IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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Appellate Case No. 2017-00068

Martha M. Fountain and Curtis Fountain, ... Plaintiffs,

v.

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

v.

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

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

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STATEMENT OF ISSUES ON APPEAL

I. WHETHER OR NOT THE TRIAL COURT ERRED IN FINDING THAT A SPECIAL RELATIONSHIP EXISTED BETWEEN RESPONDENT, FRED'S, INC. AND APPELLANT TO SUPPORT A CLAIM FOR EQUITABLE INDEMNIFICATION.

II. WHETHER OR NOT THE TRIAL COURT ERRED IN FINDING RESPONDENT, FRED'S, INC. WAS WITHOUT FAULT.

III. WHETHER OR NOT THE TRIAL COURT ERRED IN FAILING TO CONCLUDE RESPONDENT, FRED'S, INC. WAS ESTOPPED FROM RECOVERING DAMAGES NOT REQUESTED IN THEIR COMPLAINT.

IV. WHETHER OR NOT THE TRIAL COURT ERRED IN AWARDING CERTAIN ATTORNEY'S FEES AND COSTS TO RESPONDENT, FRED'S, INC. BASED UPON APPELLANT'S CONTENTION THAT THEY WERE BOTH SPECULATIVE AND RELATED TO THE DEFENSE OF PLAINTIFFS' CLAIM AND PROSECTUION OF THE EQUITABLE INDEMNIFICATION CLAIM.

STATEMENT OF THE CASE

This is an action was originally brought as one by Plaintiffs against Defendant's Fred's, Inc. and Wildevco, LLC on May 12, 2010 stemming from a trip-and-fall incident. Specifically, Plaintiff, Martha Fountain alleged that on or about March 10 2010 while she was attempting to enter Fred's store she tripped and fell over a raised sidewalk in front of the store. The incident resulted in Plaintiff stumbling forward striking her head on the glass doors and falling to the sidewalk leading to a laceration of the head along with a fractured arm. Plaintiffs' specifically alleged the Defendants, Fred's and Wildevco failed: (1) to keep and maintain the premises; (2) take reasonable precautions to avoid unsafe condition; (3) to warn customers of dangerous condition; to inspect the premises; (4) remedy the condition; and (5) to discover risks, to warn of or make safe unreasonable risks.

After approximately two years of litigation, since the filing of the Complaint, an Amended Answer was filed by Fred's and Wildevco, which included a Third-Party Complaint

wherein claims were asserted against Tippins-Polk. Prior to the trial of the underlying suit brought by Martha and Curtis Fountain Respondents reached a settlement agreement, which was later codified in an executed Settlement Agreement. Upon execution of the Settlement Agreement the only claim that remained was a claim for equitable indemnification by Respondents against Appellant.

A trial was held over the course of April 6 and 7, 2016 before The Honorable Doyet A. Early, III. At the conclusion of the trial Judge Early too the matter under advisement with an Order and Judgment later requested by Judge Early finding in favor of Respondents. The Order specifically concluded that "[Appellant] breached its contractual obligations and its duty of care to in failing to construct the premises free from latent defects" and that those "construction defects, for which [Appellant] is solely responsible, were the sole proximate cause of Mrs. Fountain's injuries." The trial court, in accordance with the foregoing findings, entered a judgment in favor of Respondent, Fred's, Inc. in the amount of Seventy-Six Thousand Six Hundred Ninety-One and 82/100 ($76,691.82) Dollars. The Order and Judgment was filed on August 3, 2016 and Tippins-Polk has filed this motion related thereto. Appellant timely filed a Motion under Rule 52(b), SCRCP and Rule 59(e) to make additional findings and reconsider/amend. Appellant's motion was eventually denied by the trial court with Appellant timely filing their notice of appeal.

ARGUMENTS

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

As a cursory matter Respondent Fred's, Inc., first points to a sustainable claim for indemnification against Appellant under the accepted principle of imputed liability, which eliminates any need to establish the existence of a special relationship. It has been well settled that the right to indemnification exists in two types of scenarios with the first being through "imputed fault" and the second being "where some special relationship exists between the first and second parties." *Town of Winnsboro v. Wiedman-Singleton, Inc. (Winnsboro I), 303 S.C. 52, 398 S.E.2d 500* (Ct.App. 1990) aff'd 307 S.C. 128, 414 S.E.2d 118 (1992) (Winnsboro II). In *Stuck v. Pioneer Logging Machinery, Inc.*, it was noted that "a right of indemnity exists whenever the relation 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. (279 S.C. 22, 24, 301 S.E.2d 552, 553 (1983)). In the instant case it was established Respondent Fred's, Inc., was exposed to potential liability solely as a result of the wrongful act of Appellant in their negligent construction of the Respondent's premises.

Appellant takes the alternate position in their appeal by arguing there was no special relationship between them and Respondent Fred's, Inc. In support of its position Appellant cites *Rock Hill Telephone Co., Inc. v. Globe Communications, Inc.*, wherein it was determined the relationship at issue was too remote or distant thus not satisfying the definition of special relationship giving rise to a claim for indemnification. (363 S.C. 385, 611 S.E.2d 235 (2005)). In *Rock Hill*, the utility company Rock Hill Telephone Company was granted a permit by the

Department of Transportation to install an underground cable along a highway. To accomplish its task Rock Hill Telephone Company hired an independent contractor who ultimately retained a subcontractor to perform a part of the work. An accident eventually occurred involving a car striking the backhoe of the subcontractor, which was settled by Rock Hill with an action for indemnity ensuing against the subcontractor. *Rock Hill* is easily distinguishable from the case at bar as this action for equitable indemnification is a direct claim being made against the general contractor rather than a sub-contractor with whom a contract was made for services rendered to knowingly benefit Respondent Fred's, Inc.

In its Order the Court found the relationship with Respondent Fred's, Inc., and Appellant was not an attenuated action against a sub-contractor. Specifically, evidence was presented during the trial that Appellant had never previously done business with Respondent Wildevco but rather came about this opportunity on account of its relationship as a general contractor on the construction of another Respondent Fred's, Inc., store. Furthermore, it was noted the contract executed by and between Appellant and Respondent Wildevco was clearly known to have been for the benefit of Respondent Fred's, Inc., as they were directly referenced in the agreement and Rett Polk testified to knowing that the primary store in this shopping center was Respondent Fred's, Inc. (R. p. 410, lines 12-14). Furthermore, Mr. Polk testified to Appellant having built ten to fifteen stores for Respondent Fred's, Inc. (R. p. 410, lines 10-11). Mr. Polk even testified to the fact that Appellant is in fact an owner of another location operated by Respondent Fred's, Inc. (R. p. 406, lines 13-14). Likewise, Mr. Barber testified to having never previously had any relationship with Tippins-Polk. Therefore, there existed more than sufficient evidence presented to establish the existence of a direct relationship between Respondent Fred's, Inc., and Appellant such that an equitable indemnification claim between the parties is proper.

As it pertains directly to the contractual argument by Tippins-Polk, it is well settled that in a situation where "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." *Bob Hammond Const. Co., Inc. v. Banks Const. Co.*, 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct.App. 1994); (*See also Cothran v. Rock Hill*, 211 S.C. 17, 43 S.E.2d 615(1947)). It is indisputable that the contract entered into, though not executed by Respondent Fred's, Inc., was created for their direct benefit as it specifically referenced the construction of a Fred's store. (R. pp. 470-471). Moreover, Mr. Polk even testified to knowing the contract was for the building of a Fred's store thus it can be argued that this was a contract for an incidental or consequential benefit to Fred's thereby affording them the same relation to the parties of the contract thereby satisfying the special relationship requirement to pursue an equitable indemnification claim.

II. THE TRIAL COURT CORRECTLY CONCLUDED THAT RESPONDENT FRED'S, INC., WAS WITHOUT FAULT.

Respondent Fred's, Inc., presented a claim for equitable indemnification under the premise that it was "compelled to pay damages because of negligence imputed to him as the result of another parties tortious act." *Fowler v. Hunter*, 388 S.C. 355, 363, 697 S.E.2d 531, 535 (2010) (quoting *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Co.*, 336 S.C. 53, 518 S.E.2d 301 (Ct.App. 1999)). A party who asserts a claim for equitable indemnification is entitled to 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 plaintiff's claims against it which were eventually proven to be the fault of the indemnitor." *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Co.*, 336 S.C. 53, 63, 518 S.E.2d 301, 307 (Ct.App. 1999). "Equitable indemnity cases involve a fact pattern in

which the first party is at fault, but the second party is not. *Id.*, (*See also Town of Winnsboro v. Wiedman-Singleton, Inc. (Winnsboro I)*, 303 S.C. 52, 398 S.E.2d 500 (Ct.App. 1990), *aff'd*, 307 S.C. 128, 414 S.E.2d 118 (1992) (*Winnsboro II*). "If the second party is also at fault, he comes to court without equity and has no right to indemnity. *Id.*

As Appellant repeatedly points out in its initial brief the underlying suit brought by Plaintiffs against Respondents was a premises liability/negligence suit. Specifically, the suit alleged that Plaintiff, Martha Fountain tripped and fell as a result of the presence of a dangerous condition on Respondents premises resulting in her sustaining bodily injuries. It is well settled law in the state of South Carolina that "[a] merchant is not an insurer of the safety of his customers but only owes the duty of exercising ordinary care to keep the premises in a reasonably safe condition. *Garvin v. Bi-Lo, Inc.*, 343 S.C. 625, 628, 541 S.E.2d 831, 832 (2001), (*See also Pennington v. Sayre Corp.*, 252 S.C. 173, 165 S.E.2d 695 (1969). Likewise, a merchant "is not required to maintain the premises in such a condition that no accident could happen to a patron using them." *Denton v. Winn-Dixie Greenville, Inc.*, 312 S.C. 119, 120, 439 S.E.2d 292, 293 (Ct. App. 1993), (*See also Panoz v. Gulf & Bay Corporation,* 208 So.2d 297 (Fla. App.), *cert. denied,* 218 So.2d 166 (Fla.1968); *Gavin v. City of Chicago,* 97 Ill. 66 (1880); *Overton v. Wenatchee Beebe Orchard Co.,* 28 Wash.2d 377, 183 P.2d 473 (1947)). Specifically, in a matter involving a purported dangerous or defective condition a plaintiff, to recover damages for injuries as a result of said condition, "must show either (1) that the injury was caused by a specific act of the respondent which created the dangerous condition; or (2) that the respondent had actual or constructive knowledge of the dangerous condition and failed to remedy it." *Garvin v. Bi-Lo, Inc.*, 343 S.C. at 625, (*See also Anderson v. Racetrac Petroleum Inc.,* 296 S.C. 204, 371 S.E.2d 530 (1988); *Pennington v. Zayre **833 Corp.,* 252 S.C. 176, 165 S.E.2d 695

(1969); *Hunter v. Dixie Home Stores,* 232 S.C. 139, 101 S.E.2d 262 (1957); *Cook v. Food Lion, Inc.,* 328 S.C. 324, 491 S.E.2d 690 (Ct.App.1998)).

During the trial of the suit now on appeal it was well settled and established that Appellant was the general contractor charged with the interpretation of the site plans and architectural plans and seeing to the construction of the premises in accordance therewith. There was further evidence presented that Respondent Fred's, Inc., had no direct involvement either in development of the plans or the construction of the premises such that there was sufficient evidence establishing that they did not create a dangerous condition. Alternatively, under a premises liability theory there would have had to be evidence, for Respondent Fred's, Inc., to have had liability, that they had actual or constructive knowledge of a dangerous condition and despite such knowledge they failed to remedy the condition. Appellant contends simply that Respondent Fred's, Inc., had been operating this business for several years with the curb ramp such that constructive notice of the condition existed. However, the foregoing contention is akin to Appellant arguing Respondent had constructive knowledge of a dangerous condition in a case where a customer is injured by the entrance door simply because they knew the entrance door was there without any obligation for establishing the shopkeeper knew of a danger inherent in the condition. In short there was no evidence presented during the trial of the equitable indemnification claim that would support a finding that Respondent Fred's, Inc., created the purportedly dangerous condition or had actual or constructive knowledge of the existence of a dangerous condition on its property such that there could be no liability on their behalf.

a. Respondent Fred's, Inc. and Appellant were not joint tortfeasors such that there is a right of indemnity between them.

Under South Carolina law, there can be no indemnity among mere joint tortfeasors. *Id.*, at 64 (*See also Scott v. Fruehauf Corp.,* 302 S.C. 364, 396 S.E.2d 354 (1990)); (*See also Stuck v.*

Pioneer Logging Machinery, Inc., 279 S.C. 22, 301 S.E.2d 552 (1983)); (*See also Atlantic Coast Line R.R. v. Whetstone,* 243 S.C. 61, 132 S.E.2d 172 (1963)). Parties that have no legal relation to one another and who owe the same duty of care to the injured party share a common liability and are joint tortfeasors without a right of indemnity between them. *Id.* (*See also Scott, supra*). Joint tortfeasor" refers to "[t]hose who act together in committing wrong, or whose acts if independent of each other, unite in causing single injury"; "two or more persons jointly or severally liable in tort for the same injury to person or property." *Id.* (quoting Black's Law Dictionary 839 (6th ed. 1990)).

This matter is comparable to the case of *Bruno v. Pendleton Realty Co.*, which centered on a trip and fall that occurred in the parking lot of a shopping center. (240 S.C. 46 124 S.E.2d 580 (1962)). In the aforementioned matter a patron had fallen when he was stepping on the edge of a curb that was concealed by overgrown grass. *Id.* The Court noted simply that:

> One 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, but 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. at S.C. 51. In the case at bar Respondent Fred's, Inc., owed a duty, under a standard premises liability theory, to Plaintiff Martha Fountain to maintain and keep its premises in a reasonably safe condition. However, and alternatively, Appellant's duty as established in *Fields v. J. Haynes Waters Builders, Inc.* is stated as that where "a builder who undertakes to supervise the construction of a building is under a duty to exercise reasonable care and such supervision to see that the work is done in conformity with the applicable building code ... and in a good and workmanlike manner." (376 S.C. 545, 560, 658 S.E.2d 80, 88 (2008)). The Court expounded

upon this point and duly noting that it "has embraced the notion that in constructing a home, a builder warrants that the home is fit for its intended use as a dwelling, that the home was constructed in a workmanlike manner, and that the home is *free of latent defects.*" *Id.* at 561 (*emphasis added).* Finally, this warranty is noted to extend to the original purchaser as well as subsequent purchasers such that in the instant case it stands to reason that their warranty would cover both Respondents.

The trial court determined herein that, based upon the evidence presented, the condition at issue qualified as a latent defect at the time of the construction process overseen by Appellant. Upon the foregoing finding by the Court, it was clear and indisputable that Appellant has breached its duty owed to the Respondents such that they are liable to them for the equitable indemnification claim. As espoused in *Fields*, the duty owed by an entity, in the capacity of Appellant, was owed to the property owner and not to subsequent invitees there directly contradicting any potential argument of joint liability between Appellant and Respondents for the underlying injuries sustained by Plaintiffs.

b. The finding that there existed a "latent defect" on the property does not establish fault on Respondent Fred's, Inc.

Appellant submits that in holding that a latent defect was created in the construction of the premises that Respondent Fred's, Inc., was found at fault was wholly misplaced and a complete misinterpretation of the findings. "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, 125, 406 S.E. 2d 361, 362 (1991); (*See also Wilson v. Duke Power Co.*, 273 S.C. 610, 258 S.E.2d 101 (1979); *Bruno v. Pendleton Realty*, 240 S.C. 46, 124 S.E.2d 580 (1962)). Furthermore a latent defect is seen as "one which a reasonably careful

inspection will not reveal." *Id.*; (*See also Land v. Franklin National Insurance Company*, 225 S.C. 33, 80 S.E.2d 420 (1954); 26A C.J.S. *Defect.*

During the trial in this case Joseph Stephen Hunt was called on to testify regarding the condition created during the construction of the premises. Specifically, he referred to the particular issues with the curb ramp it is believed to have been the cause of Plaintiff's fall as a construction defect as having been created by Appellant. Under the analysis of a latent condition as defined above is noted as being one which an owner should have knowledge of and which the invitee is unaware. However, Mr. Hunt specifically testified the condition at issue was not one that Respondent Fred's, Inc. would reasonably have been aware of or able to identify through their inspections due to the training, experience, or education in construction necessary to discern and identify the construction defect. It is a direct result of the clear and undisputed testimony of Mr. Hunt that Respondent argues it had neither actual nor constructive knowledge of a latent condition.

c. The Court properly excluded evidence of a purported similar incident in a neighboring county.

The trial court appropriately excluded evidence Appellant attempted to introduce relative to a purportedly similar incident as the admissibility of evidence is within the sound discretion of the trial court. "Evidence of similar accidents, transactions, or happenings is admissible in South Carolina where there is some special relation between the accidents tending to prove or disprove some fact in dispute." *Watson v. Ford Motor Co.*, 389 S.C. 434, 453, 699 S.E.2d 169, 179 (2010); (*See also Whaley v. CSX Transp., Inc.*, 362 S.C. 456, 483, 609 S.E.2d 286, 300 (2005)). "Courts require a plaintiff to establish a factual foundation to show substantial similarity because evidence of similar incidents may be extremely prejudicial." *Id.*, at 454. "A plaintiff must present

a factual foundation for the court to determine that the other accidents were substantially similar to the accident at issue." *Id.* at 453.

> In *Buckman v. Bombardier Corp.,* the District Court set forth factors that a court should consider when admitting evidence of other incidents to support a claim that the present accident was caused by the same defect: (1) the products are similar; (2) the alleged defect is similar; (3) causation related to the defect in the other incidents; and (4) exclusion of all reasonable secondary explanations for the cause of the other incidents." 893 F.Supp. 547, 552 (E.D.N.C.1995) (citing *Hale v. Firestone Tire & Rubber Co.,* 756 F.2d 1322, 1332 (8th Cir.1985)).

Id.

In the case at bar Appellant sought to introduce evidence of a purported trip and fall from another of the Respondent's stores located in a neighboring county. In its attempt to introduce this evidence Appellant was permitted to proffer testimony through their witness, Mr. Rett Polk, who was the reported general contractor at the store located in the neighboring county. Mr. Polk testified plainly, "we had the same incidence where we had a store constructed with the handicapped ramp per Fred's plans and plans we were issued." (R. p. 407, lines 18-20). However, Mr. Polk provided absolutely no additional details in regards to the specifics of the ramp in question or the allegedly similar incident. Pertinent to the analysis of admissibility Mr. Polk testified that a different architect prepared the architectural plans at the neighboring store and a different engineer prepared the site plans. Moreover, it was even admitted that the neighboring store's site plans were not even the same as the plans relied upon in the construction of the store where the underlying incident giving rise to the equitable indemnification claim occurred. Simply put there was more than ample evidence proffered during Mr. Polk's testimony for the trial court to rely upon to determine the conditions existing at the neighboring store were dissimilar enough to exclude any evidence of the allegedly similar incident.

III. THE TRIAL COURT CORRECTLY PERMITTED RESPONDENT FRED'S, INC., TO RECOVER THE DAMAGES AWARDED AT THE CONCLUSION OF THE TRIAL.

Respondent Fred's, Inc., in bringing its suit for equitable indemnification against Appellant, set forth the pertinent and required factual allegations to support the pursuit of such a cause of action. In conjunction with the foregoing cause of action, Respondent prayed for certain relief from the trial court, which included a request that "they be awarded judgment over and against [Appellant] for all or part of any verdict or judgment which may be recovered by Plaintiffs." Appellant, in reliance on the foregoing portion of the prayer for relief incorrectly contends Respondent is now not entitled to recover damages for the amount paid in settlement to Plaintiffs or fees incurred. The narrowly construed analysis by Appellant is flawed as it fails to acknowledge the additional language in the relief wherein Respondents requested "such other and further relief as the Court would deem just and proper."

In a matter for equitable indemnification it is well settled that the cost of settling a case is recoverable "(1) if the settlement is bona fide, with no fraud or collusion by the parties; (2) if, in the circumstances, the decision to settle is a reasonable means of protecting the innocent party's interest; and (3) if the amount of the settlement is reasonable in light of the third party's estimated damages and the risk and extent of defendant's exposure if the case is tried." *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 62, 64, 518 S.E.2d 301, 307 (Ct.App. 1999). Fred's, through the expert testimony of E. Mitchell Griffith, presented sufficient evidence to the Court during trial to satisfy each of the foregoing three elements thereby permitting, as both just and appropriate, an award by this Court for costs paid during settlement. Therefore, while not explicitly prayed for, these costs were within the sound discretion of the Court to award and based upon prevalent case law are both just and proper in an equitable indemnification action.

Appellant seems to take the position that Respondent is unable to recover damages irrefutably recovered under a properly pled equitable indemnification matter by virtue of some nuances in the prayer for relief. "The Rules clearly set forth the required contents of pleadings. Pleadings 'shall contain (1) a short and plain statement of the grounds including facts and statutes upon which the court's jurisdiction depends, unless the court already has jurisdiction to support it, (2) a short and plain statement of the facts showing that the pleader is entitled to relief, and (3) a prayer or demand for judgment for the relief to which he deems himself entitled.'" *Justice v. Pantry*, 330 S.C. 37, 41-42, 496 S.E.2d 871, 873 (Ct.App. 1998); (quoting Rule 8(a), SCRCP)). The court went on to state that "[P]leadings in a case should be construed liberally so that substantial justice is done between the parties." *Id.*; (quoting *Russell v. City of Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991)). "Our courts have held that 'it is the substance of the requested relief that matters regardless of the form in which the request for relief was framed.'" *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 437, 673 S.E.2d 448, 458 (2009); (quoting *Richland County v. Kaiser*, 351 S.C. 89, 94, 567 S.E.2d 260, 262 (Ct.App. 2002); (quoting *Standard Fed. Sav. & Loan Ass'n v. Munco*, 306 S.C. 22, 26, 410 S.E.2d 18, 20 (Ct.App. 1991)).

This matter, as pled in the multiple complaints, was clearly and unequivocally one for equitable indemnification, which permits the party entitled to such a remedy to recover damages, which may include settlement proceeds paid as well as attorney's fees and costs. To challenge the ruling of the trial court in the damages awarded, Appellant would have to argue and establish abuse of judicial discretion in this instance. Respondent, through general language, pleaded for recovery of "such other and further relief as the Court would deem just and proper," which when,

as required, are construed liberally affords the trial court the discretion to award all appropriate damages otherwise recoverable in a case for equitable indemnification.

IV. THE TRIAL COURT CORRECTLY PERMITTED RESPONDENT FRED'S, INC., TO RECOVER ATTORNEY'S FEES AND COSTS AS SUBMITTED AT TRIAL.

Appellant's final contention was that the trial court erred in its award of attorney's fees and costs to Respondent Fred's, Inc. Specifically, Appellant contends that the award by the trial court should be reversed due to their being no distinction in the fees as to whether they were associated with the defense of the underlying suit or prosecution of the equitable indemnification suit. Alternatively, Appellant submits that the fees and costs are based upon speculation and as such cannot be recovered. Appellant's contention as to the speculative nature of the award is wholly misguided. In support of its claim for attorney's fees and costs Respondent submitted an Affidavit of Denise M. Brockwell (R. pp. 565-567), which was notably admitted without objection. Through the aforementioned affidavit, Respondent set forth the precise amounts of attorney's fees and costs incurred in furtherance of their efforts to protect their interests as an innocent party.

"The law of equitable indemnification allows recovery of expenses when the act of the wrongdoer involves the innocent defendant in litigation or places him in such relation with others as makes it necessary to incur expenses to protect his interest." *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 61, 518 S.E.2d 301, 307 (Ct.App. 1999); (*See Addy v. Bolton,* 257 S.C. 28, 183 S.E.2d 708 (1971)). Moreover, "'expenses' under the *Addy* rule include any costs which are reasonably necessary to defend litigation or otherwise protect the innocent party's interest." *Id.* Tippins-Polk seeks to distort the ruling of the Court in *Addy* and its progeny of cases by attempting to limit recovery to simply the costs associated with the defense of a suit

brought against an innocent party. However, it is clear from the holding in *Vermeer* that such costs extended to any such expenses to protect the interests of the innocent third party.

In the case at bar it is uncontroverted that the instant litigations commenced simply as a suit by Plaintiffs against Respondents and only through later efforts came to include the equitable indemnification claim against Appellant. Even Appellant cannot contend that the actions taken, which may also have benefited Respondent Fred's, Inc., in its claim for equitable indemnification were not done to protect their interests as an innocent party to the suit brought by Plaintiffs. Specifically, the depositions of Rett Polk and J. Steven Hunt, while relating to the indemnification claim also served a benefit to Fred's in its defense of the claim by Plaintiffs as it served to establish another defense that Respondent Fred's, Inc., did not create a dangerous condition on its premises. Mr. Hunt was brought in to establish precisely all the manners in which Appellant breached its duty to create a property free of latent defects and that this defect was one that an ordinary and prudent shopkeeper would not and could not be reasonably expected to discover. Therefore, the fees Appellant contends are being sought relative to the indemnification claim were clearly incurred in the protection of the interests of an innocent party and thus under the *Addy* rule are indeed recoverable.

Appellant further contends the attorney's fees are not recoverable because those related to the defense of Plaintiffs' claims can only be determined by pure speculation. In support of its position Appellant cites *Moore v. Moore* wherein it was noted that the amount of damages cannot be left to conjecture, guess, or speculation, though importantly noting, mathematical certainty is not required. (360 S.C. 241, 599 S.E.2d 467 (Ct.App. 2004)). It is important to note herein that Appellant consented, without objection, to the admission of the Affidavit of Denise

M. Brockwell (R. pp. 565-567), which was the evidence submitted to the trial court upon which the award of attorney's fees and costs was made.

The absence of an objection by Appellant is fatal to its claim now that these fees and costs are not recoverable. "Although limited exceptions exist, objections to the admission of evidence must be made when evidence is presented at trial to preserve error for appeal." *Parr v. Gaines*, 309 S.C. 477, 481, 424 S.E2d 515, 518 (Ct.App. 1992); (*See also State v. Davis*, 309 S.C. 56, 419 S.E.2d 820 (Ct.App. 1992)). Moreover, in *Doe v. S.B.M*, it was held that "[t]he failure to make an objection at the time evidence is offered constitutes a waiver of the right to object" and bars the litigant from later requesting review of the issue by the appellate court. (327 S.C. 352, 356, 488 S.E.2d 878, 880-81 (Ct. App 1997)); (*See also Cogdill v. Watson*, 289 S.C. 531, 347 S.E.2d 126 (Ct. App. 1986)); (citing *McReight v. MacDougall*, 248 S.C. 222, 149 S.E.2d 621 (1966)); (*See also Washington v. Whitaker*, 317 S.C. 108, 451 S.E.2d 894 (1994) (by failing to raise contemporaneous objection to plaintiffs' request for punitive damages, city waived any objection to propriety of punitive damages against municipality)); (*Ball v. Canadian Am. Express Co.*, 314 S.C. 272, 442 S.E.2d 620 (Ct. App. 1994) (failure to object at trial waives right to object on appeal)). In *Freeman v. A & M Mobile Home Sales, Inc.*, 293 S.C. 255, 359 S.E.2d 532 (1987), a scenario similar to the one at issue here presented itself when an attorney offered to simply present a court with an *estimate* of hours spent in the litigation of this case. (*Emphasis added)*. Likewise in *Freeman* no objection was raised as to this procedure of utilization of an estimate and as such the Court held that counsel was not in a position at a later stage to complain about the estimate presented in the affidavit.

It is undisputable that Appellant did not object to the submission of Ms. Brockwell's Affidavit (R. pp. 565-567) nor did they challenge the Invoice Details Report (R. p. 568) that

accompanied the Affidavit. In fact, Appellant stipulated and consented to the evidentiary submission of Respondent Fred's, Inc., that formed the basis for the trial court's conclusion as to the amount of attorney's fees and costs to be awarded. Based upon the foregoing precedent Appellant, due to their failure to contemporaneously object, has not properly preserved this issue for appellate review.

CONCLUSION

For the reasons stated herein, this Court should affirm the Order and Judgment of the trial court in full.

Respectfully submitted,

December 1, 2017

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IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

RECEIVED
DEC 01 2017
SC Court of Appeals

Appellate Case No. 2017-00068

Martha M. Fountain and Curtis Fountain, ... Plaintiffs,

v.

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

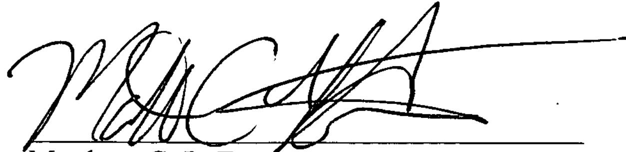
v.

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

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

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.



December 1, 2017

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