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. 2017-00068

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.

FINAL BRIEF OF RESPONDENT WILDEVCO, LLC

GAFFNEY LEWIS & EDWARDS, LLC
Regina Hollins Lewis, SC Bar No. 68539
Lee Ellen Bagley, SC Bar No. 77672
3700 Forest Drive, Suite 400
Columbia, South Carolina 29204
803.790.8838 (telephone)
803.790.8841 (facsimile)

Attorneys for Respondent Wildevco, LLC

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. 2017-00068

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.

FINAL BRIEF OF RESPONDENT WILDEVCO, LLC

GAFFNEY LEWIS & EDWARDS, LLC
Regina Hollins Lewis, SC Bar No. 68539
Lee Ellen Bagley, SC Bar No. 77672
3700 Forest Drive, Suite 400
Columbia, South Carolina 29204
803.790.8838 (telephone)
803.790.8841 (facsimile)

Attorneys for Respondent Wildevco, LLC

TABLE OF CONTENTS

Table of Authorities.....Pages iii. –iv.

Statement of Issues on Appeal.....Page v.

Statement of the Case.....Page 1

Statement of the Facts.....Page 2

Standard of Review.....Page 6

Arguments.....Page 8

I. The trial court properly found that Tippins-Polk was at fault and that Wildevco met its burden of proving that it was without fault in causing the Fountains' damages..... Page 8

II. Wildevco's Complaint against Tippins-Polk supports the trial court's award of attorneys' fees and costs.....Page 25

III. The trial court properly granted attorneys' fees to Wildevco as the fees were supported by the evidence and were properly limited to fees incurred in defending the underlying claims by the Fountains.....Page 27

Conclusion.....Page 29

TABLE OF AUTHORITIES

CASES

Addy v. Bolton, 257 S.C. 28, 183 S.E.2d 708 (S.C. 1971).....6

Bank of New York v. Sumter County, 387 S.C. 147, 691 S.E.2d 473 (S.C. 2010).....25

Craft v. South Carolina Com'n for Blind, 385 S.C. 560, 685 S.E.2d 625 (Ct. App. 2009).....6, 20

Griffin v. Van Norman, 302 S.C. 520, 397 S.E.2d 378 (Ct. App. 1990).....14

Jourdan v. Boggs/Vaughn Contracting, Inc., 324 S.C. 309, 476 S.E.2d 708 (Ct. App. 1996).....6

Larimore v. Carolina Power & Light, 340 S.C. 438, 531 S.E.2d 535 (Ct. App. 2000).....16, 17

Lynch v. Carolina Self Storage Centers, Inc., 409 S.C. 146, 760 S.E.2d 111 (Ct. App. 2014)....16

MailSource, LLC v. M.A. Bailey & Assoc., Inc., 356 S.C. 370, 588 S.E.2d 639 (Ct. App. 2003).....25, 26

McCoy v. Greenwave Enterprises, Inc., 408 S.C. 355, 759 S.E.2d 136 (S.C. 2014).....28

Mortgage Loan Co. v. Townsend, 156 S.C. 203, 152 S.E. 878 (S.C. 1930).....27

O'Leary-Payne v. R.R. Hilton Head, II, Inc., 371 S.C. 340, 638 S.E.2d 96 (Ct. App. 2006).....12

Otis Elevator, Inc. v. Hardin Const. Co. Group, Inc., 316 S.C. 292, 450 S.E.2d 41, (S.C. 1994).....7, 13, 14

Rock Hill Telephone Co., Inc. v. Globe Communications, Inc., 363 S.C. 385, 611 S.E.2d 235 (S.C. 2005).....13

Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Const., LLC, 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015).....7

Straight v. Goss, 383 S.C. 180, 678 S.E.2d 443 (Ct. App. 2009).....25

Tiger, Inc. v. Fisher Agro, Inc., 301 S.C. 229, 391 S.E.2d 538 (S.C. 1989).....6

Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc., 351 S.C. 459, 570 S.E.2d 197 (Ct. App. 2002).....18

Town of Winnsboro v. Wiedeman-Singleton, Inc., 303 S.C. 52, 398 S.E.2d 500 (Ct. App. 1990).....6, 7, 13

Town of Winnsboro v. Wiedeman-Singleton, Inc., 307 S.C. 128, 414 S.E.2d 118 (S.C. 1992).....6, 13, 27

Verenes v. Alvanos, 387 S.C. 11, 690 S.E.2d 771 (S.C. 2010).....24

Wintersteen v. Food Lion, Inc., 344 S.C. 32, 542 S.E.2d 728 (S.C. 2001).....12

Walterboro Community Hosp. v. Meacher, 392 S.C. 479, 709 S.E.2d 71 (Ct. App 2011).....7

Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (S.C. 2010).....18

RULES

Rule 52, SCRCP.....2, 25

Rule 59, SCRCP.....2, 25

STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT PROPERLY FIND THAT WILDEVCO WAS ENTITLED TO EQUITABLE INDEMNFICIATION WHERE THE EVIDENCE ESTABLISHED THAT TIPPINS-POLK WAS AT FAULT AND THAT WILDEVCO WAS WITHOUT FAULT IN CAUSING THE PLANTIFFS' DAMAGES?

II. DID THE TRIAL COURT PROPERLY FIND THAT WILDEVCO'S COMPLAINT WAS SUFFICIENT TO SUPPORT AN AWARD OF ITS ATTORNEYS' FEES AND COSTS PURSUANT TO ITS COMPLAINT?

III. DID THE TRIAL COURT PROPERLY GRANT ATTORNEYS' FEES TO WILDEVCO WHERE THE FEES WERE REASONABLE AND WERE PROPERLY LIMITED TO THOSE FEES INCURRED IN DEFENDING THE UNDERLYING CLAIMS BY THE FOUNTAINS.

STATEMENT OF THE CASE

This appeal arises from the entry of a judgment in favor of Respondents Wildevco and Fred's, Inc. ("Fred's") on their respective third-party claims for equitable indemnification against Appellant Tippins-Polk Construction, Inc. ("Tippins-Polk"). Respondents asserted the third-party claims in an underlying case, which arose as a result of a trip and fall by Martha Fountain that occurred on March 10, 2010 at the Fred's store in Williston, South Carolina. In an action filed on May 12, 2010, Plaintiffs Martha and Curtis Fountain (the "Fountains") sued Defendants Fred's, Inc. (hereinafter "Fred's"), and Wildevco, LLC (hereinafter "Wildevco") (collectively, "Defendants"), the owner and developer of the premises, alleging negligence and loss of consortium.[1] In the lawsuit, Plaintiff Martha Fountain alleged, *inter alia*, that she tripped on a defective handicap curb ramp in front of the store, which caused her to fall and sustain personal injuries.

On August 1, 2012, with the consent of Plaintiffs, Wildevco filed an Amended Answer and Third-Party Complaint against Tippins-Polk, which served as the general contractor for, among other things, the construction of the buildings, parking lot, curbing and sidewalks of the subject premises. With leave of the court, Wildevco amended its Third-Party Complaint several times, ultimately setting forth causes of action against Tippins-Polk for breach of agreement and/or warranties, negligence, equitable indemnification, and breach of contract in connection with the construction of the subject Fred's store. During the course of litigation, the parties filed several Motions for Continuance due to various reasons, including but not limited to issues concerning former fourth-party defendants and changes of counsel.

On the evening prior to the scheduled trial of the underlying case, March 20, 2016,

[1] Plaintiffs also sued Thaddeus "Tad" Barber, one of the principals of Wildevco; Mr. Barber was dismissed as a defendant shortly before the scheduled trial of this matter.

Wildevco and Fred's settled the action with Plaintiffs. The settlement was finalized and the agreement was executed on April 21, 2016. Thereafter, Wildevco and Fred's filed a motion to amend their respective complaints to include a claim of contribution. Tippins-Polk opposed the motion and the court denied the motion, concluding that it was untimely. The parties then proceeded to trial on June 6 and 7, 2016 on the sole claim of equitable indemnification.

On August 1, 2016 the trial court entered judgment against Tippins-Polk and in favor of Wildevco in the amount of Three Hundred Five Thousand Four Hundred Eighteen Dollars and Thirty Cents ($305,418.30) and in favor of Fred's in the amount of Seventy-Six Thousand Six Hundred Ninety-One Dollars and Eighty-Two Cents ($76,691.82). Thereafter, Tippins-Polk timely filed a Motion to Make Additional Findings and Motion to Reconsider and/or Amend the judgment pursuant to Rules 52(b) and 59(e), SCRCP. Wildevco and Fred's filed oppositions to the Motion and a hearing was held on the Motion in open court on September 12, 2016. The trial court denied the Motion by Order entered November 22, 2016. This appeal followed.

STATEMENT OF FACTS

In or about 2005, Wildevco entered into a Lease Agreement with Fred's for the development and construction of a shopping center to be leased by Fred's for a period of ten years, from 2005 until 2015. (R. p. 272, lines 1-9). As the owner of the property, Wildevco managed the construction process, including engaging architects, engineers, and the general contractor. (R. p. 272, lines 16-23).

On April 28, 2005 Wildevco and Tippins-Polk entered into a Construction Agreement pursuant to which Tippins-Polk was to construct the premises located in Williston, South Carolina to be leased by Fred's. (R. p. 273, line 5 – p. 274, line 11). The Agreement provided that Tippins-Polk was to conduct all site work, including asphalt paving, in accordance with the

site plans for the premises. (R. p. 470). The site plans provided, *inter alia*, that "[t]he contractor should notify the engineer for a review should discrepancies be discovered at the site or on the drawings." (R. p. 466, "General Notes – Sitework," para. 3). Tippins-Polk was selected by Wildevco for the project based in part on its past experience in having constructed Fred's facilities. (R. p. 275, lines 18-23).

Thereafter, Wildevco hired Christopher Booker Architects to draft architectural plans and engineering firm Hass & Hilderbrand, Inc. to prepare a survey and site plans for the construction of the Fred's store. (R. p. 239, lines 15-25, p. 287, line 24 – p. 288, line 13). The site plans govern the construction and supersede the architect's plans in relation to the manner in which the premises were to be constructed outside the limits of the building, including the sidewalk and parking lot. (R. p. 266, lines 3-24). The site plans provided, *inter alia*, that the sidewalk was to be constructed such that it was flush or even with the asphalt pavement at the area of the front entrance to the Fred's store. (R. p. 243, lines 2-22). Although the site plans indicated that the area between the asphalt and sidewalk were to be flush, Tippins-Polk constructed the sidewalk with a handicap curb ramp and, further, such that the elevation of the sidewalk was only approximately two and one-half inches between the asphalt and the sidewalk in the area in front of the store. (R. p. 250, lines 2-9; p. 326, lines 8-16). Fred's and Wildevco's safety expert, J. Steven Hunt, testified that the ramp should never have been constructed as the site plans did not call for it but, rather, provided that the front edge of the sidewalk between the parking lot and sidewalk was to be flush. (R. p. 331, lines 13-24). Additionally, Hunt testified that, as constructed, the sidewalk elevation was approximately two and one-half inches high when it should have been a minimum of four inches high. Hunt explained that the reason for the minimum height is that small changes in elevation are difficult for people to see and perceive

and, as a result, they catch their toe on the small elevation and fall. (*Id.*)

Once construction was commenced, Thaddeus ("Tad") Barber, one of the principals of Wildevco, monitored the construction by going to the property periodically to ensure that work was being conducted. (R. p. 276, lines 2-9). Barber is a real estate broker specializing in commercial real estate but has no education or work experience involving construction, architecture, or engineering. (R. p. 271, lines 12-20). Accordingly, Barber was not qualified to conduct any inspections to determine whether or not the building or premises met building codes or applicable standards. (R. p. 276, lines 10-16).

After completion of construction, Tippins-Polk sought and obtained a Certificate of Occupancy from Barnwell County and Fred's subsequently opened for business. Wildevco was not involved in obtaining the Certificate of Occupancy or with the building inspection conducted by the County. (R. p. 277, line 15 – p. 288, line 3). Wildevco did not hire a third party to inspect the site to determine whether the property was constructed in accordance with the plans as it relied on Tippins-Polk as the general contractor along with the engineer as experts to properly design and construct the premises. (R. p. 278, lines 4-11).

The Fred's store opened for business in September 2005. (R. p. 278, lines 18-20). Pursuant to the Lease Agreement between Wildevco and Fred's, Wildevco was responsible for maintaining the curbs and sidewalks, which entailed keeping the parking lot free of debris and trash, removing obstructions and making repairs. (R. p. 278, line 21 – p. 279, line 9). Wildevco maintained the curbs and sidewalks in accordance with the Lease Agreement. (*Id.*)

On March 10, 2010, Martha Fountain visited the Fred's store to shop. (R. p. 210, line 6 – p. 211, line 4). As she went to enter the store, she caught her toe on a raised area of concrete in the transition from the asphalt pavement of the parking lot to the sidewalk and fell. (R. p. 211,

lines 5-15). She fell forward hitting her head against the door of the store and injured her head and right hand/wrist. (R. p. 211, lines 16-21; R. p. 216, lines 2-8). Mrs. Fountain testified that she could not perceive the raised area of the transition and did not notice that there was any change in elevation. (R. p. 224, lines 11-23).

As a result of the fall, Mrs. Fountain underwent four surgical procedures to repair damage to her right hand/wrist and elbow that involved the use of cadaver bones. (R. p. 216, line 4 – p. 217, line 21). She also sustained nerve damage in her shoulder and neck as a result of hitting her head. (*Id.*) Mrs. Fountain testified that, as of the time of trial, she continued to experience numbness in her right hand and was limited in her ability to lift and grip objects. She is no longer able to play the piano or sew due to the injuries sustained in the fall. (R. p. 217, line 22 – p. 219, line 3).

Mrs. Fountain further testified that she was out of work for approximately four months following the accident and was unable to return to her job as a Zone Manager at Walmart because she was unable to perform the lifting duties of the job. (R. p. 219, line 4 – p. 220, line 16). Mrs. Fountain incurred lost wages of approximately Twenty-One Thousand Dollars ($21,000.00) and medical expenses of approximately Seventy-Thousand Dollars ($70,000.00). (R. p. 221, lines 2-9).

The injury caused a financial strain on Martha Fountain and her husband Curtis, who had to work extra hours as a truck driver in order to earn income to compensate for Mrs. Fountain's lost wages. (R. p. 233, lines 2-16). Prior to the accident, Mr. Fountain was planning to stop driving the truck as a result of a promotion Mrs. Fountain received while at Walmart. As a result of the accident, he was unable to stop driving the truck as planned. He testified that they "lost cars and everything else" due to the loss of Mrs. Fountain's income. (R. p. 237, line 10 – p. 238,

line 4). In addition, Mr. Fountain had to assist with Mrs. Fountain's care when he was not working given her surgeries and her inability to perform certain tasks for herself. (R. p. 231, line 21 – p. 233, line 25). The underlying litigation followed.

STANDARD OF REVIEW

"In an action at equity, this court can find facts in accordance with its view of the preponderance of the evidence." *Craft v. South Carolina Commission for the Blind*, 385 S.C. 560, 685 S.E.2d 625 (Ct. App. 2009) (*citing Doe v. Clark*, 318 S.C. 274, 276, 457 S.E.2d 336, 337 (1995). "However, this court is not required to disregard the findings of the trial court who saw and heard the witnesses and was in a better position to judge their credibility." *Tiger, Inc. v. Fisher Agro, Inc.*, 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1989).

ARGUMENT

The South Carolina appellate courts have "long recognized the principle of equitable indemnification." *Town of Winnsboro v. Wiedeman-Singleton, Inc., et al.,* 307 S.C. 128, 414 S.E.2d 118 (1992). "'Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party. A right to indemnity may arise by contract (express or implied) or by operation of law as a matter of equity between the first and second party.'" *Jourdan v. Boggs/Vaughn Contracting, Inc.*, 324 S.C. 309, 312, 476 S.E.2d 708, 710 (Ct. App. 1996) (quoting *Town of Winnsboro v. Wiedman-Singleton (Winnsboro I)*, 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990); *aff'd* 307 S.C. 128, 414 S.E.2d 500, 502 (*Winnsboro II*)). "Indemnity is allowed when the act of the wrongdoer involves the innocent defendant in litigation or places him in a situation where it becomes necessary to incur expenses to protect his interest." *Id.* at 313, 476 S.E.2d at 710 (citing *Addy v. Bolton*, 257 S.C. 28, 183 S.E.2d 708 (1971)).

"The damages which can be claimed under equitable indemnity may include the amount the innocent party must pay to a third party because of the at-fault party's breach of contract or negligence as well as attorney fees and costs which proximately result from the at-fault party's breach of contract or negligence." *See id.* 307 S.C. at 130, 414 S.E.2d at 120. To recover on its equitable indemnification claims against Tippins-Polk, Wildevco was required to show that: 1) Tippins-Polk was at fault in causing the Fountains' damages; 2) Wildevco had no fault for the Fountains' damages; and 3) Wildevco incurred expenses that were necessary to protect its interest in defending against the Fountains' claims. *Stoneledge at Lake Keowee Owners' Ass'n v. Clear View Constr., LLC*, 413 S.C. 615, 625, 776 S.E.2d 426 (Ct. App. 2015) (citing *Inglese v. Beal*, 403 S.C. 290, 299, 742 S.E.2d 687, 692 (Ct. App. 2013); *Walterboro Cmty. Hosp. v. Meacher*, 392 S.C. 479, 485, 709 S.E.2d 71, 74 (Ct. App. 2011)).

Where, as here, a party seeking equitable indemnification settles a claim brought against it by a third-party, the party may recover the cost of settling a case if it makes the following showing: (1) the settlement is bona fide, without fraud or collusion by the parties; (2) the decision to settle is a reasonable means of protecting the innocent party's interest; and (3) 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." *Otis Elevator v. Hardin Constr. Co. Group*, 316 S.C. 292, 297, 450 S.E.2d 41, 44 (1994) (internal citation omitted). In making this showing, Wildevco was not required to prove the Fountains' actual ability to recover the amount paid in settlement so long as Wildevco proved that it was *potentially* liable to the Fountains. *Id.* (emphasis added). Here, the trial court properly concluded that Wildevco established all three elements required to support its claim for equitable indemnification against Tippins-Polk and, further, made the requisite showing to recover the cost of settling the underlying case with the

Fountains. As the trial court properly entered judgment against Tippins-Polk and in favor of Wildevco, this Honorable Court should affirm the judgment.

ARGUMENT

I. THE TRIAL COURT PROPERLY FOUND THAT TIPPINS-POLK WAS AT FAULT AND THAT WILDEVCO MET ITS BURDEN OF PROVING THAT IT WAS WITHOUT FAULT IN CAUSING THE FOUNTAINS' DAMAGES.

Regarding Wildevco, Tippins-Polk first argues that the trial court erred in finding that Respondents Wildevco and Fred's were without fault in causing the Fountains' damages in the underlying action.[2] (App.'s Br., p. 19). Tippins-Polk is incorrect. The only cognizable evidence presented at the trial of this matter unequivocally proved that Tippins-Polk was solely at fault for the Fountains' damages. Thus, the trial court properly found that Fred's and Wildevco were without any fault for the Fountains' damages and this Honorable Court should affirm the trial court's ruling.

Tippins-Polk does not challenge the trial court's findings that it was at fault in causing the Fountains' damages or that Wildevco incurred expenses that were necessary to protect its interests in defending against the Fountains' underlying claims. Nor does Tippins-Polk challenge the trial court's findings that the settlement reached between the Fountains and Wildevco was bona fide, that it was a reasonable means of protecting Wildevco's interests, or that it was reasonable in light of the Fountains' damages and the risk and extent of Wildevco's exposure if the Fountains' claims were tried. Rather, Tippins-Polk contends that the trial court erred in finding that Wildevco was without fault in causing the Fountains' damages because there was "overwhelming" evidence that established that Wildevco was at least one percent (1%)

[2] The first issue raised by Tippins-Polk in its Brief is that there existed no special relationship between Tippins-Polk and Fred's that would give rise to an equitable indemnification claim by Fred's. As this issue does not relate to Wildevco, Wildevco presents no argument herein. Wildevco notes, however, that the trial court properly found that a special relationship existed between Tippins-Polk and Fred's to support Fred's claim against Tippins-Polk. (*See* R. p. 273, line 19 – p. 274, line 11; p. 275, lines 18-23; p. 410, lines 10-14; p. 415, lines 9-17).

at fault for the Fountains' injuries. (App.'s, Br. p. 19). Tippins-Polk is incorrect as the testimony of Wildevco's witnesses established, and the trial court properly found, that Wildevco acted reasonably at all times and did not have actual or constructive knowledge of Tippins-Polk's construction defect that caused the accident.

Tilden Hilderbrand, the civil engineer who Wildevco hired to prepare the site plans for the subject Fred's construction project, testified that the site plans as drawn called for the front edge of the sidewalk where Martha Fountain tripped to be flush with the asphalt pavement of the parking lot such that there should have been no elevation change between the pavement and the sidewalk and no handicap curb ramp. (R. p. 243, line 5 – p. 247, line 24; R. p. 264, lines 2-18). Had the asphalt been poured flush with the sidewalk in accordance with the site plans, there would not have existed a trip hazard to cause Martha Fountain's fall.

Hilderbrand further testified that although the architectural plans included a handicap curb ramp, the architectural plans are drawn prior to the civil engineer determining the site elevations and, as such, the site plans govern the height of the sidewalk. (R. p. 246, lines 10-18; R. p. 266, lines 3-11). Mr. Hilderbrand unequivocally testified that the sidewalk as constructed by Tippins-Polk did not comply with the site plans and was not proper. (R. p. 247, line 6 – p. 248, line 5; p. 250, lines 2-9; p. 267, line 24 – p. 268, line 3). Further, Mr. Hilderbrand testified that he has no recollection of Tippins-Polk contacting him regarding any discrepancy discovered at the site or on the drawings, as Tippins-Polk was required to do if it determined a discrepancy existed or there was any question regarding the plans. (R. p. 248, line 21 – p. 249, line 8).

Tad Barber testified that Wildevco hired Tippins-Polk, in part, because it constructed Fred's stores in the past. (R. p. 275, lines 18-23). He testified that Wildevco considered Tippins-Polk to be an expert in being able to produce the final product, *i.e.* the completed Fred's

store and parking lot, and that Wildevco hired Tippins-Polk for its expertise and ability to interpret plans and building codes. (R. p. 278, lines 4-11). Mr. Barber further testified that at no time prior to Martha Fountain's accident was he aware that the site plans called for the sidewalk area where Mrs. Fountain tripped to be flush with the parking lot pavement as he was not trained to read and interpret site plans and reasonably relied on Tippins-Polk to do so. (R. p. 278, lines 4-11; p. 279, lines 10-23). Further, Mr. Barber was not qualified and did not have the ability to determine whether or not the subject sidewalk area complied with building codes or standards, or the site plans. (R. p. 271, lines 12-20; p. 279, lines 10-23).

The sole safety expert who provided testimony at trial, J. Steven Hunt, testified on behalf of Wildevco and Fred's. He testified that the subject sidewalk was designed properly; further, he testified that the site plans called for the front edge of the sidewalk where Martha Fountain tripped to be flush with the parking lot pavement and, accordingly, did not call for the installation of a curb ramp. (R. p. 324, lines 9-22; p. 326, lines 8-16; p. 327, lines 15-16). Mr. Hunt also testified that, although Tippins-Polk should have constructed the subject front edge of the sidewalk to be flush with the parking lot pavement, the sidewalk as constructed was nevertheless defective and did not meet the applicable building code, nor did it comply with the architectural plans that called for painting of the front sidewalk edge. (R. p. 330, line 21 – p. 333, line 25). Additionally, while Tippins-Polk should not have constructed the subject sidewalk to include a curb ramp, the curb ramp as constructed was defective, which may have affected Mrs. Fountain's walking path on the date of the incident. (R. p. 332, line 19 – p. 333, line 16). Specifically, Hunt testified that the flare of the curb ramp was too long and, consequently, protruded into the walking zone. He further indicated that the ramp was "very wavy and irregularly constructed...the important part about it is if it had been two foot rather than 48

inches, you know, the flare would have been back here and half the distance, which might have made a difference. It might have taken it out of her path that day." (*Id.*)[3] Additionally, Mr. Hunt testified that Wildevco did not have the specialized knowledge that would have enabled it to discern the foregoing construction defects nor did it have any duty to hire anyone other than Tippins-Polk to inspect the property to ensure that it complied with the applicable plans. (R. p. 337, lines 13-20; p. 357, lines 14-22). Finally, Mr. Hunt testified that the foregoing construction defects directly caused Martha Fountains' fall. (R. p. 337, line 21 – p. 338, line 7).

Tippins-Polk produced no expert testimony or other evidence to rebut the above testimony except for the self-serving testimony of the owner of Tippins-Polk. As such, there is no question that the trial court properly found that Tippins-Polk was solely at fault, and that Wildevco was entirely without fault, in causing the Fountains' injuries.

A. Although without fault for the Fountains' injuries, Wildevco proved that it was potentially liable to the Fountains for their underlying premises liability claims.

In it undisputed that the Fountains' underlying claims against Wildevco arose under a theory of premises liability. Tippins-Polk apparently acknowledges that Wildevco was not required to prove that it would have actual liability in the underlying case but, was only required to show that it was potentially liable to the Fountains. Tippins-Polk argues that the trial court failed to properly analyze any potential liability of Wildevco under South Carolina premises liability law. This argument, too, fails as the record shows that the trial court properly assessed

[3] Tippins-Polk suggests that because Barber testified that he did not know that the curb was shorter than it should have been, he necessarily conceded that the construction of a curb was proper; this claim is without merit. (App.'s Br., p. 10 at footnote 3). As previously discussed, Barber was not aware at any time prior to Martha Fountain's accident that the site plans called for the sidewalk area where Mrs. Fountain tripped to be flush with the parking lot pavement as he was not trained to read and interpret site plans and reasonably relied on Tippins-Polk to do so. (R. p. 278, lines 4-11; p. 279, lines 10-23). Further, Mr. Barber was not qualified and did not have the ability to determine whether or not the subject sidewalk area complied with building codes or standards, or the site plans. (R. p. 271, lines 12-20; p. 279, lines 10-23).

the facts of the underlying case and concluded that Wildevco was potentially liable to the Fountains.

In South Carolina, "'[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...' 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.'" *O'Leary-Payne v. R.R. Hilton Head, II, Inc.*, 371 S.C. 340, 348, 638 S.E.2d 96, 100 (Ct. App. 2006) (quoting *Bruno v. Pendleton Realty Co.*, 240 S.C. 46, 50–51, 124 S.E.2d 580, 582 (1962)). Additionally, to recover damages for injuries caused by a dangerous or defective condition on a storekeeper's premises, a plaintiff must show either (1) that the injury was caused by a specific act of the defendant which created the dangerous condition; or (2) that the defendant had actual or constructive knowledge of the dangerous condition and failed to remedy it. *Wintersteen v. Food Lion, Inc.*, 344 S.C. 32, 35, 542 S.E.2d 728, 729 (2001) (internal citations omitted).

The Fountains alleged in their underlying negligence claims, *inter alia*, that Wildevco was negligent "in failing to take reasonable precautions to avoid an unsafe condition from existing at said store" and "in such other particulars that the evidence may establish." (Plaintiffs' Complaint, R. p. 145). In support of their claims, Plaintiffs retained an expert witness, Bryan Durig, Ph.D., P.E., to testify that the curb ramp on which Martha Fountain tripped was defective and that the defect was the proximate cause of the Fountains' injuries. (Griffith Depo., R. p. 457, lines 2-16). Based in part on this opinion, as well as the opinion of Fred's and Wildevco's safety

expert, Mr. Hunt, expert E. Mitchell ("Mitch") Griffith concluded that it was reasonable for Fred's and Wildevco "to try and protect their interest...from getting an adverse verdict against them" by reaching a settlement with the Fountains. (*Id.* at R. p. 456, lines 7-11).

Wildevco hired Tippins-Polk to construct the premises and, as such Tippins-Polk was Wildevco's servant as it relates to the construction and thereby potentially liable for the negligence of Tippins-Polk. Thus, contrary to Tippins-Polk's contention that the only potential liability of Wildevco was whether it had actual or constructive notice of the defect, Wildevco could also have been found to be liable based on the negligence of its servant, Tippins-Polk pursuant to the doctrine of *respondeat superior*. *See Rock Hill Telephone Co., Inc. v. Globe Comms., Inc.*, 363 S.C. 385, 391, 611 S.E.2d 235, 238 (2005) ("'A person who delegates to an independent contractor an absolute duty owed to another person remains liable for the negligence of the independent contractor just as if the independent contractor were an employee...' A landlord who undertakes repair of his property by use of a contractor has a nondelegable duty to see that the repair is done properly.") (internal citations omitted). *See also Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 57, 398 S.E.2d 500, 503 (Ct. App. 1990), *aff'd*, 307 S.C. 128, 414 S.E.2d 118 (1992).

In *Otis Elevator v. Hardin Constr. Co. Group*, Hardin Construction argued that its subcontractor Otis Elevator was not entitled to indemnity because "the only basis of [the plaintiff's] claims were . . . the alleged acts and omissions of Otis [Elevator] alone." The Supreme Court of South Carolina correctly found that this argument lacked merit because the plaintiff's allegations against Otis Elevator were not determinative of whether Hardin Construction was required to indemnify Otis Elevator; "'rather, such a determination was based on the evidence and the facts found by the fact finder.'" 316 S.C. 292, 295-296, 450 S.E.2d 41,

43 (1994) (quoting *Griffin v. Van Norman*, 302 S.C. 520, 524, 397 S.E.2d 378, 380 (Ct. App. 1990)). Further, although the plaintiff in *Otis Elevator* alleged, among other things, that Otis Elevator was negligent in "'failing to provide an attendant or someone to oversee the use of the elevator,'" the evidence showed that Hardin Construction, not Otis Elevator, had the duty under their agreement to "'provide a competent operator'" for the elevator and Hardin Construction failed to provide one. *Id.* at 296, 450 S.E.2d at 43.

Similarly, in the present case, Tippins-Polk had a duty to construct the premises in accordance with the applicable plans and standards, and free of latent defects, and its breach of that duty was the sole and proximate cause of the Fountains' injuries, as correctly determined by the trial court. (R. p. 427, line 18 – p. 428, line 10; p. 429, line 14 – p. 430, line 6; p. 433, lines 7-11; Order of judgment, R. pp. 24-25). Because the Fountains sued only Fred's and Wildevco, and not Tippins-Polk, Wildevco was potentially liable to the Fountains for the fault of its servant, Tippins-Polk. Therefore, the trial court properly found that Wildevco, which was without fault in causing the Fountains' injuries, is entitled to equitable indemnity from Tippins-Polk, including indemnity for the amount paid to the Fountains in settlement as the settlement was "reasonable in light of the risk and extent of Wildevco and Fred's exposure if the Plaintiffs' underlying claims proceeded to trial." (R. pp. 24-25). Further, the trial court's findings in this regard clearly evidence its analysis under the rubric of South Carolina premises liability law. (*Id.*) Based upon the foregoing, there is no question that Wildevco met its burden of proving that it was *potentially* liable to the Fountains for the negligence of Tippins-Polk in failing to construct the premises in accordance with the applicable drawings and plans and for Tippins-Polk's "[breach of] its contractual obligation and duty of care to construct the premises free of latent defects," all of which caused the Fountains injuries. (*Id.* at p. 24).

1. Tippins-Polk is incorrect that potential liability equates to fault.

Tippins-Polk asserts that Wildevco cannot be without fault in causing the Fountains' injuries if it was also "potentially liable" for the Fountains' underlying claims. This assertion is erroneous. Indeed, the very purpose of a claim for equitable indemnification is to permit a party such as Wildevco, who is forced to defend against claims due to the fault of a third-party, to recover in equity from the third-party. In order to establish its claim for equitable indemnification, Wildevco was required to prove potential liability to the Fountains. Upon Wildevco's satisfaction of that element, Tippins-Polk cannot then argue that such potential liability consequently renders Wildevco at fault. To adopt Tippins-Polk's circular logic would effectively destroy the well-established right in South Carolina to recover equitable indemnity from the at-fault party and undermine decades of South Carolina jurisprudence. Thus, the Court should reject Tippins-Polk's argument and affirm the judgment of the trial court.

B. The trial court properly concluded that the trip hazard created by Tippins-Polk was a latent defect that Wildevco could not reasonably have discovered.

Tippins-Polk next attempts to create a conflict in the trial court's ruling based on the court's use of the term "latent defect." Specifically, Tippins-Polk argues that South Carolina courts have 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." (App.'s Br., p. 27). Based on this definition, and the trial court's conclusion of law that Tippins-Polk failed to keep the premises free from latent defects, Tippins-Polk asserts that the court necessarily found as a matter of law that Wildevco knew or should have known of the construction defect. This argument completely ignores the trial court's analysis and is specious. The trial court expressly found that:

> Wildevco was without fault and was an innocent party with regard to the construction of the Fred's premises and its inspection and maintenance of the premises. Wildevco did not breach any duty owed to Mrs. Fountain in its actions with regard to the construction and, thereafter, the inspection and maintenance of the Fred's facility as the defects were such that could not reasonably have been discovered by Wildevco.

(R. p. 24, para. 3).

Thus, the trial court used the term "latent defect" in the context that the small elevation was a defect that was not obvious and could not reasonably have been discovered by Wildevco. The trial court's reference in this regard is consistent with the applicable law, which unquestionably provides that "[a] merchant has a duty to warn a customer 'only of latent or hidden dangers of which the [merchant] has knowledge or should have knowledge.'" *Larimore v. Carolina Power & Light,* 340 S.C. 438, 445, 531 S.E.2d 535, 538 (Ct. App. 2000) (cited by *Lynch v. Carolina Self Storage Centers, Inc.*, 409 S.C. 146, 162, 760 S.E.2d 111, 120 (Ct. App. 2014)). It does not follow that because the trial court referred to the trip hazard as a "latent defect," it necessarily concluded that Wildevco had actual or constructive knowledge. Indeed, the ruling of the trial court is clear and expressly finds no evidence of actual or constructive notice on the part of Wildevco. Simply put, Tippins-Polk misconstrues the trial court's ruling and fails to set forth a basis for reversal; as such, this Honorable Court should affirm the judgment.

C. There is no evidence that Wildevco breached the standard of care it owed to the Fountains.

Tippins-Polk's argument that Wildevco was at least 1% at fault for the Fountains' injuries rests largely on the proposition that as owner of the subject premises, under whose control the subject parking lot, curb, and sidewalk remained, Wildevco breached its common law

duty to Martha Fountain to inspect the premises for tripping hazards. (App.'s Br., p. 28). This argument also fails to establish reversible error.

Mr. Hunt, as well as the trial court, acknowledged that Wildevco had a duty to inspect the premises as part of its obligation to exercise ordinary care to maintain the premises in a reasonably safe condition.[4] (R. p. 355, line 24 – p. 356, line 13; p. 394, line 18 – p. 396, line 17). However, no evidence was presented that such duty included inspecting the premises for the defects at issue in the present matter, *i.e.* a sidewalk curb and curb ramp that failed to comply with the site plans and applicable standards in such a manner that would be imperceptible to someone without specialized knowledge and skill. As set forth above, a merchant has a duty to warn a customer "only of latent or hidden dangers of which the [merchant] has knowledge or should have knowledge." *Larimore,* 340 S.C. at 445, 531 S.E.2d at 538. Mr. Hunt, testified that "an ordinary person at a store level conducting a reasonable inspection" would not be able to identify the subject curb ramp as a tripping hazard or as a building code violation as it was a subtle defect. (R. p. 370, lines 12-18). Further, Mr. Hunt testified that Wildevco and Fred's did not have the "specialized knowledge and skill" that would have allowed them to discover the defect. (R. p. 337, lines 13-20; p. 357, lines 14-2).

Contrary to Tippins-Polk's contention, neither Wildevco nor Fred's had a duty to hire a safety consultant or anyone other than Tippins-Polk to inspect the premises to ensure that it complied with the applicable plans and standards. (R. p. 337, lines 6-12; p. 357, lines 14-22; p. 371, lines 18-21; p. 394, line 18 – p. 396, line 17). Unquestionably, expert testimony is required

[4] Tippins-Polk erroneously states that Mr. Hunt 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*." (App.'s Br., pp. 28-29). Precisely to the contrary, Mr. Hunt testified that Wildevco did not have the specialized skill to discern the condition that caused Mrs. Fountain's fall, that it did not have a duty to hire anyone else to inspect the property for such a condition and that it properly relied on Tippins-Polk to construct the subject sidewalk free of any such defects. (R. p. 337, lines 6-20; p. 355, line 24 – p. 356, line 13; p. 357, lines 14-22).

to establish such a duty. *See Watson v. Ford Motor Co.*, 389 S.C. 434, 699 S.E.2d 169 (2010) (expert evidence is required where a factual issue must be resolved with scientific, technical, or any other specialized knowledge); *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 351 S.C. 459, 472, 570 S.E.2d 197, 203 (Ct. App. 2002) (noting expert testimony required to establish both the standard of care and defendant's failure to conform to the standard). Notwithstanding, Tippins-Polk did not and could not present any such evidence. In fact, the only cognizable evidence presented on the issue was the testimony of Wildevco and Fred's safety expert, Mr. Hunt, the only expert presented at trial, who testified that no such duty existed and that Wildevco and Fred's relied on Tippins-Polk to construct the premises according to the applicable plans and standards. (R. p. 337, lines 6-12; p. 355, line 24 – p. 356, line 13; p. 357, lines 14-22). The trial court correctly observed in response to a directed verdict motion by Tippins-Polk that Fred's and Wildevco's common law duty to inspect the premises for tripping hazards did not "include[] looking for latent defects which [were] not in the ordinary capacity to know about...that's why they employ engineers and architects." (R. p. 390, line 14 – p. 391, line 10). Further, Tippins-Polk cited no South Carolina case law that "requires a landowner or lessee/lessor to go out and to make sure that the contractors complied with all the site plans, architectural plans, and/or building codes." (R. p. 395, lines 1-6). Tippins-Polk's attempt to create a duty where none exists is futile. As such, this Honorable Court should affirm the trial court's judgment.

D. There is no evidence that Wildevco provided defective plans to Tippins-Polk.

In its continued attempt to create reversible error, Tippins-Polk next argues that Wildevco provided defective plans to it and suggests that the plans caused it to build the premises to include a construction defect. Wildevco hired architectural firm Christopher Booker &

Associates, P.C. and civil engineering firm Hass & Hilderbrand, Inc. to provide the necessary architectural drawings and site plans, respectively, for the subject Fred's project. Although Mr. Hilderbrand believed the site plans were clear in regard to the subject curb ramp, he testified that the two lines depicted on the plans in front of each entry door "could be" confusing. (R. p. 250, lines 14-25). However, he further testified that, pursuant to the instructions on the site plans, Tippins-Polk was to notify him if it discovered any discrepancies at the site or on the drawings and he had no recollection of Tippins-Polk ever contacting him with any question or concern regarding the site plans. (R. p. 248, line 6 – p. 249, line 8). Notably, Rett Polk testified that he never called the engineer in regard to the site plans. (R. p. 417, lines 3-9). Further, Mr. Hilderbrand testified that, although the architectural drawings depicted a curb ramp, those drawings were, as is customary, prepared prior to the civil engineer's determination of the site elevations and preparation of the site plans. (R. p. 246, lines 10-18). Given the elevations once determined, the site plans were prepared such that they dictated no elevation at the front edge of the sidewalk where Mrs. Fountain tripped, *i.e.* the subject sidewalk area should have been flush with the parking lot pavement. (R. p. 243, line 5 – p. 247, line 24; p. 264, lines 2-18). Hilderbrand also acknowledged that, between the site plans and the architectural drawings, the site plans governed the height of the sidewalk curb. (R. p. 246, lines 10-18).

Tad Barber testified that he "suppose[d]" the differences between the architectural plans and the site plans "could cause" some confusion. (R. p. 280, line 24 – p. 281, line 5). However, it is undisputed that Mr. Barber does not have the specialized skill or knowledge that would enable him to render an opinion on whether the drawings or plans were defective and, in any event, again, there is no evidence that Tippins-Polk contacted the engineer regarding a perceived

a perceived discrepancy in the plans. (R. p. 271, lines 12-20; p. 279, lines 10-23; p. 290, lines 16-19; p. 337, lines 6-20; p. 355, line 24 – p. 356, line13; p. 357, lines 14-22; p. 417, lines 3-9).

Rett Polk testified that that he believed that, like the architectural drawings, the site plans called for the installation of a curb ramp because it included a standard curb ramp detail on the plans and it "shouldn't have been on the plan" if the engineer did not want it installed and that he had "never heard of" plans that contained details on them that did not apply to the pertinent job ("[t]hat doesn't happen"). (R. p. 402, line 19 – p. 403, line 5; p. 409, lines 6-8; p. 417, lines 3-4). However, on cross-examination, Mr. Polk testified that the architectural plans themselves included typical handrail ramp details despite the fact that Tippins-Polk did not install any such handrails. (R. p. 430, line 23 – p. 431, line 13). Therefore, his testimony was in itself contradictory.

None of the above testimony relied upon by Tippins-Polk establishes that the architectural or site plans were insufficient or defective. Tippins-Polk presented no expert testimony to support this proposition and produced no evidence whatsoever that potential "confusion" renders the plans insufficient or defective. The trial court considered the testimony relied upon by Tippins-Polk to support its contention that the plans were defective, the trial court saw and heard the testimony of the witnesses in this matter and was in the best position to judge their credibility. *Craft v. S.C. Comm'n for Blind*, 385 S.C. 560, 685 S.E.2d 625 (Ct. App. 2009). Moreover, and in any event it, was incumbent upon Tippins-Polk to ensure that the premises were constructed in accordance with the plans and to seek additional information as necessary to properly construct the premises in accordance with the plans. The trial court properly found that it failed to do so, thereby causing the Fountains' damages. Therefore, this Honorable Court should affirm the judgment.

E. There is no evidence that Wildevco negligently tasked Barber with managing the subject construction project and the trial court did not make any such finding.

Tippins-Polk contends that the trial court's findings of fact establish that Wildevco was at fault in failing to hire someone qualified to act as Wildevco's construction manager to oversee the subject Fred's project. Tippins-Polk is incorrect. The trial court correctly concluded that Tad Barber lacked the knowledge and expertise to identify the latent construction defects in the premises. However, it did not conclude that Wildevco had a duty to employ someone to inspect for and identify such defects.

Tippins-Polk mistakenly assumes that the trial court implicitly found that Tad Barber was not qualified to oversee the project because he had no construction, engineering, or architectural background; however, this assumption is erroneous. The court's finding that Mr. Barber lacked the requisite knowledge and expertise to discover the construction defects does not compel the conclusion that Mr. Barber was unqualified to manage the construction project as Tippins-Polk suggests. In fact, the trial court specifically noted in trial that Wildevco hired Tippins-Polk as well as the other entities involved in the construction and/or design of the premises based upon their specific knowledge in the requisite areas. (R. p. 391, lines 2-10). That Tippins-Polk here argues that Wildevco was required to hire someone with construction knowledge and experience to ensure that it as the general contractor (with expertise in the area) performed its job correctly is patently unreasonable and unsupported by the law.

In short, Tippins-Polk cannot spontaneously create a duty where none exists, particularly when it presented no evidence of any kind to support such a conclusion. Based upon the foregoing, this Honorable Court should affirm the trial court's finding that Wildevco was without fault and reasonably relied on Tippins-Polk as the general contractor to ensure that the premises was built in accordance with the drawings and site plans, free from latent defects.

F. The trial court properly excluded evidence of the prior incident at the Fred's in Varnville, South Carolina.

Tippins-Polk contends that the trial court erred in excluding evidence of a prior trip and fall incident that allegedly occurred at the Fred's store located in Varnville, South Carolina three (3) months prior to Martha Fountain's subject fall at the Williston, South Carolina Fred's location. Although in Wildevco's estimation, the trial court's evidentiary ruling in this regard does not have any bearing on the issues on appeal as to Wildevco, in the event that this Honorable Court deems otherwise, the trial court correctly excluded the prior Varnville incident. Rett Polk testified that the construction of the Varnville store involved a different architect, a different site plan engineer, and that the site plans were different from those at issue in the present action. (R. p. 407, line 21 – p. 409, line 3). As such, the trial court properly exercised its discretion to exclude evidence of the prior Varnville incident as it was wholly irrelevant to any fact at issue in the present matter.

G. The settlement agreement between the Fountains, Fred's and Wildevco does not acknowledge liability on the part of Wildevco.

Tippins-Polk next argues that, by virtue of the language of the Full and Final Confidential Settlement, Release of All Claims, and Indemnity Agreement ("Settlement Agreement") between the Fountains, Fred's and Wildevco, Wildevco admitted common liability for the Fountains' injuries and, as such, Wildevco is estopped from taking an alternate position in the same legal proceeding, *i.e.* that it was without fault in causing the Fountains' injuries for purposes of its equitable indemnification claim. As an initial matter, and as set forth in Wildevco's Motion to Exclude Matter from Record on Appeal, although the parties and witnesses referenced the Settlement Agreement several times throughout the trial of this matter, it was never offered nor introduced into evidence. (R. p. 379, line 22 – p. 380, line 2; p. 381, line 11 – p. 385, line 5; p. 397, lines 2-12; p. 398, lines 9 -18). As such, it is not a proper matter for inclusion in the record

on appeal. Notwithstanding, the language of the Settlement Agreement is immaterial to Wildevco's entitlement to recovery under the theory of equitable indemnification. Thus, the trial court correctly found that Wildevco was entitled to equitable indemnification from Tippins-Polk as Tippins-Polk was solely responsible for the Fountains' injuries.

The Settlement Agreement reads in pertinent part:

> Plaintiffs agree 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, joint obligors or indemnitors ("Joint Tortfeasors") for any damages or injury arising out of or relating to the Incident. Additionally, this Agreement and the payment made by or on behalf of Wildevco and Fred's pursuant to Section 1 of this Agreement operate 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. As such, this Agreement discharges ***any*** common liability of Wildevco and Fred's and ***any*** Joint Tortfeasors, including Tippins-Polk Construction, Inc., to Plaintiffs.

(R. p. 681) (emphasis added). Nothing in the foregoing paragraph may be read as an admission of common liability. Quite the opposite, the term "joint tortfeasors" is defined simply to reference all parties who ***may*** be liable to the Fountains. Just as Wildevco, for purposes of its equitable indemnification claim against Tippins-Polks, was *potentially* liable to the Fountains while also having no fault for their injuries, the Settlement Agreement's release of such potential liability, along with that of any other actor, is neither an admission of nor determinative of liability on Wildevco's part.

Moreover, the Settlement Agreement expressly disclaims any liability on the part of Wildevco. Paragraph 8 of the Settlement Agreement provides:

> Plaintiffs understand and hereby agree that this Agreement is a compromise of a disputed claim, and that entry into this Agreement, the terms of this Agreement, any documents executed and delivered incident to this Agreement, and any actions taken in furtherance of this Agreement ***do not constitute and will not be***

deemed or construed as an admission of liability or wrongdoing, or of any position whatsoever in any respect, by Wildevco and Fred's, and that liability or wrongdoing is expressly denied by Wildevco and Fred's.

(R. p. 680) (emphasis added). As such, it is clear that Wildevco did not intend to and, in fact, did not acknowledge in the Settlement Agreement any liability for the Fountains' damages.

Tippins-Polk fails to provide any case law supporting its argument that Wildevco, by drafting the Settlement Agreement in a manner that permitted it to seek a claim of contribution against Tippins-Polk, acted with unclean hands. Wildevco was well within its right to draft the Settlement Agreement in a manner that allowed it to pursue a potential claim of contribution against Tippins-Polk, as a party may plead alternate theories for relief without being found with unclean hands. *See Verenes v. Alvanos*, 387 S.C. 11, 14, 690 S.E.2d 771, 772 (2010) (reviewing a case where Appellant's single cause of action alleges entitlement under the alternate remedies of equitable indemnity and contribution).

Further, Wildevco's settlement expert, Mitch Griffith, testified that a settlement does not equate to an admission of liability and that it was reasonable for Wildevco and Fred's to extinguish any liability of Tippins-Polk and any other potential joint tortfeasor to the Fountains in order to preserve any claim Wildevco or Fred's may have for contribution. (R. p. 458, lines 12-15).

Tippins-Polk's request that this Honorable Court apply meaning to the terms of the Settlement Agreement that contravene its clearly stated intent is misguided. The trial court properly found that Wildevco was without fault in causing the Fountains' injuries and this Honorable Court should affirm its findings.

H. There is no evidence of unclean hands on the part of Wildevco.

Tippins-Polk avers throughout its brief that Wildevco may not recover in equity against it because Wildevco has unclean hands. "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, 206-207, 678 S.E.2d 443, 457-458 (Ct. App. 2009) (internal citation omitted). As discussed more fully above, Tippins-Polk presented no cognizable evidence of fault on the part of Wildevco to the trial court; therefore, the trial court properly found that Wildevco was without fault in causing the Fountains' injuries. "The decision to grant equitable relief is in the discretion of the trial judge." *Id.* Based upon the foregoing, Wildevco cannot have unclean hands and this Honorable Court should affirm the trial court's judgment.

II. WILDEVCO'S COMPLAINT AGAINST TIPPINS-POLK SUPPORTS THE TRIAL COURT'S AWARD OF ATTORNEYS' FEES AND COSTS.

Tippins-Polk next asserts that the trial court erred by awarding relief that was not sought in Wildevco's Third Amended Third-Party Complaint ("Complaint") against Tippins-Polk. However, as set forth in Wildevco's Motion to Strike and Exclude Matter from Record on Appeal, Tippins-Polk failed to raise the issue prior to or during the trial of this matter and raised it for the first time in its Motion to Make Additional Findings and Motion to Reconsider and/or Amend pursuant to Rules 52(b) and 59(e), SCRCP; therefore, the issue was not preserved and is not properly before the Court for consideration. (R. p. 189, line 3 – p. 192, line 24; p. 390, line 8 – p. 399, line 24; p. 434, line 12 – p. 435, line 10; pp. 56 – 57). *See Bank of N .Y. v. Sumter Cnty.*, 387 S.C. 147, 159, 691 S.E.2d 473, 479 (2010) ("It is axiomatic that an issue cannot be raised for the first time in a post-trial motion."); *MailSource, LLC v. M.A. Bailey & Assocs.*, 356

S.C. 370, 374, 588 S.E.2d 639, 641 (Ct.App.2003) ("A party cannot raise an issue for the first time in a Rule 59(e), SCRCP[,] motion which could have been raised at trial.").

Should this Honorable Court find that the issue was properly preserved, it also is without merit as the damages awarded to Wildevco are supported by the allegations in its Complaint and, in any event, were properly sought in the Complaint. In its Complaint, Wildevco alleged as follows specifically in relation to its claim for equitable indemnification:

> If the allegations in the Plaintiff's Complaint are proven to be true, then the Third-Party Plaintiff is entitled to full and complete indemnity from the Third-Party Defendants for any and all liability imposed upon the Third-Party Plaintiff by virtue of the Third-Party Defendant's actions and/or omissions, including indemnity for the costs and attorneys' fees associated with defending this civil action against the claims of the Plaintiffs...

(R. pp. 164 – 165). Further, Wildevco prayed generally for relief as follows:

> WHEREFORE, the Defendant/Third-Party Plaintiff Wildevco, LLC prays for all relief requested in its Amended Answer to Plaintiff's Complaint and, further, for all relief requested in this Third Amended Third-Party Complaint, including judgment over and against the Third-Party Defendant for all or part of any verdict or judgment that may be recovered by the Plaintiffs directly or indirectly against the Defendant/Third-Party Plaintiff, together with costs and disbursements herein, as well as for all damages sustained by Defendant/Third-Party Plaintiff, including attorneys' fees and costs, and for such other and further relief as the court would deem just and proper.

(R. pp. 165 – 166). Thus, the Complaint sought recovery of all damages sustained by Wildevco, which included the amount paid to the Fountains as a result of the settlement between the parties. Tippins-Polk focuses only on the portion of the prayer that specifically requested relief resulting from an award or judgment issued in Wildevco's favor. It wholly ignores that the prayer for relief requested in addition "all damages sustained" by Wildevco and that it requested "such other and further relief as the court would deem just and proper." *Id.* Tippins-Polk points to no authority for the suggested proposition that Wildevco was required to expressly request recovery for settlement payments made to the Fountains. In short, as the relief granted to Wildevco was

sought and supported by the allegations of the Complaint, this Honorable Court should affirm the award. *See Mortgage Loan Co. v. Townsend et al.,* 156 S.C. 203, 152 S.E. 878 (1930) (pleadings must be liberally construed and where facts alleged warrant relief it is immaterial how narrow specific prayer may be if bill contains prayer for general relief). *See also Town of Winnsoboro v. Wiedeman-Singleton, Inc., et al.,* 307 S.C. 128, 130, 414 S.E.2d 120 (1992) ("The damages which can be claimed under equitable indemnity may include the amount the innocent party must pay to a third party because of the at-fault party's breach of contract or negligence as well as attorney fees and costs which proximately result from the at-fault party's breach of contract or negligence.")

III. THE TRIAL COURT PROPERLY GRANTED ATTORNEYS' FEES TO WILDEVCO AS THE FEES WERE SUPPORTED BY THE EVIDENCE AND WERE PROPERLY LIMITED TO FEES INCURRED IN DEFENDING THE UNDERLYING CLAIMS BY THE FOUNTAINS.

Finally, Tippins-Polk asserts in the alternative to reversal of the decision below that the trial court's award of attorneys' fees should be reversed because the court failed to apportion the recoverable amount of attorneys' fees incurred by Wildevco in defending the underlying action versus those that were related to the indemnification action and, thus, not recoverable. Specifically, Tippins-Polk alleges the Court improperly based its decision on speculation and conjecture in awarding fifty percent (50%) of the fees Wildevco designated as related to both the defense of the Fountains' claims and the prosecution of the subject indemnification claims. This claim, too, lacks merit as the Court properly awarded attorneys' fees that were the natural and direct consequence of Wildevco's defense of the Fountains' underlying claims. Thus, the Court should reject Tippins-Polk's argument and affirm the award of attorneys' fees and costs to Wildevco.

As Tippins-Polk acknowledges, Wildevco presented a detailed fee report, which

indicated which tasks were specific to defending the underlying claim, which were specific to pursuing the equitable indemnification claim and those tasks that related to both the defense of the underlying claim and the equitable indemnification claim.

Counsel for Wildevco testified that she and her co-counsel reviewed all of Wildevco's billing records to determine the tasks and accompanying fees for which reimbursement should be sought. (R. p. 569; p. 378, line 14 – p. 381, line 68; p. 386, line 6 – p. 387, line 15). Full reimbursement was sought for those fees that were attributable solely to the defense of the underlying claim. *Id.* Tasks that were performed solely for the purpose of pursuing the equitable indemnification claim were highlighted in yellow and no reimbursement was sought for those tasks. *Id.* With regard to tasks that were performed both for the defense of the underlying claim and the pursuit of the equitable indemnification claim, the entries were highlighted in blue and Wildevco sought reimbursement at fifty percent (50%) of the total fee charged. *Id.* Notably, the equitable indemnification claim and the underlying claims in Plaintiffs' action were so intertwined that Wildevco was not required to apportion the fees for tasks related to both claims. (R. p. 378, lines 22-25). Nonetheless, Wildevco requested reimbursement for only 50% of fees incurred for tasks performed that related both to the underlying claim and the equitable indemnification claim.

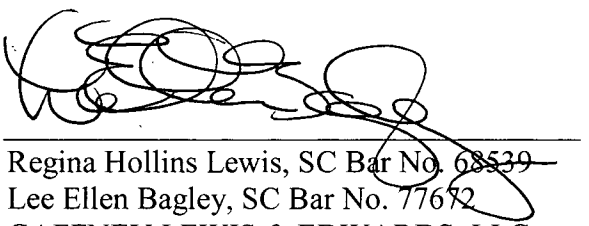
The trial court properly found that Wildevco incurred costs and expenses, including attorneys' fees, as a legal consequence of Tippins-Polk's negligent construction of the subject premises. Further, the requested fees were reasonable. (R. p. 569; p. 378, line 14 – p. 381, line 2; p. 386, line 6 – p. 387, line 15); *see also McCoy v. Greenwave Enters, Inc.*, 408 S.C. 355, 359, 759 S.E.2d 136, 138 (2014) (reasonable attorney's fees incurred in resisting the indemnified claim may be recovered in contractual or equitable indemnification). As conceded by Tippins-

Polk, mathematical certainty is not required in awarding attorney's fees, and the award was well within the reasonable discretion of the Court. Accordingly, Tippins-Polk fails to show reversible error and this Honorable Court should affirm the award of attorneys' fees and costs to Wildevco.

CONCLUSION

For the reasons set forth herein, Tippins-Polk fails to set forth any evidence of error by the trial court. Accordingly, this Honorable Court should affirm the judgment below.

Respectfully submitted,



Regina Hollins Lewis, SC Bar No. 68539
Lee Ellen Bagley, SC Bar No. 77672
GAFFNEY LEWIS & EDWARDS, LLC
3700 Forest Drive, Suite 400
Columbia, South Carolina 29204
803.790.8838 (telephone)
803.790.8841 (facsimile)

December 4, 2017

Attorneys for Respondent Wildevco, LLC