plaintiff and Respondents acknowledges that Respondents were liable for Plaintiff's injuries as "joint tortfeasors."

Judicial estopppel "is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant asserted in the same or related proceeding." Cothran v. Brown, 357 S.C. 210, 215 (2004). Under South Carolina law, all five of the following elements are necessary to apply the doctrine of judicial estoppel: "(1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent. Id. at 215–16.

The settlement agreement prepared by counsel for Wildevco specifically states that the document seeks to release Respondents as "joint tortfeasors," along with other joint tortfeasors which included Appellant. Respondents admitted common liability, and, therefore, Respondents are estopped from taking an alternate position in the same legal proceeding. Counsel for Wildevco argues in its initial brief that the settlement agreement does not acknowledge liability on the part of Wildevco; however, the agreement states that it operates as a satisfaction and discharge of "common liability of [Respondents] and any Joint Tortfeasor, including [Appellant]." Based on this language, it is clear that Respondents intended to extinguish the common liability among Wildevco, Fred's, and Appellant in order to preserve Respondents' claim for contribution against Appellant. Furthermore, the extinguishing of the common liability of Respondents' liability

occurred dafter Wildevco represented to Judge Gibbons that the sole remaining cause of action was equitable indemnification.

Respondents have taken the position in the settlement agreement that they were joint tortfeasors with Appellant, and have admitted that they had common liability for Plaintiff's injuries. Respondents cannot extinguish what did not exist. See Vermeer Carolina's Inc., 336 S.C. at 68. Respondents should not be allowed to take the position that they have no liability for Plaintiff's injuries. See New Hampshire v. Maine, 532 U.S. 742, 750 (2001) (a party's later position must be consistent with its earlier position). Accordingly, the doctrine of judicial estoppel prohibits Respondents from recovering under a claim for equitable indemnification because they have admitted that they shared "common liability" with Appellant, and, thus, have unclean hands.

Therefore, this court should reverse the circuit court's finding that Respondents were without fault.

III. THE CIRCUIT COURT ERRED IN AWARDING ATTORNEYS' FEES BECAUSE THE FEES WERE SPECULATIVE.

The attorneys' fees incurred in defending a lawsuit brought against a party because of the negligence or breach of contract by another party may be recoverable as damages in an equitable indemnification action, and not in prosecuting the indemnification claims. See Addy v. Bolton, 257 S.C. 28, 34 (1971) ("[I]n actions of indemnity, brought where the duty to indemnify is either implied by law or arises under contract, and no personal fault of the indemnitee has joined in causing the injury, reasonable attorneys' fees incurred in resisting the claim indemnified against may be recovered as part of the damages and expenses."). Furthermore, the amount of attorneys' fees cannot be left to conjecture, guess, or speculation; however, mathematical certainty is not required. See Moore v. Moore, 360 S.C. 241, 255 (Ct. App. 2004). "The evidence . . . should be such that a court or jury can reasonably determine an appropriate amount." Id.

Wildevco produced a billing statement as evidence of attorneys' fees, and the billing statement was highlighted in several colors indicating tasks that were related solely to the defense of Plaintiff's claims and those that were related to both the defense and prosecution of the indemnification claim against Appellant. Not only can Respondents not claim attorneys' fees for prosecuting an equitable indemnification claim pursuant to the clear language of the South Carolina Supreme Court in Addy, but there was no discussion from counsel for counsel for Wildevco as to how the fees were divided between those incurred in defending Plaintiff's claims and those incurred in prosecuting the equitable indemnification claim. Furthermore, counsel for Fred's produced an affidavit from his paralegal; however, the affidavit clearly states the following: "The bills produced to and paid by Fred's were not broken down so as to distinguish between actions undertaken in the defense of the suit brought by [Plaintiff] and those to advance the Third-Party Complaint against [Appellant]." See R. at ____ (Aff. of Denise Brockwell at ¶ 9). Therefore, the amount of attorneys' fees claim by both Wildevco and Fred's can only be determined by pure speculation, and, thus, are not recoverable.

Respondents' evidence as to attorneys' fees arising out of the defense of Plaintiff's claims are left to conjecture, guess, and speculation. Accordingly, such speculative attorneys' fees are not recoverable.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reverse the circuit court's order granting judgment for Respondents. In the alternative, Appellant respectfully

requests this Court reverse the circuit court's award of attorneys' fees and costs to Respondents.

Dated this 23 day of October, 2017.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM BARNWELL COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

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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, John J. Dodds, IV, of Wall Templeton & Haldrup, do hereby certify that I have served the Appellant's Initial Reply of Appellant on counsel for Respondents, by depositing the same in the United States Mail, properly posted on October 23, 2017 addressed as follows to counsel of record:

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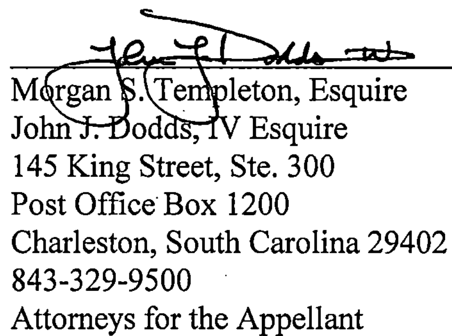

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October 23, 2017

The Honorable Jerry Abbott Kitchings
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RECEIVED
OCT 25 2017
SC Court of Appeals

Re: *Martha M. Foundain v. Fred's Inc., et al.*
Civil Action No.: 2010-CP-06-101

Dear Mr. Kitchings:

Please find enclosed an original and six (6) copies of Appellant's Response to Motion to Strike Matter and Exclude Matter from Record on Appeal and Proof of Service in the above referenced matter. I am also enclosing an original and one copy of Appellant's Initial Reply Brief.

Please file the originals with the Court and return a filed-stamped copy of each to me in the envelope provided for your convenience.

By copy of this letter to all counsel of record, I am serving them with the enclosed Response to Motion and Reply Brief of Appellant.

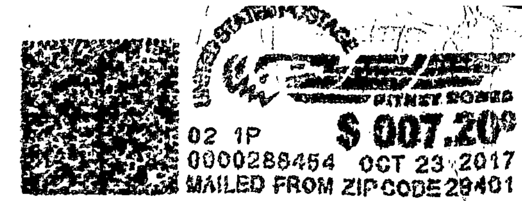
Thank you for your time and attention to this matter.

Sincerely,

WALL TEMPLETON & HALDRUP, P.A.

John J. Dodds, IV

JJD,IV/sjs
enclosures
cc: Lee Ellen Bagley, Esquire (*w/ encl*)
Matthew C. LaFave, Esquire (*w/ encl*)



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