THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BARNWELL COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2017-000688

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.

APPELLANT'S MOTION TO RECONSIDER ORDER GRANTING IN PART AND DENYING IN PART RESPONDENT WILDEVCO, LLC'S MOTION TO STRIKE MATTER FROM RECORD ON APPEAL

WALL TEMPLETON & HALDRUP, P.A.

Morgan S. Templeton, Esquire
John J. Dodds, IV, Esquire
145 King Street, Ste. 300
Post Office Box 1200
Charleston, South Carolina 29402
843-329-9500
Attorneys for the Appellant

TO: THE HONORABLE JUDGES OF THE SOUTH CAROLINA COURT OF APPEALS:

COMES NOW the Appellant Tippins-Polk Construction, Inc. ("Appellant"), by and through its undersigned attorneys, respectfully moving this Honorable Court to alter or amend the November 29, 2017 Order granting Respondent Wildevco, LLC's ("Wildevco") motion to strike the settlement agreement from Appellant's designation of matter. The grounds for this motion are as follows: (1) the Court's Order does not delineate which section(s) of the settlement agreement are to be included into the record on appeal and which are to be stricken, and Appellant respectfully requests clarification of the ruling; and (2) if the Court has stricken the entire settlement agreement, despite counsel for Wildevco's consent that certain provisions are relevant and should be included into the record, Appellant respectfully requests the ruling be reconsidered as the settlement agreement was presented to the lower court within the meaning of Rule 210(c), SCACR.

On or about August 11, 2017, Appellant filed its Initial Brief, along with proof of service and Appellant's Designation of Matter to be Included in the Record on Appeal. On October 11, 2017, Wildevco filed a Motion to Strike Matter and Exclude Matter from Record on Appeal. Wildevco argued, inter alia, that Appellant's argument set forth in Section III of its Initial Brief was not preserved for appeal. Wildevco also argued that the settlement agreement reached between Plaintiffs and Wildevco and Respondent Fred's, Inc. (collectively "Respondents") should be stricken from the Record on Appeal because, "although the parties did reference it during testimony and argument during the trial of this matter [,]" it was never offered nor introduced into evidence. Therefore, Wildevco argued, it was not a proper matter for inclusion in the record on appeal.

Appellant submitted a response in opposition to Wildevco's motion, arguing that, while the settlement agreement was not entered into evidence, it was presented to the lower court within the meaning of Rule 210(c), SCACR. In response to this, Wildevco filed a reply in which it argues, in pertinent part, the following:

> In relation to the confidential Settlement Agreement between Plaintiff and Respondents . . . , Appellant's sole argument is that a limited section of the Settlement Agreement acknowledges that Respondents were liable for Plaintiff's injuries. While Wildevco disputes such argument, *Wildevco acknowledges that the subject section of the Settlement Agreement on which [Appellant] relies for this narrow argument is appropriate for inclusion in Appellant's Designation of Matters on Appeal*; however, Appellant improperly enlarged the scope of its Designation of Matters on Appeal by designating the entire Settlement Agreement, the overwhelming majority of which is wholly irrelevant to Appellant's appeal. As Appellant provides no basis whatsoever to support its argument that the remaining portions of the Settlement Agreement are relevant to the present appeal, this Honorable Court should exclude *such portions* from the record on appeal.

Wildevco's Reply to Appellant's Response to Motion to Strike at p. 4 (emphasis added).

On November 29, 2017, this Honorable Court issued an Order granting in part and denying in part Wildevco's Motion to Strike. The Order stated the following: "The motion to strike the settlement agreement from Appellant's designation of matter is granted because the agreement was not actually presented to the lower court. . . . The motion to strike is otherwise denied." Order at p. 1. The Court provided no additional clarification as to whether the entire settlement agreement, or merely only the sections to which Wildevco did not consent, were stricken from the record on appeal.

As referenced above, Wildevco clearly states in its Reply to Appellant's Response to Wildevco's Motion to Strike that it consents to allowing the following provision of the settlement agreement into the record on appeal:

> 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 and any Joint Tortfeasors, including Tippins-Polk Construction, Inc., to Plaintiffs.

See R. at p. 681 (Settlement Agreement at ¶ 11).

Appellant respectfully requests clarification from this Honorable Court as to whether this provision, which Wildevco consented to being included into the record, will not be stricken from the record on appeal. Wildevco's consent to permitting the above provision upon which Appellant relies to be included in the record on appeal is tantamount to a written stipulation and is binding upon Wildevco. Appellant respectfully requests the Court consider this stipulation and allow this provision to be included.

If the Order granting Wildevco's motion to strike applies to the entire settlement agreement, despite Wildevco's consent to include the above paragraph into the record, Appellant respectfully requests the Court reconsider its ruling. Rule 210(c), SCACR, states, in pertinent part, the following: "The Record shall not . . . include matter which was not presented to the lower court or tribunal." Id. Further, Rule 209(b), SCACR, states that "[a] party may not include any matter in

his Designation which is not relevant to the appeal." Id. The Supreme Court held in State v. Oxner, 391 S.C. 132 (2011), that "[a]ll this Court has ever required is that the questions presented for its decision must have been fairly and properly raised to the lower court and passed upon by that court." Id. at 134.

As an initial matter, the settlement agreement is undoubtedly relevant to the appeal. Not only is the agreement referenced throughout the trial transcripts and in Appellant's and Wildevco's briefs, but Judge Early used the monetary amount paid by Respondents in calculating the judgment entered against Appellant.[1] As the Court is well aware, the underlying action was one for equitable indemnity, wherein the damages recoverable by the indemnity plaintiff is the amount of damages sustained as a result of the indemnity defendant's tortious conduct. Therefore, the settlement agreement is relevant in this regard. Furthermore, a party may recover under equitable indemnity only if the party is without fault, i.e., the party has "clean hands." See Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 366 S.C. 53, 63 (Ct. App. 1999). In this regard, the language of the settlement agreement is relevant to Appellant's defense of unclean hands because, from the language of the settlement agreement, the intent was to relieve Respondents' liability for contribution as joint tortfeasors. The language of the above provision operates as a satisfaction and discharge of common liability of Respondents and any joint tortfeasors, including Appellant. Based on this language, it is clear that Respondents intended to extinguish the common liability among Respondents and Appellant in order to preserve Respondents' claim for contribution against Appellant. Respondents could not extinguish or discharge what did not exist. Wildevco

[1] Pursuant to the settlement agreement, Wildevco paid $250,000.00 to Plaintiff. Wildevco also produced affidavits of attorney's fees to the court totaling $55,418.30. Judge Early entered a judgment against Appellant on behalf of Wildevco for $305,418.30.

acknowledged it had common liability in Plaintiffs' injuries in the settlement agreement, and it should not be permitted to take the position that they have no liability for Plaintiffs' injuries pursuant to the doctrine of judicial estoppel.

Secondly, the settlement agreement was presented to the lower court. While the settlement agreement itself was not admitted into evidence, its existence was confirmed by the parties and by the lower court and it was referenced numerous times by all parties and the court in arguments and during examinations (including specifically the provision above indicating that Respondents were joint tortfeasors). As discussed above, Judge Early used the terms of the settlement agreement in entering judgment against Appellant. Furthermore, when Respondents moved to amend their complaint on the morning of trial in order to assert a contribution claim, counsel for Appellant opposed the motion and stated the following:

> But I'd like to get on the record my grounds for opposing this: Judicial estoppel. You know, they showed up on the date certain date . . . and sought a continuance, they settled the day before with the plaintiff. They knew at that point that this case was settled and contribution is obviously a cause of action they could pursue. . . . It's clearly judicial estoppel. They're now trying to take a different position the date of trial and assert another claim.

R. at p. 184; 4–12; p. 185: 4–6. In response to this argument, Judge Early said, "I understand." R. at p. 185; 11. Judge Early then heard arguments from counsel for Wildevco and denied the motion to amend the complaint, finding it "to not be timely, properly filed." R. at 188:18–19. Judge Early's indication that he understood Appellant's argument, and then subsequently ruling, constitutes the court "passing" upon these arguments. See State v. Oxner, 391 S.C. 132 at 134 ("All this Court has ever required is that the questions presented for its decision must have been fairly and properly raised to the lower court and passed upon by that court."). This argument was fairly and properly

raised throughout trial and was passed upon by the lower court.

Wildevco argues in its motion to strike and its reply to Appellant's response that the settlement agreement was never entered into evidence, and, therefore, it was not presented to the lower court. Something does not have to be entered into evidence for it to have been presented to the lower court. All that is required is that the issues were properly raised and that the court had an opportunity to decide the question presented. See Williamson v. SCE&G, 236 S.C. 101, 107–08 (1960). Counsel for Wildevco does not cite any law to the contrary. Appellant respectfully requests that this Court not rely on blanket statements that are misapplications of the law.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests clarification from this Honorable Court as to whether the provision indicating that Respondents were joint tortfeasors, which Wildevco consented to being included into the record, will not be stricken from the record on appeal. If the Order granting Wildevco's motion to strike applies to the entire settlement agreement, despite Wildevco's consent to include the above paragraph into the record, Appellant respectfully requests the Court reconsider its ruling.

Dated this 4th day of December, 2017.

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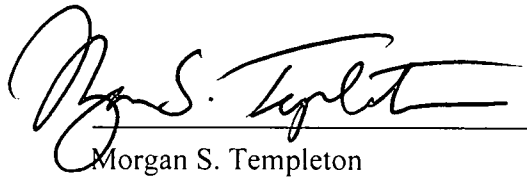
Respectfully submitted,

WALL TEMPLETON & HALDRUP, P.A.



Morgan S. Templeton
John J. Dodds, IV
Post Office Box 1200
Charleston, South Carolina 29402
(832) 329-9500
Morgan.Templeton@WallTempleton.com
John.Dodds@WallTempleton.com
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Of Whom Tippins-Polk Construction, Inc. is the Appellant.

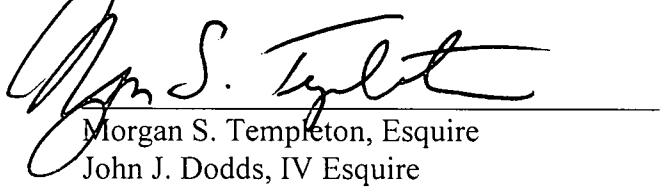
PROOF OF SERVICE

I, Morgan S. Templeton, of Wall Templeton & Haldrup, do hereby certify that I have served the Appellant's Motion to Reconsider Order on counsel for Respondents, by depositing the same in the United States Mail, properly posted on December 4, 2017 addressed as follows to counsel of record:

Lee Ellen Bagley, Esq.
Gaffney Lewis & Edwards
3700 Forest Drive, Suite 400
Columbia, SC 29204

Matthew C. LaFave, Esq,
Crowe LaFave, LLC
Post Office Box 1149
Columbia, SC 29202

WALL TEMPLETON & HALDRUP, P.A.



Morgan S. Templeton, Esquire
John J. Dodds, IV Esquire
145 King Street, Ste. 300
Post Office Box 1200
Charleston, South Carolina 29402
843-329-9500
Attorneys for the Appellant

Wall Templeton
ATTORNEYS

Morgan S. Templeton
Telephone: 843.329.9500 Ext. 209
Facsimile: 843.329.9501
Morgan.Templeton@WallTempleton.com

December 4, 2017

The Honorable Jerry Abbott Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29211

Re: *Martha M. Fountain v. Fred's Inc., et al.*
Civil Action No.: 2010-CP-06-101
Appellate Case No.: 2017-000688

Dear Mr. Kitchings:

Please find enclosed an original and six copies of Appellant's Motion to Reconsideration of Order relative to the above-referenced matter. Please file the original and return a filed-stamped copy to me in the envelope provided for your convenience.

By copy of this letter to all counsel of record, I am serving them with the enclosed Motion for Reconsideration.

Thank you for your time and attention to this matter.

Sincerely,

WALL TEMPLETON & HALDRUP, P.A.

Morgan S. Templeton

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