

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

Case No. 2017-000688

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SC Court of Appeals

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.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL COURT ERR IN FINDING THAT THERE WAS A SUFFICIENT SPECIAL RELATIONSHIP BETWEEN FRED'S AND APPELLANT TO SUPPORT A CLAIM FOR EQUITABLE INDEMNIFICATION?
- II. DID THE TRIAL COURT ERR IN FINDING THAT RESPONDENTS WERE WITHOUT FAULT?
- III. DID THE COURT ERR IN FAILING TO FIND THAT RESPONDENTS WERE ESTOPPED FROM RECOVERING DAMAGES NOT REQUESTED WITHIN THE COMPLAINT?
- IV. ALTERNATIVELY, DID THE COURT ERR IN AWARDING ATTORNEYS' FEES UNDER RESPONDENTS' CLAIM FOR EQUITABLE INDEMNIFICATION EVEN THOUGH THE FEES WERE FOR BOTH FOR DEFENDING PLAINTIFFS' CLAIM, AS WELL AS PROSECUTING THIS MATTER AGAINST APPELLANT, AND WERE SPECULATIVE?
- V. DID THE COURT ERR IN REFUSING TO CONSIDER A SIMILAR INCIDENT AT A FRED'S STORE IN A NEIGHBORING COUNTY?

STATEMENT OF THE CASE

Plaintiffs, Martha M. Fountain and Curtis Fountain, filed this premises liability action on May 12, 2010, asserting claims against Respondents, Fred's, Inc. ("Fred's") and Wildevco, LLC ("Wildevco"), for an alleged trip and fall at the Fred's store located in Williston, South Carolina. (R. pp. 144–46). Plaintiffs alleged, and Fred's admitted, that it was doing business in Barnwell County; and Plaintiffs alleged, and Wildevco admitted, that Wildevco was the owner of the premises. (See *id.*; see also R. pp. 148–49). Plaintiffs alleged that on or about March 10, 2010, Plaintiff, Martha Fountain, was entering the Fred's store and tripped on the raised sidewalk in front of the store's entrance and fell injuring herself. (R. p. 144). Plaintiffs specific claims against Respondents are that they failed: (1) to keep and maintain the premises; (2) take reasonable

precautions to avoid an unsafe condition; (3) to warn customers of a dangerous condition; (4) to inspect the premises; (5) to remedy the condition; and (6) to discovery risks, to warn of or make safe unreasonable risks. (R. p. 145). The Complaint further alleged that as a result of Respondents' failures, Plaintiffs sustained damages. (R. p. 146). Plaintiffs did not allege negligence based on a creation of an unsafe condition. (R. p. 145).

Two years after the filing of the Complaint, Respondents filed an Amended Answer and Third-Party Complaint asserting claims against Appellant, Tippins-Polk Construction. (R. pp. 155–59). In August 2015, Wildevco moved to amend their third-party complaint and asserted in their memorandum that the case between Plaintiffs and Respondents was a “premises liability matter.” (R. p. 86). Furthermore, Respondents' memorandum stated that “Plaintiffs contend [Respondents] have a duty to provide a safe premises for patrons of Fred's, including Plaintiff Martha Fountain, and [Respondents] breached that duty, proximately causing the injuries.” (R. pp. 86–87). Judge G. Thomas Cooper heard Wildevco's motion to amend and granted the motion noting in his Order that the matter was a “premises liability” action. (R. pp. 1–11).

This matter was given a date certain trial date of March 21, 2016. On March 21, 2016, counsel for Respondents and Appellant appeared before Judge Brian Gibbons, whereby counsel for Wildevco moved for a continuance. (R. at 169–70). During the hearing, counsel for Wildevco informed the Court that Plaintiffs had settled their claims against Defendants on March 20, 2016. Id.

During the hearing on March 21, 2016, Counsel for Wildevco also acknowledged that the sole remaining claim that Respondents were asserting against Appellant was equitable indemnification. (See generally R. pp. 167–74). In response to Wildevco's motion to continue,

the Judge Gibbons issued a form 4 order on March 21, 2016, stating that the “only claim left is equitable indemnification” (R. p. 12). The order further stated that “the equitable indemnification claim is continued,” and “all remaining parties agree to hear this NJ via bench trial.” Id. No parties moved for to reconsider the Form 4 Order.

On April 21, 2016, a Settlement Agreement between Plaintiffs and Respondents was executed. (R. pp. 676–83). In the Settlement Agreement, Plaintiffs agreed to “release, acquit and forever discharge [Respondents] of and from any and all liability” (R. p. 677). The Settlement Agreement further stated that “it is the intent of this Agreement to relieve [Respondents] of any liability for contribution or indemnity to any person or entity that is or may be responsible or liable to Plaintiffs as joint tortfeasors” (R. p. 681).

The Agreement noted that “this Agreement operate[s] as a satisfaction of any claim by Plaintiffs against any and all such Joint Tortfeasors, including [Appellant], and will reduce any damages recoverable against any and all such Joint Tortfeasors, to the full extent of the relative pro-rata share, if any, of the common liability of [Respondents].” Id. It continues, “As such, this agreement discharges any common liability of [Respondents] and any Joint Tortfeasors, including [Appellants] to Plaintiffs.” Id.

The Respondents’ claim for equitable indemnification was set to be tried before the Judge Doyet A. Early, III on June 6, 2016. On the morning of trial, Respondents moved to amend their complaint to add contribution as an additional claim against Appellant. As part of this motion, Respondents submitted a memorandum in support. (R. p. 179). The trial court denied the motion to amend, and the trial on the sole claim of equitable indemnification took place on June 6 and 7, 2016, before Judge Early. (R. p. 188).

At the conclusion of the trial, the Court took the matter under advisement, and subsequently filed an Order and Judgment in favor of Respondents on August 1, 2016. (R. p. 436; see also R. p. 15). The Order concluded, in part, that “[Appellant] breached its contractual obligation and its duty of care to [Respondents] in failing to construct the premises free from latent defects.” (R. p. 24). The Order further stated that “[t]he construction defects, for which [Appellant] is solely responsible, were the sole proximate cause of Mrs. Fountain’s injuries” (R. p. 25). Judgment was entered against Appellant in favor of Wildevco for the total sum of Three Hundred Five Thousand, Four Hundred Eighteen and 30/100 Dollars (\$305,418.30) and in favor of Fred’s for the total sum of Seventy Six Thousand Six Hundred Ninety-One and 82/100 Dollars (\$76,691.82). (R. p. 26).

Counsel for Appellant received the filed Order and Judgment on August 3, 2016. Appellant filed a timely motion to make additional finding under Rule 52(b), SCRPC, and motion to reconsider/amend under Rule 59(e), SCRPC. (R. pp. 32–59). An order denying the motion to make additional findings and motion reconsider was filed on February 13, 2017, and Appellant received notice on February 17, 2017. R. p. 27. Appellant filed a timely notice of appeal on March 13, 2017. Furthermore, Appellant moved for, and was granted, leave to deposit funds for the judgments with the Barnwell County Clerk of Court during pendency of this appeal. (R. pp. 28–29).

STATEMENT OF FACTS

Wildevco is the owner of property in Williston, South Carolina, on which a Fred’s Store was located under a ten-year lease – from 2005 to 2015. (R. p. 272). Wildevco was the developer and managed the construction process for the Fred’s Store in Williston. (R. p. 256). As part of

the construction process, Wildevco hired the architects to provide architectural plans for the Fred's Store, and Wildevco hired engineers to provide the site plans for the property where the Fred's Store is located. (R. p. 275).

Wildevco signed an agreement with Christopher Brooker Architects ("Architect") to provide architectural services. (R. p. 288; see also R. pp. 556–64). Wildevco expected the Architect to provide the site engineer with the most updated plans. (R. pp. 288–89). Under the terms of the architectural agreement, the Architect agreed to provide a life safety code study. (R. pp. 289–90). The architectural agreement also provided that the Architect would provide field inspections for \$100 per visit. (R. p. 559). However, Wildevco never requested the Architect to conduct field inspections of the Fred's store to ensure that that life safety plan was being implemented in the construction. (R. p. 291). Wildevco thought that someone else would have picked-up any issues up with the construction. (R. pp. 291–92).

Wildevco agreed that the purpose of field inspections is for the Architect to visit the construction site and to make sure that the project is being constructed pursuant to the Architect's plans. (R. p. 292). Even though Wildevco was going to be open to the public, Wildevco did not feel like it was necessary to request the Architect to inspect the construction to ensure it was built pursuant to the plans, and according to the life safety plan. Id.

Wildevco retained Hass & Hilderbrand, Inc. to prepare site plans for the Fred's Store in Williston. (R. p. 239). Tilden Hilderbrand drew the site plans and he testified that both the developer and the site work contractor use the site plans. (R. p. 241). As part of his duties as a site engineer, Mr. Hilderbrand has been requested by other owners to inspect a completed project to make sure that the project was completed in accordance to the site plans. (R. p. 255–56).

However, Wildevco did not request that Mr. Hilderbrand conduct a post construction inspections to ensure that the project was constructed according to the site plans. Id.

Mr. Hildebrand testified that the site plans provided “how site will be graded, how the utilities are installed; basically everything on the property that’s developed from the ground down, including pavement.” (R. p. 240). The site engineer uses the architectural drawings as a base for the site plans. (R. p. 246). However, Mr. Hilderbrand testified that the architectural plans that were provided to Hass & Hilderbrand were different from the final stamped architectural plans that were provided during the trial. (R. p. 260)..

Mr. Hilderbrand testified that the site plans contain elevation grades for the sidewalk curb. (R. p. 242). Mr. Hildebrand testified that the elevations on the site plans show there is no step-down along the front sidewalk curb and that the site plans provide for the sidewalk curb to be flush with the parking lot along the front of the building. (R. p. 243). Although Mr. Hilderbrand first testified that the sidewalk curb along the front of the Fred’s store was designed to be flush with the parking lot, he subsequently testified at trial that the site plans actually had elevations changes from 107.8 on the left side of the store, 107.9 at the front doors, and 107.5 on the right side of the store. (R. p. 244; see also R. pp. 257–58).

Mr. Hilderbrand testified that the site plans had a sidewalk curb of six inches along the front of the sidewalk in front of the neighboring units to the left of the Fred’s Store. (R. p. 258). Mr. Hilderbrand also testified that on the opposite side of the building along the right corner of the Fred’s Store there was a sidewalk curb of five inches. Id.

According to Mr. Hilderbrand’s testimony, Mr. Hildebrand first testified that the sidewalk curb was flush along the front of the building, and then changed his opinion and stated

that the site plans had the sidewalk only flush with the parking lot at the location of the doors. He testified that “no elevated edge was required since ADA access was required there.” (R. p. 244). Therefore, the site plans did not have a flush sidewalk along the entire front of the Fred’s store, but rather the sidewalk curb was designed with an elevation of six inches on the far left side of the building gradually sloping down until the sidewalk curb was flush with the parking lot at the store doors, then gradually sloping back up to five inches on the far right side of the building. (R. pp. 257–60). Although, the sidewalk curb was designed to gradually slope down from six inches on one corner and five inches on the other corner, Mr. Hildebrand testified a two inch curb across the front of the sidewalk edge would not be typical, and that a typical step-up would be six inches. (R. p. 248).

Mr. Hilderbrand testified that his site plans did not include a handicap ramp; however, he acknowledged that the site plans had several perpendicular lines in front of the sets of Fred’s doors. (R. pp. 246–47). Mr. Hilderbrand testified that he did not know what the perpendicular lines in front of the Fred’s doors which were on his plans indicated. Mr. Hilderbrand acknowledged that these perpendicular lines in front of the Fred’s doors on the Hass & Hilderbrand site plans could be confusing. (R. p. 250). He also acknowledged that the site plans did contain a design for a handicap ramp on page one of the site plans. (R. p. 253).

Mr. Hilderbrand further testified that Hass & Hildebrand site plans did not include details for the sidewalk area, and that his responsibility did not include designing the sidewalk. (R. p. 251). He testified that it was his responsibility to “tie into the sidewalk.” Id. Mr. Hilderbrand also acknowledged that the architectural plans for the construction of the Fred’s Store did include a handicap ramps at the front doors of the Fred’s Store. (R. p. 253).

Mr. Hilderbrand testified that when he reviewed the architectural plans, he decided that handicap ramps would not work because the sidewalk on the architectural plans was only nine feet wide. (R. p. 244). Therefore, Mr. Hilderbrand decided to make the sidewalk curb flush with the parking lot. (R. p. 243). He also testified that a ten foot sidewalk would be sufficient for a handicap ramp. (R. p. 252). Mr. Hilderbrand reviewed the stamped the architectural plans at trial and then testified that the architectural plans did call for a sidewalk of at least ten feet – ten feet, four inches. (R. p. 253). At this point, Mr. Hilderbrand acknowledged that the Hass & Hilderbrand site plans and the architectural plans for the Fred's Store did not comply with one another and were different. (R. p. 262). Mr. Hilderbrand testified that the architectural plans and his site plans "appear to be different." Id. The trial court confirmed Mr. Hilderbrand's testimony and noted for the record that the site plans did not include a ramp and had a nine foot sidewalk, while the architectural plans included a handicap ramp and had a ten feet plus sidewalk. (R. p. 253.)

Wildevco entered into a contract with Appellant to construct the Fred's Store on April 28, 2005. (R. pp. 470–73). The construction agreement between Wildevco and Appellant identified Thaddeus Barber ("Barber") as the construction manager. Id. Under the contract, Appellant agreed to construct the Fred's Store in accordance with the building plans, the site plans, the specifications, and the building code. Id. If there was any question about the site plans or the manner in which the property was being constructed, the questions would either be directed to the owner (Wildevco) or the preparer of the plans (the architect or engineer). Fred's was not a party to the construction contract between Wildevco and Appellant.¹ (R. p. 305).

¹ Counsel for Fred's concedes that Fred's was not a party to the construction agreement.

The construction contract between Wildevco and Appellant provide for a final inspection of the building. (R. pp. 470–73). The construction contract also provided for a punch out list where Wildevco could visit the project after completion of construction and to allow Wildevco an opportunity to identify construction issues which may be needed to be corrected. Id. Because the Fred’s store was going to be open to the general public, it is reasonable for Wildevco—as owner—to make an inspection of the property, which Barber suspects that he did. (R. p. 276).

Barber was one of the partners of Wildevco and was responsible for managing the construction of the Fred’s store on behalf of Wildevco. (R. p. 272). However, Barber: (1) did not have any education or work experience involving construction; (2) did not have any education or work experience involving architecture; and (3) did not have any education or work experience involving engineering. (R. p. 271). Barber visited the construction project periodically to do general observations to see what was going on at any particular time—for example, whether site work was being done or whether walls being put up. (R. p. 276). Wildevco as the developer, tasked Barber with managing the construction. (R. p. 271). Even though Barber was responsible for managing the construction of the Fred’s Store, Barber was not qualified to conduct inspections to determine whether or not the building met building codes or building standards. (R. p. 276).

Under the lease agreement between Fred’s and Wildevco for the Fred’s store, Wildevco was responsible for having the construction done, and Wildevco was responsible for maintaining the Fred’s store after construction. (R. p. 278). More specifically, Wildevco was responsible for maintaining the curbs and sidewalks.² Id. Barber testified that painting is part of maintenance of

² If the lease agreement required Wildevco to maintain the “curbs” then there must have been a curb

the Fred's store. (R. p. 296).

The construction was completed in October 2005 when the certificate of occupancy was issued by the County of Barnwell. (R. p. 555). The certificate of occupancy informed Wildevco that the construction of the Fred's store complied with the building code. Id. After completion of construction, it was plainly visible that: (1) there was a raised sidewalk curb in the front of the Fred's store; (2) there were handicap ramp cuts into the sidewalk curb; (3) the sidewalk curb was painted, and (4) the transition area between the sidewalk curb and the flush area of the handicap ramp was not painted. After construction Wildevco maintained the curbs and sidewalks. Barber testified the only "maintenance" that Wildevco provided was keeping it free of leaves and debris and trash, removing obstructions, and if something broke, providing repairs. (R. p. 279). However, Barber testified that Wildevco did not repaint the curb until 2012 or 2013 (after the incident), roughly seven or eight years after construction was completed. (R. p. 296). Barber also testified that he did not know "that the sidewalk curb was shorter than it should have been."³ (R. p. 280).

The front of the Fred's store has bollards or yellow posts in front of the propane tank rack. (R. p. 298). These bollards or yellow posts were not part of the Tippins-Polk construction project, and were installed sometime after completion of construction of the Fred's store. (R. pp. 298–99). The purpose of these bollards or yellow columns are to act as safeguards and warnings to keep vehicles from driving and crashing into the propane tanks. (R. p. 299).

contemplated within the lease agreement between Fred's and Wildevco. This is another example of how the site plans did not correlate with the building plans and designed use.

³ Here counsel for Wildevco indicates that the curb was constructed shorter than it should have been, clearly indicating that the plans did in fact call for a curb, and not flush.

Barber conducted periodic inspections of the Fred's store after construction, and continued to conduct these inspections all the way up to the time Plaintiff Martha Fountain tripped at the Fred's store. (R. p. 300). However, Barber did not look for safety issues, except for safety issues related to lighting of the parking lot. Id.

Although, Barber looked for safety issues related to lighting of the parking lot, Wildevco never conducted inspections around the Fred's store looking for tripping hazards. (R. p. 302). Furthermore, Wildevco never hired anyone to conduct inspections at the Fred's store looking for tripping hazards. (R. pp. 302–03).

Barber testified that there was some differences between the site plans and the architectural plans, and that these differences could cause some confusion. (R. pp. 280–81). Wildevco tendered Stephen Hunt as an expert in the field of fall safety investigations, codes, regulations, and standards relative to building construction. (R. p. 322). Mr. Hunt testified that he has been a safety consultant for 39 years. (R. pp. 331–32). He testified that his past experiences as a safety consultant included being retained by retail stores to inspect their properties in an effort to find tripping hazards similar to what caused Plaintiff to trip. (R. p. 351). As part of the inspections of the retail stores, when Hunt came across a tripping hazard, he would safeguard the tripping hazard. (R. p. 352). Some of those safeguards included painting, which could help safeguard the hazard, but he testified that “it’s not as good as having a good design in the first place.” Id.

Hunt had published articles in his field, some of which were on his firm’s website. (R. p. 354). One publication was a blog on the firm website where Mr. Hunt investigated someone tripping over a wheel stop at an apartment complex that had migrated over and became a tripping

hazard. (R. pp. 354–55). Mr. Hunt acknowledged that, in the situation discussed in his publication, the apartment management company was not the party that installed the wheel stop, it was someone else. (R. p. 355). Mr. Hunt’s conclusion in the publication was that the apartment management company failed to provide a safe pedestrian walkway where one was expected by the nature of the environment. Id. Mr. Hunt also acknowledged that the owners and occupants of buildings open to the public have a recognized safety standard to inspect their properties with an interest in preventing pedestrian falls. (R. pp. 355–56).

Mr. Hunt also testified that safety hierarchy is a principle that has been in place many, many years. (R. p. 360). He further testified that if you think you have a hazard, you should first try and design it out, so there is no hazard. Id. He also stated if you can’t design it out, then you put a safeguard in place to help people when they encounter the hazard. Id. He went on to testify that the last part of the hierarchy is that you warn people about the hazard. Id.

Mr. Hunt was provided a copy of the site plans and asked if the sidewalk at the Fred’s store was constructed properly, and Mr. Hunt testified that the sidewalk “probably was,” but “the curb ramp that were on the sidewalk were not constructed in accordance with these [site] plans.” (R. p. 324). The Court asked Mr. Hunt, “The site plan calls for it to be flush, is that correct?” (R. p. 332). Mr. Hunt testified that “the site plan called for it to be flush; in other words, there should have been no curved flare at all, no change in elevation, none at all.” Id. However, Mr. Hunt was then referred back to the “architectural plans,” and agreed that the architectural plans required painting of the sidewalk front edge – indicating that there was in fact a sidewalk curb called for within the architectural plans. (R. p. 333).

Mr. Hunt was asked whether it was his opinion that the sidewalk and curb ramp as

constructed did not comply with the **architectural** drawings, to which he responded, “that is correct, in all of those areas.” (R. p. 335). He was further asked whether he had an opinion as to whether Appellant should have known that the plans called for the sidewalks to be flush, to which he responded: “Yes. I mean, I would think a contractor should have the specialized knowledge and skill to be able to read the plans and know.”⁴ Id.

Mr. Hunt testified that the **site** plans [not architectural plans] included how to construct the sidewalk. (R. p. 338). However, Mr. Hunt further testified that the architectural plans also provide how to construct the sidewalk. (R. pp. 338–39). Mr. Hunt was further asked if the site plans control construction the sidewalks or do the architectural plans control, and Mr. Hunt testified that the “site plans do.” (R. p. 339). But, then Mr. Hunt continued and testified that “it’s a combination.”⁵ (R. p. 341).

Mr. Hunt was asked about how far the curb flare extended in front of the store door, and Mr. Hunt testified thirteen inches. (R. p. 342). He also acknowledged that the “controlling” site plans had a ramp of four feet wide, but the doorway was six feet wide. Id. Mr. Hunt acknowledged that as a result of having a four foot wide ramp and a six foot wide door, parts of the ramp flare would extend in front of the door. (R. pp. 342–43). However, Mr. Hunt testified that a typical ramp is the same width as the doors. (R. p. 343). Mr. Hunt was asked about the specific site plans and the Fred’s store at issue in this matter and he acknowledged that as a result of the site plans, which provide for a four foot wide ramp and a six foot wide door, the flares

4 The site engineer himself struggled interpreting his own design and change his testimony about the sidewalk curb during trial.

5 This is contrary to the site engineer’s testimony that the site plans did not control the construction of the sidewalk.

from the ramp will extend in front of the doorway. (R. pp. 343–44).

Mr. Hunt testified that during his investigations, he spoke to Mr. Hildebrand, and Mr. Hildebrand told him the parking lot was supposed to be flush all the way across the front of the store. (R. p. 344). However, Mr. Hunt testified that when he now looks at the site plans, it appears to show a 4.8 inch drop in elevation at one corner of the building. Id. He further testified that from the corner of the building with a sidewalk curb elevation of 4.8 inches, the sidewalk curb then gradually slopes down to where the sidewalk curb is supposed to be flush with the parking lot. Id.

Mr. Hunt was asked where the sidewalk curb was supposed to be flush according to the site plans, and he testified around the front entrance way. (R. p. 345). Mr. Hunt noted that “you’ve got a long run” of the front sidewalk curb, and that the 4.8 inch elevation of the sidewalk curb at the corner of the store “gets shorter and shorter” until it becomes flush in front of the entrance to the store. (R. p. 346). Mr. Hunt also testified that “when you have elevations, you can work with them, but they shouldn’t be under four [inches],” because “it’s in the building code, that four-inch minimum.” (R. p. 342). Hunt also testified that the elevation of the sidewalk curb would be under four inches once you moved one foot from the corner of the building when applying the maximum slope permitted. (R. p. 347). Therefore, the sidewalk curb would be under four inches starting one foot from the corner all the way until the sidewalk curb became flush at the entrance of the building. (See R. pp. 347–51).

Mr. Hunt was asked whether it was his opinion that anything under four inches is a tripping hazard, and he responded “I guess I’m saying that, that anything under four inches can be a tripping hazard, yeah.” (R. p. 345). Mr. Hunt was asked “if anything under four inches was

a tripping hazard, you would not want to design a plan where you have less than four inches of a curb going across the front of the Fred's store." Id. Mr. Hunt responded "no". Id. Mr. Hunt further testified that "when you've got a real small change in elevation that runs the entire length around the entrance that's where you have no visual cues – there is nothing to visually cue you in on that height." (R. p. 351).

Edward William Polk, the owner of Tippins-Polk Construction, testified on behalf of Appellant. (See R. p. 400). Mr. Polk testified that Wildevco provided the architectural and civil site plans. (R. p. 400–01). Mr. Polk further testified that both the architectural plans and the site plans contained a sidewalk curb with handicapped ramps. (R. pp. 401–02). Mr. Polk also stated that when there is a discrepancy between the architectural plans and the site plans, you refer to the architectural plans. (R. pp. 402–03).

STANDARD OF REVIEW

"Equitable indemnity is an action in equity." Walterboro Community Hosp. V. Meacher, 392 S.C. 479, 484 (Ct. App. 2011)(citing Verenes v. Alvanos, 387 S.C. 11, 18 n. 6 (2010) (noting a cause of action for equitable indemnity is necessarily equitable in nature)); see Loyola Fed. Sav. Bank v. Thomasson Props., 318 S.C. 92, 93 (Ct. App. 1995) (same). "In an action in equity tried by a judge alone, the appellate court may find facts in accordance with its view of the preponderance of the evidence." Id. (quoting Goldman v. RBC, Inc., 369 S.C. 462, 465 (2006)). "However, this broad scope of review does not require the appellate court to disregard the findings made below." Id.

ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING THAT THERE WAS A SUFFICIENT SPECIAL RELATIONSHIP BETWEEN FRED'S AND APPELLANT TO SUPPORT A CLAIM FOR EQUITABLE INDEMNIFICATION.

There is no "special relationship" between Fred's and Appellant that would give rise to a right of indemnification. There was not any contractual relationship between Fred's and Appellant, and Appellant was merely a remote or distant independent contractor. Appellant does not have a special relationship with Fred's as contemplated under South Carolina jurisprudence, and therefore there is no right for equitable indemnification.

The right of indemnification may be created by contract or by operation of law "in cases of imputed fault or where some special relationship exists between the first and second parties." Town of Winnsboro v. Wiedeman-Singleton, 303 S.C. 52, 56 (Ct. App. 1990). (emphasis added). Fred's was not faced with imputed fault, and there was no recognized special relationship between Fred's and Appellant.

A right to equitable indemnification can arise out of imputed fault, but that is not the case in this matter. Had the Court discussed premises liability law in South Carolina, and discussed how Fred's was potentially liable under the premises liability claims asserted by Plaintiffs, it would be evident that Fred's was potentially at fault based on their own actions or inaction, not based on imputed fault arising out of the actions of Appellant.

Under South Carolina premises liability law, a plaintiff must prove that the defendant created the dangerous condition, or the defendant knew or should have known about the condition. See Meadows v. Heritage Vill. Church & Missionary Fellowship, Inc., 305 S.C. 375, 376-80. In Plaintiffs' premises liability claims against Respondents, Plaintiffs would have to

prove that Fred's created the condition which caused Plaintiffs' injuries, or prove that Fred's knew or should have known about the condition that caused Plaintiffs' injuries.

Fred's liability was not based on imputed fault arising out of the conduct of Appellant. The only liability Fred's faced from Plaintiffs' claims would have based on whether Fred's knew or should have known about the condition that caused Plaintiffs' injuries. Since there is no imputed liability, the only way a right of equitable indemnification would arise in favor of Fred's is based on a special relationship with Appellant.

There is not a special relationship between Fred's and Appellant according to South Carolina law. The trial court incorrectly found that there was a special relationship between Fred's and Appellant based on "[Appellant]'s agreement to construct a facility for a Fred's retail store," and based on "its prior construction of at least one other Fred's store." (R. p. 23). Although the Court found there was a special relationship, the Court also acknowledges that the construction agreement was only between Wildevco and Appellant. (R. p. 20). Therefore, Fred's was not a party to the construction agreement.

The Court's finding a special relationship between Fred's and Appellant conflicts with South Carolina case law. In a Court of Appeals opinion, where the parties had an identical relationship to that of Fred's and Appellant, the court held that there was no special relationship that would give rise to a right to equitable indemnification. Rock Hill Telephone, 363 S.C. at 385 (Ct. App. 2005) The Court of Appeal in Rock Hill Telephone specifically found that there was no special relationship with "merely a remote or distant independent contractor." Id. at 390.

In Rock Hill Telephone, Rock Hill Telephone Company needed to install an underground cable along a highway. The utility company hired an independent contractor to install the

underground cable, and the independent contractor in turn hired a subcontractor to perform the work of installing the cable. In Rock Hill Telephone, the South Carolina Supreme Court stated that the relationship between utility company and the subcontractor that performed the work was an attenuated one, and found “that the subcontractor is merely a remote or distant independent contractor, and therefore does not have a special relationship with the utility as contemplated under our jurisprudence.” Id. at 390.

The relationships between Fred’s, Wildevco and Appellant in this matter are identical to the relationships of the parties involved in the Rock Hill Telephone decision. The trial court’s findings of fact state that Fred’s contracted with Wildevco to have a building built, and for Fred’s to lease the building as a Fred’s store in Williston, South Carolina. (R. pp. 19–20). The trial court’s finding states that Wildevco in turn contracted with Appellant to perform the work of constructing the building. Id. Just as the relationships in Rock Hill Telephone, there is no direct contract between Fred’s and Appellant. Just as the subcontractor in Rock Hill Telephone, Appellant is “merely a remote or distant independent contractor.” 363 S.C. at 390. Accordingly, under South Carolina law, there is no special relationship between Fred’s and Appellant that would give rise to equitable indemnification.

Since there is no imputed liability as to Fred’s, any claim for equitable indemnification must be based on a special relationship with Appellant. Under South Carolina law there is no special relationship between Fred’s and Appellant. Therefore, Fred’s has no right to equitable indemnification from Appellant.

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

Respondents failed to prove they were without fault, and there was overwhelming evidence that establishes that both Respondents were at least 1% at fault for Plaintiffs' injuries. Specifically, the trial court erred because: (a) Respondents' entire case involved proving Appellants were at fault, not their lack of fault; (b) the trial court acknowledges Respondents' liability by finding that the condition that caused Plaintiffs' injuries was a "latent defect;" (c) Wildevco admitted that it did not perform a recognized safety standard of routinely inspecting the premises looking for tripping hazards; (d) Wildevco provided defective plans for the project which had discrepancies related to the conditions that caused Plaintiffs' injuries; (e) Wildevco tasked an unqualified individual to oversee the construction of the Fred's store; and (f) Respondents acknowledged liability in the Settlement Agreement between Plaintiffs and Respondents. Because the only cause of action was for equitable indemnification, Respondents' fault in causing Plaintiffs' injuries bars any recovering under the unclean hands doctrine.

In South Carolina, the right of indemnification may be created by contract or by operation of law "in cases of imputed fault or where some special relationship exists between the first and second parties." Town of Winnsboro, 303 S.C. at 56, aff'd 307 S.C. 128 (1992). A plaintiff may maintain an equitable indemnification action if he was compelled to pay damages because of negligence imputed to him as the result of another's tortious act." Fowler v. Hunter, 388 S.C. 355, 363 (2010)(citing Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Co., 336 S.C. 53 (Ct.App.1999)). "The right of equitable indemnity arises out of the relationship between the indemnity plaintiff and the indemnity defendant." Inglease v. Beal, 403 S.C. 290, 299 (Ct. App.

2013). “Under the doctrine of equitable indemnity, ‘a right of indemnity exists whenever the relationship between the parties is such that either in law or in equity there is an obligation on one party to indemnify the other, as where one person is exposed to liability by the wrongful act of another in which he does not join.’” Id. (citing Stuck v. Pioneer Logging Mach., Inc., 279 S.C. 22, 24 (1983)).

The party asserting an equitable indemnification cause of action must prove the elements of indemnity, including that the indemnitee was without fault. Walterboro Cmty. Hosp. v. Meacher, 392 S.C. 479, 486 (Ct. App. 2011)(citing Fowler v. Hunter, 388 S.C. 355, 363 (2010)). If there is insufficient evidence of lack of fault, the elements of equitable indemnification elements are not met, and the claim for equitable indemnification fails. Id. at 489. “Equitable indemnity cases involve a fact pattern in which the first party is at fault, but the second party is not.” Id. (citing Vermeer Carolina's, Inc., 336 S.C. at 63). “A plaintiff asserting an equitable indemnification cause of action may recover damages if he proves: (1) the indemnitor was liable for causing the plaintiff's damages; (2) the indemnitee was exonerated from any liability for those damages; and (3) the indemnitee suffered damages as a result of the plaintiff's claims against it, which were eventually proven to be the fault of the indemnitor.” Id. “The most important requirement for the finding of equitable indemnity is that the party seeking to be indemnified is adjudged without fault and the indemnifying party is the one at fault.” Vermeer, 336 S.C. at 63. As the trial court’s Order notes, “In making this showing, the indemnitee is not required to prove the plaintiff’s actual ability to recover the amount paid in settlement so long as the party seeking indemnification proves that it was *potentially* liable to the plaintiff in the underlying case.” R. at 18. (citing Otis Elevator v. Hardin Constr. Co. Group, 316 S.C. 292, 297 (1994))(emphasis in

original)).

“The doctrine of unclean hands precludes a [party] from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant.” Straight v. Goss, 383 S.C. 180, 206–07 (Ct. App. 2009)(quoting First Union Nat'l Bank of S.C. v. Soden, 333 S.C. 554, 568 (Ct. App. 1998)). “He who comes into equity must come with clean hands. It is far more than a mere banality. It is a self-imposed ordinance that closes the door of the court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief.” Id. (quoting Emery v. Smith, 361 S.C. 207, 220 (Ct. App. 2004); see also Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 814 (1945)).

Plaintiffs’ claims asserted against Respondents arise solely out of premises liability. Respondents admitted in a memorandum in support of a motion to amend their complaint that this is a premises liability action, and that Plaintiffs’ claims arose out of Wildevco and Fred’s duty to provide safe premises for patrons. (R. p. 86). However, the trial court’s order fails to even discuss premises liability law in South Carolina. Therefore, for the trial court to properly analyze whether Respondents were liable to Plaintiffs, the trial court must apply South Carolina premises liability law to the facts. The facts and evidence establish that Respondents were at fault for Plaintiffs’ injuries, and Plaintiff’s claim for equitable indemnification are barred under the “uncleans hands” doctrine.

“To establish negligence in a premises liability action, a plaintiff must prove the following three elements: (1) a duty of care owed by defendant to plaintiff; (2) defendant’s breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty.” Singleton v. Sherer, 377 S.C. 185, 200 (Ct. App. 2008)(citing Hurst v. East

Coast Hockey League, Inc., 371 S.C. 33, 37 (2006)); see also Bramlette v. Charter-Medical-Columbia, 302 S.C. 68 (1990); Anderson v. Racetrack Petroleum, Inc., 296 S.C. 204 (1988); Shipes v. Piggly Wiggly St. Andrews, Inc., 269 S.C. 479 (1977); Kershaw Motor Co. v. Southern Ry., 136 S.C. 377 (1926); Sims v. Giles, 343 S.C. 708 (Ct. App. 2001); Small v. Pioneer Machinery, Inc., 329 S.C. 448 (Ct. App. 1997); Cook v. Food Lion, Inc., 328 S.C. 324 (Ct. App. 1997); Vinson v. Hartley, 324 S.C. 389 (Ct. App. 1996).

“The nature and scope of duty in a premises liability action, if any, is determined based upon the status or classification of the person injured at the time of his or her injury.” Id. (citing Sims v. Giles, 343 S.C. 708, 715 (Ct. App. 2001)). “South Carolina recognizes four general classifications of persons present on the property of another: adult trespassers, invitees, licensees, and children.” Id. “Different standards of care apply depending upon the classification of the person present.” Id.

“[An invitee is a person] who enters onto the property of another by express or implied invitation, his entry is connected with the owner’s business or with an activity the owner conducts or permits to be conducted on his land, and there is a mutuality of benefit or a benefit to the owner.” Id. (quoting Sims, 343 S.C. at 716–17). “The law recognizes two types of invitees: the public invitee and the business visitor.” Id. (citing Sims, 343 S.C. at 717). “A public invitee is one who is invited to enter or remain on the land as a member of the public for a purpose for which the land is held open to the public.” Id. (quoting Goode v. St. Stephens Un. Methodist Church, 329 S.C. 433, 441 (Ct. App. 1997)). “In contrast, a business visitor is an invitee whose purpose for entering the property is either directly or indirectly connected with the purpose for which the property owner uses the land.” Id. (citing Parker v. Stevenson Oil Co., 245 S.C. 275,

280 (1965); Sims, 343 S.C. at 717; Goode, 329 S.C. at 441; Hoover v. Broome, 324 S.C. 531, 536 (Ct. App. 1996) (“A customer of a store is classified as an invitee.”) (citing Shipes, 269 S.C. 479).

“Storekeeper liability is founded upon the duty of care a possessor of land owes to an invitee.” Wintersteen v. Food Lion, Inc., 344 S.C. 32, 36 (2001). “Generally a person owes an invitee the duty of exercising reasonable or ordinary care for his safety and is liable for any injury resulting from the breach of this duty.” Id.; see also Sides v. Greenville Hosp. Sys., 362 S.C. 250, 256 (Ct. App. 2004); Larimore v. Carolina Power & Light, 340 S.C. 438, (Ct. App. 2000). “An invitee enters the premises with the implied assurance of preparation and reasonable care for his protection and safety while he is there.” Landry v. Hilton Head Plantation Prop. Owners Ass’n, Inc., 317 S.C. 200, 203 (1994); see also Singleton, 377 S.C. at 202, 659 S.E.2d 196, 205; Bryant v. City of North Charleston, 304 S.C. 123, 125 (Ct. App. 1991)). “A landowners owes an invitee a duty of care to discover risks and to warn of or eliminate foreseeable unreasonable risks.” Id. (citing F.P. Hubbard & R.L. Felix, The South Carolina Law of Torts (3rd Ed. 2004) at 80). To that extent, “the owner of the premises owes the customers the duty of exercising 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.” O’Leary-Payne v. R.R. Hilton Head, II, Inc., 371 S.C. 340, 348 (2006)(citing Bruno v. Pendleton Realty Co., 240 S.C. 46, 50–51 (1962)).

“According to South Carolina law, ‘[o]ne who operates a shopping center, where stores are leased to merchants and the owner retains possession and control of the parking area and sidewalks, is not an insurer of the safety of those who use the parking lot and sidewalks as

customers of the merchants leasing the stores” O’Leary-Payne, 371 S.C. at 348 (quoting Bruno, 240 S.C. 46, 50–51. “However, ‘the owner of the premises owes the customers the duty of exercising 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.’” Id.

Similarly, the operator of a parking lot must use reasonable care to keep the premises used by invitees in a reasonably safe condition. Meadows v. Heritage Vill. Church & Missionary Fellowship, Inc., 305 S.C. 375, 377 (1991)(citing Felder v. K-Mart Corp., 297 S.C. 446 (1989); Moore v. Levitre, 294 S.C. 453 (1988); Abeles v. Great Atlantic & Pacific Tea Co., 244 S.C. 508 (1964); 240 S.C. at 50–51.

“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.” Id. (citing Wintersteen, 344 S.C. at 35.

Constructive notice is a legal inference, which substitutes for actual notice. Major v. City of Hartsville, 410 S.C. 1, 3–4 (2014)(citing Strother v. Lexington Cnty. Recreation Comm’n, 332 S.C. 54 (1998)). “Constructive notice arises when a condition has existed for such a period of time that a [property owner/occupant] in the use of reasonable care should have discovered the condition.” Id. (quoting Fickling v. City of Charleston, 372 S.C. 597, 609–10 n.34 (Ct. App. 2007)). “Where a recurring condition is of such a nature as to amount to a continual condition, when coupled with other factors, the recurring condition may be sufficient to create a jury issue

as to constructive notice.” Id. (citing Fickling, 372 S.C. at 601 n.37).

“The mere fact that there is a difference between the levels in the different parts of the premises does not, in itself, indicate negligence unless, owing to the character, location and surrounding condition of the change of level, a reasonably careful person would not be likely to expect or see it.” Bruno, 240 S.C. at 51 (citing Crocker v. WTAR Radio Corp., 194 Va. 572 (1953). “It is also true that where a dangerous condition in premises is latent and of which the owner knew or should have known, and is unknown to invitees, the owner is required to give proper warning in order to relieve himself from liability for injuries incurred by reason thereof.” Id. “A **latent defect** is one which **an owner** has, or should have, knowledge of, and of which an invitee is reasonably unaware.” Callander v. Charleston Doughnut Corp., 305 S.C. 123, 126 (1991)(emphasis added).

a. Wildevco and Fred’s failed to prove that they were without fault.

Wildevco and Fred’s failed to prove all the elements of equitable indemnification as described by the Court’s Order by not establishing that they were not at fault. Therefore, the equitable claims against Appellant must fail. As noted in the Court’s Order, for Respondents to be successful in its equitable indemnification claims against Appellant, they must prove that: (1) Appellant was at fault in causing Plaintiffs’ damages; (2) Respondents were not at fault for Plaintiffs’ damages; and (3) Respondents sustained damages in protecting its interest in defending Plaintiffs’ claims. (R. p. 18). The Court also noted that where one settles a claim and then seeks equitable indemnification, the party seeking equitable indemnification must show: (1) the settlement is bona fide, with no fraud or collusion; (2) the decision to settle was reasonable; and (3) the amount of settlement was reasonable. Id. Furthermore, the Court noted that the party

seeking indemnification **must also prove** that they were “potentially” liable to Plaintiff in the underlying case. Id.

If Respondents failed to prove they were “potentially” liable to Plaintiff for premises liability claims, then there can be no recovery under equitable indemnification by a settling party based on the law cited by the Court. Otis Elevator, 316 S.C. at 291. There was no finding or conclusion of law that Wildevco and Fred’s proved that they were potentially liable under premises liability. Accordingly, under the very case law cited by the trial court, Wildevco and Fred’s failed to meet their burden for a claim of equitable indemnification.

Conversely, if they were “potentially” liable under Plaintiffs’ claims against Respondents, they are not free from fault (i.e., breached the duty of care as provided under shopkeeper liability in South Carolina, and, thus, cannot recover under a theory of equitable indemnification. See O’Leary-Payne, 371 S.C. at 349. As noted above, to be liable under premises liability, the defendant must have created the unsafe conditions, or either knew or should have known about the unsafe condition. The only potential liability of Respondents is based on the second prong—whether they knew or should have known about the condition that caused Plaintiffs’ injuries.

Furthermore, as noted in the Court’s Order, Respondents have to prove that they were not at fault. However, Respondents’ case-in-chief focused solely on proving that Appellant was responsible for the construction and was at fault. There was no evidence proving Respondents were not at fault. Accordingly, Respondents failed to prove all the elements of equitable indemnification, and their claim against Appellant must fail.

b. The trial court's order found that the defect that caused Plaintiffs' injuries was a "latent defect," and thus should have found Respondents liable.

The trial court found that "latent defects" caused Plaintiffs' injuries, and thus found that Respondents knew or should have known about the defects. (R. pp. 24–25). Any potential liability of Respondents can only be based on whether Respondents knew or should have known about the conditions that caused Plaintiffs' injuries. The testimony at trial is that the condition that caused Plaintiff to trip and fall existed for nearly five years after construction. Under South Carolina, constructive notice is a legal inference, which substitutes for actual notice. Major, 410 S.C. at 3–4. "Constructive notice arises when a condition has existed for such a period of time that a [property owner/occupant] in the use of reasonable care should have discovered the condition. Id.

South Carolina South Carolina courts have long defined "latent defect" as a defect which an owner has knowledge of, or should have knowledge of, and of which an invitee is reasonably unaware. Callander, 305 S.C. at 126 (citing Wilson v. Duke Power Co., 273 S.C. 610 (1979); Bruno, 240 S.C. at 51. Pursuant to the conclusions of law in the trial court's final order, the trial court concluded as a matter of law that Appellant failed to construct the store free from "latent defects." (R. pp. 24–25). The order also concludes that these defects "were the sole proximate cause of Mrs. Fountain's injuries after she tripped on the subject curb ramp and fell" (R. p. 25).

The trial court's conclusions of law state that Plaintiff's fall was solely caused by a latent defect. Id. Because South Carolina courts have long defined "latent defect" as one which the owner has, or should have knowledge of, and of which an invitee is reasonably unaware, the trial

court's order concludes, as a matter of law, that the defect, which solely caused Plaintiff's trip and fall, was a defect which Respondents had knowledge, or should have had knowledge of, and of which Plaintiffs were reasonably unaware. Therefore, Respondents are at least 1% at fault for Plaintiffs' injuries, and Respondents' claim for equitable indemnification must fail because of unclean hands doctrine.

c. Wildevco admitted that it breached the standard of care owed to Plaintiffs.

Wildevco admitted that it failed to adhere to its expert's recognized safety standard of inspecting the premises looking for tripping hazards. 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, and to discover risks and to warn of or eliminate foreseeable unreasonable risks. O'Leary-Payne, 371 S.C. at 348; Landry, 317 S.C. at 203.

Respondents' duty to Plaintiffs and other patrons is separate and apart from any duty related to the construction of the Fred's store. Plaintiffs' lawsuit against Respondents was based on the allegation that Respondents breached this duty to discover risks and to warn or eliminate risks. The Plaintiffs' claims against Respondents were not based on creating an unsafe condition.

Noticeably absent from the Court's Order is any reference to the testimony of Respondents' safety expert, and more specifically their expert's testimony regarding the "recognized safety standard" of owners and occupants of public premises to inspect premises for tripping hazards. During trial, Respondents' expert testified that there is a recognized safety standard for owners and occupants of public buildings to conduct inspection of the premises

looking for tripping hazards similar to the condition that caused Plaintiffs' injuries. (R. pp. 355–56). Respondents' expert established that Respondents, as owners and occupier, have a duty to take affirmative action to inspect for tripping hazards around the property. Id. However, Wildevco admitted that it failed to follow the standard of care opined by Respondents' safety expert, Steve Hunt. Barber testified that Wildevco did not inspect the property for tripping hazards, and testified that Wildevco did not hire anyone to inspect the property for tripping hazards. (R. pp. 276, 300, and 302–03). Wildevco breached its duty owed to patrons, including Plaintiffs, by failing to inspect for tripping hazards at the property.

It cannot be said that Wildevco did nothing wrong because Wildevco failed to adhere to the standard of care established by Respondents' safety expert. "Under these circumstances requires a finding that [Wildevco] cannot be 'exonerated from any liability for those damages.'" See Inglese, 403 S.C. at 301 (quoting Walterboro Cmty. Hosp., 392 S.C. at 485. The testimony at trial is that Wildevco's failure to inspect for tripping hazards was a failure to exercise its duty of care to discover and to warn of tripping hazards such as the condition that caused Plaintiffs' injuries. This failure is sufficient to establish that Wildevco was at least 1% at fault for Plaintiff's injuries, and Wildevco's equitable claim is barred as a matter of law.⁶

d. Wildevco was at fault for Plaintiffs' injuries because Wildevco provided defective plans.

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

⁶ Applying the trial court's conclusion logically, it stands for the premise that despite a shopkeeper's admission that it has an obligation to inspect its premises to discover hazards so as to avoid injury to its invitees, admittedly fails to perform that duty at any point in time, is subsequently sued by a patron as a result of the condition which existed for years, the shopkeeper has no liability. Instead, the trial court's ruling mandates that the patron's sole recourse should lie against the builder (who was never sued by Plaintiffs). Under this theory, what recourse does an injured patron have when the statute of repose has expired as to claims arising out of the construction of a building. Such a conclusion is counter to decades of premises liability jurisprudence.

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 the site plans. (R. p. 20). The discrepancies between the two plans involved the very issue that cause Plaintiff to trip and fall. Therefore, Wildevco is liable for providing defective plans for the project that resulted in Plaintiffs' injuries.

The Court found that Wildevco hired architects Chris Brooker & Associates to prepare architectural drawings and hired the engineering firm of Hass and Hildebrand, Inc. to prepare site plans for the premises, and that those drawings and plans were then provided to Tippins-Polk. (R. p. 20). The Court also found that "the testimony indicated that there may have been some potential areas of confusion in the drawings and the site plans, including a possible discrepancy between the architectural drawings and the site plans." Id.

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. (R. pp. 257–60). The site engineer testified that his own site plans could be confusing, and that the architectural plans the site engineer used to prepare the site plans were not the final drawings and were not the same as the architectural plans that were provided to Appellant for construction. (R. p. 262). Furthermore, Barber admitted that the plans could be confusing. (R. pp. 280–81).

Additionally, the testimony from Appellant was that the site plans were read to indicate a curb along the front until the ramps in front of the entrance doors. (R. pp. 401–02). Appellant also testified that if there was a discrepancies between the plans, the architectural plan would

control. (R. pp. 402–03).

“If a party furnishes specifications and plans for a contractor to follow in a construction job, he thereby impliedly warrants their sufficiency for the purpose in view.” Hill v. Polar Pantries, 219 S.C. 263, 271 (1951)(citing 17 C.J.S., Contracts, § 329 at 781). Based on the Court’s findings of fact and the evidence at trial, Wildevco hired the architect and engineer to prepare drawings and plans, and Wildevco provided these drawings and plans to Appellant. The Court also found that there were drawings and plans that had some areas of confusion and a possible discrepancy. Wildevco provided the drawings and plans to Appellant for the construction of the store, and thus, impliedly warranted the sufficiency of the plans.

The testimony and the Court’s findings establish that the plans/designs were not sufficient because of the confusion and discrepancies, as well as the fact that the site engineer was provided different architectural plans. These discrepancies related to the sidewalk curb and handicap ramp at the store. Plaintiff tripped on the edge of the transition of the handicap ramp. Wildevco failed to provide sufficient drawings and plans to Appellant, and accordingly at least 1% at fault for Plaintiffs’ injuries, and is prohibited from recovering under equitable indemnification because of the unclean hands doctrine.

- e. Wildevco was liable for Plaintiffs’ injuries because Wildevco negligently tasked Barber, an unqualified person, to oversee the construction of the Fred’s store.**

Wildevco tasked Barber with overseeing the construction project for the Fred’s store even though Barber was unqualified to oversee see the construction of a retail store open to the public. Wildevco knew or should have known that Barber was unqualified to oversee the project, and doing so created an undue risk of harm to the general public, including Plaintiffs. Accordingly,

Wildevco was at fault for Plaintiffs' injuries because Wildevco tasked Barber with overseeing the construction when he was not qualified to do so.

The Court's findings of fact establishes that Wildevco was at fault in failing to hire someone qualified to act as Wildevco's construction manager to oversee the project. (R. p. 19). In the Court's Conclusion of Law, the Court stated that "Wildevco exercised due care and acted reasonably and with prudence with regard to the development of the Fred's facility" (R. p. 23). The Court concluded that Wildevco exercised due care in the development, and found that "Thaddeus 'Tad' Barber is a partner in Wildevco and was responsible for overseeing the project." (R. p. 19). However, the Court also found that Tad Barber "had no education or formal training in construction, engineering and/or architectural." Id. In other words, the findings of fact stated that Tad Barber was tasked with overseeing the project, and he was not qualified to do so.

"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 . . . created an unreasonable risk of harm to the public." James v. Kelly Trucking Co., 377 S.C. 628, 631 (2008)(citing Restatement (Second) of Torts § 317 (1965)(cited with approval in Degenhart v. Knights of Columbus, 309 S.C. 114, 116 (1992)). As this recitation suggests, "the employer's liability under such a theory does not rest on the negligence of another, but on the employer's own negligence." Id.

"It seems to be well settled that where a person holds himself out as specially qualified to perform work of a particular character, there is an implied warranty that the work which he undertakes shall be of proper workmanship and reasonable fitness for its intended use." Hill, 219

S.C. at 271. The Court's Order found that Wildevco was developer for the project, and found that Tad Barber was "responsible" for "overseeing" the project. However, the findings also state that Tad Barber was not qualified to oversee the project because he had no construction, engineering, or architectural background. The Court's findings of fact establish that Wildevco failed to provide someone qualified to oversee the project, and as a result, the Wildevco failed to comply with the standard of care that was required from a developer and is liable for Plaintiffs' injuries. Accordingly, Wildevco is at least 1% at fault for Plaintiffs' injuries, and is prohibited from recovering under equitable indemnification because of unclean hands.

f. The Settlement Agreement between Plaintiffs and Respondents acknowledges Respondents were liable for Plaintiffs' injuries as "joint-tortfeasors."

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. (R. pp. 676–83; see also R. pp. 384–85). Respondents are estopped from taking an alternate position in the same legal proceeding, and therefore, Respondents admitted common liability for Plaintiffs' injuries. Id.

A Settlement Agreement between Plaintiffs and Respondent was executed on April 21, 2017, one month after the hearing before Judge Gibbons where counsel for Wildevco informed the court that the sole remaining claim was equitable indemnification, and Judge Gibbons signed an order stating the sole remaining claim was equitable indemnification. (R. p. 12).

The Settlement Agreement stated that "it is the intent of this Agreement to relieve Wildevco and Fred's of any liability for contribution or indemnity to any person or entity that is or may be responsible or liable to Plaintiffs as joint tortfeasors" (R. p. 681). The agreement

further states that “this Agreement operate[s] as a satisfaction of any claim by Plaintiffs against any and all such Joint Tortfeasors, including Tippins-Polk Construction, Inc., and will reduce any damages recoverable against any and all such Joint Tortfeasors, to the full extent of the relative pro-rata share, if any, of the common liability of Wildevco and Fred’s. Id. As such, this agreement discharges any common liability of Wildevco and Fred’s and any Joint Tortfeasors, including Tippins-Polk Construction, Inc. to Plaintiffs.” Id.

South Carolina courts “are cognizant that litigants are free to devise a settlement agreement in any manner that does not contravene public policy or the law.” Ecclesiastes Prod. Ministries v. Outparcel Associates, LLC, 374 S.C. 483, 493 (Ct. App. 2007) (quoting Poston by Poston v. Barnes, 294 S.C. 261, 263 (1987)). “In fact, [the Court of Appeals] encourages such compromise agreements because they avoid costly litigation and delay to an injured party.” Id. “However, these settlement agreements must be carefully scrutinized in order to determine their efficiency **and impact** upon the integrity of the judicial process.” Id. (emphasis added).

From the language of the Settlement Agreement, the intent was to relieve Respondents’ liability for contribution as joint tortfeasors. Furthermore, the Agreement stated it operated as a satisfaction and discharge of “common liability of [Respondents] and any Joint Tortfeasor, including [Appellant].” (R. p. 684). 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 occurred after Wildevco represented to Judge Gibbons that the sole claim remaining in the case was equitable indemnification.

Furthermore, S.C. Code Ann. § 15–38–40(D)(2) provides: “If there is no judgment for

the injury or wrongful death against the tortfeasor seeking contribution, his right of contribution is barred unless he has . . . **agreed** while action is pending against him to **discharge the common liability** and has within one year after the agreement paid the liability and commenced his action for contribution.” Id. (emphasis added). Respondents could not extinguish or discharge what did not exist. See Vermeer Carolina's, Inc., 336 S.C. at 68. As testified to by Wildevco’s attorney, Wildevco’s attorney prepared the Settlement Agreement. (R. p. 387). This Settlement Agreement specifically discharged Respondents and Appellant’s common liability in order to preserve the claim for contribution. This discharge of common liability for Respondents must be carefully scrutinized in order to determine the impact upon the integrity of the judicial process, including the equitable indemnification claim asserted against Appellant. Ecclesiastes Prod. Ministries v. Outparcel Assoc., 374 S.C. at 493.

Respondents have agreed while the action is pending against them to discharge the common liability in order to maintain a right to contribution against Appellant. (R. p. 681). However, at trial Respondents took the position that Respondents were not at fault in their claims for equitable indemnification against Appellant. Collateral and/or judicial estoppel operates to prohibit a party to a lawsuit from adopting a position in conflict with one earlier taken in the same or related litigation. Hawkins v. Bruno Yacht Sales, Inc., 342 S.C. 352 (Ct. App. 2000).

“Valid compromise and settlement is final, conclusive, and binding upon the parties; it is as binding as any contract the parties could make, and as binding as if its terms were embodied in a judgment; and, regardless of what the actual merits of the antecedent claim may have been, they will not afterward be inquired into and examined.” 15 Am.Jur.(2d) Compromise and Settlement, § 21. Respondents have taken the position that they were joint tortfeasors with

Appellant in the Settlement Agreement, and have admitted that they had common liability for Plaintiffs' injuries.

Furthermore, Wildevco filed a motion to amend to add a claim for contribution the day of trial, and Fred's joined in the motion. (R. p. 180). In support of their motion, Wildevco filed a memorandum in support wherein Wildevco stated that Wildevco had a "viable" contribution claim against Tippins-Polk, and that "Plaintiffs and Defendants did not discharge the common liability within the statute of limitations applicable to Plaintiffs' claims to allow Wildevco to pursue contribution under the [Contribution Among Tortfeasors Act's] first prong, Wildevco pursues contribution under the second prong of the statute." (R. p. 142). The memorandum continues and states "Discharge of the defending joint tortfeasors's common liability, as required in the second prong, must have resulted directly from the settlement of the underlying claim." Id. Based on Wildevco's submissions to the Court, Wildevco confirms that there was common liability among Respondents, and that this common liability was discharged to assert a claim for contribution against Appellant.

Respondents acknowledged that they had common liability in Plaintiffs' injuries in the Settlement Agreement and in its submissions to the trial court. Respondents should not be allowed to take the position that they have no liability in Plaintiffs' injuries under collateral/judicial estoppel in their claims for equitable indemnification. Accordingly, Respondents are prohibited from recovering under a claim for equitable indemnification because they have admitted that they have unclean hands.

III. RESPONDENTS ARE BOUND BY THEIR OWN PLEADINGS AND ARE ESTOPPED FROM RECOVERING DAMAGES NOT REQUESTED WITHIN THE COMPLAINT.

Respondents' only requested damages arising from an award or judgment in favor of Plaintiffs; however, there was no award or judgment issued in favor of Plaintiffs in this case. "It is well settled that parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise." Skull Creek Club Ltd. P'ship v. Cook & Book, Inc., 313 S.C. 283, 289 (Ct. App. 1993)(quoting Elrod v. All, 243 S.C. 425 (1964)). "The allegations, statements, or admissions contained in a pleading are conclusive as against the pleader and a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are taken as true against the pleader for the purpose of the action." Id.

Respondents' pleadings requested judgment against Appellant for an award or judgment issued in Plaintiff's favor. (R. p. 159). Respondents' complaint did not seek to recover from Appellant settlement payments made to Plaintiffs. Wildevco's Third Amended Complaint requests a "judgment over and against [Tippins-Polk] for all or part of any verdict or judgment over and against [Wildevco]." (R. pp. 165–66). Similarly, Fred's last Complaint filed requested that "they be awarded judgment over and against [Tippins-Polk] for all or party of any verdict or judgment which may be recovered by the Plaintiffs." (R. p. 159). Respondents never moved at the end of trial to amend their complaint to conform to the evidence to include a request for settlement costs and fees.

Respondents are judicially bound by their pray for relief that was limited to any amount of judgment or verdict issued against Wildevco and/or Fred's in favor of Plaintiffs. There was

no judgment or verdict issued against Wildevco and/or Fred's. Therefore, Wildevco and Fred's are not entitled to recover under the claim for equitable indemnification for settlement costs paid to Plaintiffs and fees because the relief was not requested.

IV. ALTERNATIVELY, THE TRIAL COURT ERRED IN AWARDING ATTORNEYS' FEES UNDER RESPONDENTS' CLAIM FOR EQUITABLE INDEMNIFICATION BECAUSE THE FEES WERE FOR BOTH DEFENDING PLAINTIFFS' CLAIM, AS WELL AS PROSECUTING THIS MATTER AGAINST APPELLANT, AND WERE SPECULATIVE.

In the alternative to the Court reversing the trial court ruling in favor of Respondents, Appellant seeks to have the trial court's award of attorneys' fees reversed because the fees and costs included the prosecution of the equitable indemnification claims against Appellant, and because the fees are speculative. Wildevco's attorney admitted that Wildevco's fees and costs included work for both the prosecution of the claims against Appellant and the defense of Plaintiffs' claims. R. p. 387. Fred's fails to provide any indication as to what the fees were associated with – defense or prosecution. (See R. p. 389; see also R. p. 568). The award of the fees and costs should be reversed.

The attorneys' fees awarded by the trial court are based on speculation and cannot be recovered. 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 (1971). Town of Winnsboro, 307 S.C. 128; Rhett v. Gray, No. 5066, 2012 WL 6604516 (S.C. Ct. App. Dec. 19, 2012). The amount of damages cannot be left to conjecture, guess, or speculation; however, mathematical certainty is not required. Moore v. Moore, 360 S.C. 241, 255 (Ct. App. 2004).

Wildevco produced a detailed billing statement as evidence of attorneys' fees. (R. pp. 571–675). The billing statement was highlighted in several colors indicating tasks that were related solely to the defense of the Plaintiffs' claims, and indicating tasks that were related to both the defense of Plaintiffs' claims, and the prosecution of the indemnification claims. (R. p. 387). Counsel for Wildevco stated that the amount for those tasks related to both the defense and the prosecution of the indemnify claims was divided in half. Id. There was no discussion from Counsel for Wildevco on how the fifty percent split was arrived at, and thus, any division is based on speculation and is not recoverable. Additionally, even if Wildevco cut the fees in half it was still for work on both defending claims and prosecuting the equitable indemnification claim.

Fred's introduced the Affidavit of Denise M. Brockwell in support of its claim for attorneys' fees. (R. pp. 565–67). However, Fred's did not breakout the attorneys' fees for the defense of Plaintiffs' claims and fees for the prosecution of the indemnification claim. Therefore, Fred's attorneys' fees being sought of the defense of Plaintiffs' claims can only be determined by pure speculation, and are not recoverable.

Respondents' evidence as to attorneys' fees arising out of the defense of Plaintiffs' claims are left to conjecture, guess and/or speculation. Accordingly, claims for attorneys' fees and costs are not recoverable by Respondents.

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. (R. p. 407). 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.

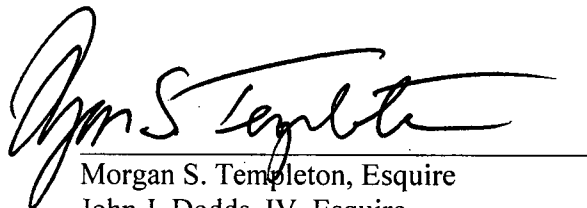
CONCLUSION

For the foregoing reasons, Appellant requests that the Court of Appeals reverse the trial court order granting judgment for Respondents, and granting judgment in favor of Appellant.

In the alternative, Appellant ask that the Court of Appeals reverse the trial court award of attorneys' fees and costs to Respondent.

Dated this 15th day of November, 2017.

WALL TEMPLETON & HALDRUP, P.A.

A handwritten signature in black ink, appearing to read "Morgan S. Templeton", is written over a horizontal line.

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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

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SC Court of Appeals

Case No. 2017-000688

Martha M. Fountain and Curtis Fountain Plaintiffs

v.

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

v.

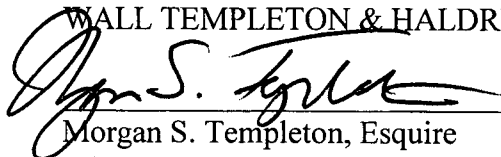
Tippins-Polk Construction, Inc. and Rhoad's Excavating Services, LLC..... Third-Party Defendants

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

CERTIFICATE OF COUNSEL

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

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