

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

RECEIVED
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SC Court of Appeals

Martha M. Fountain and Curtis Fountain Plaintiffs

v.

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

v.

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

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

RECORD ON APPEAL – VOLUME 1 OF 2

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STATE OF SOUTH CAROLINA
COUNTY OF BARNWELL
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NO: 2010-CP-06-00101

Martha M Et Al Fountain vs. Fred's Inc Et Al

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a),
SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy:
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; ☐ Statement of Judgment by the Court:

Order Granting Defs' Amended Motion to Amend Third-Party Complaint and Rescind Stipulation

Dated at Barnwell, South Carolina, this 3rd day of November, 2015.

Court Reporter:

5/1 G. Thomas Cooper, Jr.

PRESIDING JUDGE - G. Thomas Cooper, Jr.

This judgment was entered on the 6th day of November, 2015, and a copy mailed first class this 13th day of November, 2015, to attorneys of record or to parties (when appearing pro se) as follows:

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Constance B. Mansfield

Constance B. Mansfield – Deputy Clerk of Court

STATE OF SOUTH CAROLINA
COUNTY OF BARNWELL

Martha M. Fountain and Curtis Fountain,

Plaintiffs,

vs.

Fred's Inc. and Wildevco, LLC,

Defendants,

vs.

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

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

Civil Action No. 2010-CP-06-101

**ORDER GRANTING
DEFENDANTS' AMENDED MOTION
TO AMEND THIRD-PARTY
COMPLAINT
AND RESCIND STIPULATION**

FILED
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This matter came before the Court on September 9, 2015, upon Defendants Tad Barber, individually and d/b/a Wildevco, LLC's (hereinafter "Wildevco") Amended Motion to Amend Third-Party Complaint and Rescind Stipulation (hereinafter "Motion"). Lee Ellen Bagley appeared on behalf of Defendants Barber and Wildevco¹. Matt LaFave appeared on behalf of Defendant Fred's Inc. (hereinafter "Fred's"), which, as noted in Wildevco's Memorandum in Support of its Motion, joined in the Motion as Fred's also seeks to file an amended Third-Party Complaint. Thomas B. Boger appeared on behalf of attorney of record, Peden Brown McLeod, Jr., for Third-Party Defendant Tippins-Polk Construction, Inc. (hereinafter "Tippins-Polk") in opposition to the Motion.

Having duly considered the parties' arguments and submissions, and in view of the

¹ Defendants Barber and Wildevco's Motion to Dismiss Defendant Tad Barber, individually, was also heard on September 9, 2015. The Court granted the Motion, confirming its ruling it by Form 4 Order entered September 9, 2015. Accordingly, Mr. Barber is no longer a Defendant in this matter.

materials in the record, the Court orders as follows:

NATURE OF CASE AND PROCEDURAL HISTORY

The underlying action is a premises liability matter. Plaintiff Martha Fountain alleges that on March 10, 2010, as she was approaching the entrance to the Fred's store in Williston, South Carolina, she tripped on a portion of a handicap curb ramp in front of the store, which caused her to fall and sustain personal injury. Plaintiffs contend that Defendants Fred's Inc. and Wildevco (collectively, "Defendants") have a duty to provide a safe premises for patrons of Fred's, including Plaintiff Martha Fountain, and that Defendants breached that duty, proximately causing the injuries and damages she allegedly sustained as a result of the incident in question. Plaintiff Curtis Fountain asserts a loss of consortium claim.

The subject premises is owned by Wildevco and operated by Defendant Fred's, Inc. ("Fred's"). On August 1, 2012, with the consent of Plaintiffs, Defendants filed an Amended Answer and Third-Party Complaint against Tippins-Polk Construction, Inc. ("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. In their Third-Party Complaint, Defendants asserted causes of action for breach of agreement and/or warranties and negligence in connection with the construction of the subject Fred's store, seeking as relief in each of those causes of action indemnity or contribution from Tippins-Polk.

Thereafter, Tippins-Polk joined by Fourth-Party Complaint Southern Asphalt, LLC ("Southern Asphalt") and Rhoad's Excavating Services, LLC, which served as subcontractors on the construction project. Rhoad's Excavating Services, LLC has never appeared in this case, which resulted in an entry of default against it on July 16, 2013. The Court dismissed Tippins-Polk's Fourth-Party Complaint against Southern Asphalt by Order dated September 5, 2013;

however, Defendants were granted permission to amend their Third-Party Complaint to allege causes of action directly against Southern Asphalt as a Third-Party Defendant. Following a hearing on April 2, 2014, the Court granted Southern Asphalt's Motion for Summary Judgment as to Defendants' causes of action presented in the Amended Third-Party Complaint by Order filed July 17, 2014, as it found that Defendants did not have a contractual or other special relationship with Southern Asphalt that would support a claim or cause of action against it.

On October 8, 2013, during the exchange of written discovery between Defendants and Tippins-Polk, counsel for Tippins-Polk informed then-counsel for Defendants, Clarke McCants, that no written contract existed between the parties that related to the construction of the subject Fred's store. *See* Ex. "A" to Wildevco's Memorandum in Support of Motion ("Wildevco Memo."), Affidavit of Clarke McCants, at ¶ 4. As such, it appears that counsel for Tippins-Polk requested that Defendants limit their causes of action against Tippins-Polk to equitable indemnity and/or contribution, in the event of a verdict or judgment in favor of one or both of the Plaintiffs, as doing so would prevent the need for Tippins-Polk to depose Defendant Barber at that time. *Id.* Counsel for Defendants affirms that, based solely upon the parties' inability to locate a written contract for the subject construction and counsel for Tippins-Polk's representation that no written contract existed, Defendants entered a Stipulation as to Third-Party Claims against Tippins-Polk Construction, Inc. ("Stipulation") on October 8, 2013. *Id.*; *see also* Ex. "B" to Wildevco Memo., Stipulation.

Subsequently, former Defendant Barber located the operative Construction Agreement between Tippins-Polk and Wildevco. *Id.* at ¶ 5. Counsel for Defendants produced the Construction Agreement to counsel for Tippins-Polk and informed him that Defendants were

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withdrawing the Stipulation as the basis for its entry was premised solely upon the absence of a contract between the parties. *Id.*

On April 2, 2014, a hearing was held on a Motion for Summary Judgment filed by Tippins-Polk as to Defendants' causes of action for equitable indemnification and contribution. During the hearing, Defendants' counsel reiterated that the Stipulation was withdrawn based upon the discovery of the applicable Construction Agreement. *Id.* at ¶ 6. Following the hearing, the Court issued a ruling on June 3, 2014, denying the Motion² and noting that whether or not the Stipulation was withdrawn did not affect its ruling. *Id.* An Order confirming the Court's ruling has not yet been entered and the parties are currently in the process of attempting to resolve the outstanding issue(s) that delayed submission of the proposed Order to the Court. *See* Ex. A to Wildevco Memo., Affidavit, at ¶ 6, n. 2.

On July 24, 2014, subsequent to the Court's denial of Tippins-Polk's Motion for Summary Judgment, counsel for Tippins-Polk deposed Defendant Barber both in his individual capacity and as the Rule 30(b)(6) designee for Wildevco.

On November 3, 2014, based upon the discovery of the Construction Agreement and the Court's denial of Tippins-Polk's Motion for Summary Judgment, counsel for Defendants filed a Notice of Motion and Motion to Amend Third-Party Complaint³ to clarify and more specifically allege causes of action for equitable indemnification and breach of the Construction Agreement in addition to the initial causes of action for breach of agreement and/or warranties and negligence. *See* Ex. A to Wildevco Memo., Affidavit, at ¶ 8. Subsequent to the filing of the Motion, former counsel for Defendants, Clarke McCants, withdrew and was relieved as counsel

² The Court also denied separate motions by Plaintiff and Tippins-Polk to sever the third-party claims. *Id.* at ¶ 6, footnote 1.

³ The Motion was scheduled for hearing on September 9, 2015; prior thereto, Defendant Wildevco timely filed the subject Amended Motion to Amend Third-Party Complaint and Rescind Stipulation.

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by Consent Order filed December 26, 2014. In conjunction therewith, Defendant Fred's retained separate counsel, Matthew C. LaFave, to represent it in the ongoing litigation. Defendants Tad Barber and Wildevco retained Thomas J. Keaveny, II, to represent them; Mr. Keaveny was subsequently relieved by Consent Order for Substitution of Counsel filed May 29, 2015. Gaffney Lewis & Edwards, LLC, including Lee Ellen Bagley, now represents Defendant Wildevco, Defendant Barber having been dismissed by this Court's September 9, 2015 Order.

STANDARD OF REVIEW

I. Rescission

An action to rescind a contract is in equity. *Smothers v. United States Fid. & Guar. Co.*, 322 S.C. 207, 210, 470 S.E.2d 858, 860 (Ct. App. 1996). A contract may be reformed or rescinded, "as the justice of the case may require, upon the ground of mistake, under these circumstances:

(1) Where the mistake is mutual and is in reference to the facts, or supposed facts, upon which the contract is based; (2) where the mistake is mutual and consists in the omission or insertion of some material element affecting the subject-matter or the terms and stipulations of the contract, inconsistent with those of the parol agreement which necessarily preceded it; (3) where the mistake is not mutual, [but] unilateral, and has been induced by the fraud, deceit, misrepresentations concealment, or imposition in any form of the party opposed in interest to the reformation or rescission, without negligence on the part of the party claiming the right; (4) where the mistake is not mutual, but unilateral, and is accompanied by very strong and extraordinary circumstances, ...which would make it a great wrong to enforce the agreements sustained by competent testimony of the clearest kind."

Id. (emphases added); see also *Truck South, Inc. v. Patel*, 339 S.C. 40, 49-50, 528 S.E.2d 424, 429 (2000). "In the absence of fraud which would justify shifting the loss to the party who opposes rescission, rescission is appropriate only if both parties can be returned to the status quo prior to the contract." *King v. Oxford*, 282 S.C. 307, 313, 318 S.E.2d 125, 128-29 (Ct. App. 1984).



I. Amendment of Pleadings

Rule 15(a) of the South Carolina Rules of Civil Procedure provides that leave to amend a party's pleadings shall be freely given by the Court when: (1) justice so requires; and (2) no other party will be prejudiced by the granting of the Motion. "The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it." *Tanner v. Florence Cnty. Treasurer*, 336 S.C. 552, 559, 521 S.E.2d 153, 156 (1999); *see also City of N. Myrtle Beach v. Lewis-Davis*, 360 S.C. 225, 232, 599 S.E.2d 462, 465 (Ct. App. 2004). It is well-established that the party opposing the amendment has the burden of establishing prejudice. *Foggie v. CSX Transp., Inc.*, 315 S.C. 17, 22, 431, S.E.2d 587, 590 (1993); *Pruitt v. Bowers*, 330 S.C. 483, 489, 499 S.E.2d 250, 253 (Ct. App. 1998). The rule governing amendments "strongly favors amendments and the court is encouraged to freely grant leave to amend." *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 286, 607 S.E.2d 711, 716 (Ct. App. 2005); *see also Jarrell v. Seaboard Sys. R.R., Inc.*, 294 S.C. 183, 186, 363 S.E.2d 398, 399 (Ct. App. 1987).

LAW/ANALYSIS

I. Rescission of Stipulation

Defendants argue the Stipulation as to Third-Party Claims against Tippins-Polk ("Stipulation"), limiting Defendants' third-party claims to equitable indemnification and/or contribution, in the event that either Plaintiff recovers against Defendants, should be rescinded as it was premised entirely upon the absence of a written contract between Defendants and Third-Party Defendant Tippins-Polk. *See Wildevco Memo.* at 6. This Court takes notice that Tippins-Polk does not dispute that at the time that Defendants entered the Stipulation, they and Tippins-Polk mistakenly believed that no contract existed between the parties. *See Tippins-Polk*

GZ

Memorandum in Opposition ("Tippins-Polk Memo.") at 4. For the reasons set forth below, this Court declares the Stipulation rescinded.

Following former Defendant Barber's discovery of the written Construction Agreement, Defendants notified Tippins-Polk that the Stipulation was no longer effective due to the contract's existence. See Ex. A to Wildevco Memo., Affidavit, at ¶¶ 5-6. Thereafter, Tippins-Polk had the opportunity to and did depose Defendant Barber, both in his individual and corporate representative capacity for Wildevco, on July 24, 2014. Tippins-Polk has been on notice for over sixteen (16) months of Defendants' position that the Stipulation was withdrawn; further, Defendants' Motion to Amend Third-Party Complaint, filed by former counsel for Defendants, Clarke McCants, has been pending for almost one (1) year. Moreover, the causes of action that Defendants seek to set forth in their Second Amended Complaint simply clarify or expound upon those asserted in their original Third-Party Complaint, to wit: breach of agreement and/or warranties and negligence. Finally, pursuant to the current Scheduling Order in place, it appears that the next term of Court during which this matter may be called for trial is scheduled for December 7, 2015, approximately two (2) months from now. For these reasons, the Court finds that rescission of the Stipulation will return both Defendants and Tippins-Polk to the *status quo* and will not result in prejudice to Tippins-Polk. Accordingly, this Court orders the Stipulation rescinded as it is based upon a mutual mistake as to the existence of the Construction Agreement and its enforcement would be wholly inequitable.

II. Amendment of Third-Party Complaint

Upon rescission of the Stipulation, Defendants argue they should be allowed to amend their Third-Party Complaints to assert causes of action for breach of contract and negligence. Tippins-Polk contends the South Carolina Court of Appeals' decision in *Stoneledge at Lake*

ET 7

Keowee Owners' Ass'n, Inc. v. Clear View Constr. LLC, 2015 S.C. App. LEXIS 170 (S.C. Ct. App. Aug. 19, 2015),⁴ is controlling. Tippins-Polk asserts that equitable indemnity is the only basis for recovery against a third-party where defendant's potential liability arises solely from claims asserted by a plaintiff. Upon review of the applicable case law, this Court holds that Defendants are permitted to amend their Third-Party Complaint for the reasons set forth below.

This Court finds that while *Stoneledge* may be controlling, it does not prevent this Court from allowing Defendants to assert independent causes of action against Tippins-Polk where Defendants allege damages beyond the potential liability from Plaintiffs' claims. Here, Wildevco presents evidence of damages it incurred from a construction defect such that it may assert independent claims of breach of contract and negligence against Tippins-Polk. See *Stoneledge*, 2015 S.C. App. LEXIS 170, *9-10 and *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Southeast Grp.*, 2015 S.C. App. LEXIS 169, *4-5 (S.C. Ct. App. Aug. 19, 2015)⁵ (supporting the conclusion that direct claims of negligence and breach of contract against a third-party may be permitted where the defendant suffers its own damages independent of its obligation to defend itself in an underlying lawsuit against a plaintiff). In the present case, the Court is informed that both Plaintiffs' and Defendant Wildevco's expert witnesses opine that the portion of the premises in issue was constructed in a defective manner inconsistent with the contract documents. As a result thereof, Wildevco expended money and time to complete certain repairs to the defective curbing. Further, Wildevco, and similarly, Fred's, suffer damages in the form of a remaining defect in the construction of the subject building, which will require them to take continuing precautions for future customers of the property.

⁴ This Court notes that cited decision is not final until time expires to file rehearing motion and, if filed, determined.

⁵ This Court notes that cited decision is not final until time expires to file rehearing motion and, if filed, determined.

As previously discussed, Tippins-Polk will not be prejudiced by an amendment of the Third-Party Complaint as Defendants notified Tippins-Polk no later than April 2, 2014 that they deemed the Stipulation ineffective. Further, Defendants' underlying Motion to Amend Third-Party Complaint has been pending for nearly one (1) year. The parties have until at least December 7, 2015, the earliest date on which this case could be scheduled for trial, to complete any additional discovery that may be necessary as a result of allowing Defendants to amend their Third-Party Complaint.

Ultimately, Tippins-Polk fails to meet its burden of proving prejudice in this matter. Thus, in accordance with our courts' liberal construction of Rule 15(a), SCRCPP, this Court holds that Defendants are permitted to amend their Third-Party Complaint to more clearly allege or add causes of action for negligence and breach of contract, as well as any claimed damages.

ACCORDINGLY, it is hereby ORDERED, ADJUDGED and DECREED that Defendants' Amended Motion to Amend Third-Party Complaint and Rescind Stipulation is GRANTED.

NOVEMBER 3, 2015
Columbia, South Carolina


The Honorable G. Thomas Cooper, Jr.
Presiding Judge

STATE OF SOUTH CAROLINA
COUNTY OF Farmington
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 10 CP-6-101

Fontaine's
PLAINTIFF(S)

Freds, Wilkerson/Tippens Palk
DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):

☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court: Local continued. The major case settled with Plaintiff.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk:

The EP claim is continued. Must be resolved within the next 90 days. All remaining parties agree to hear this NJ via bench trial.

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
<u>Motion for dismissal for failure to prosecute is denied w/o prejudice for CAJ to hear.</u>		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

Brian Gibbons

Judge Code

Date

21688

3/21/16

For Clerk of Court Office Use Only

This judgment was entered on the 21st day of March, 2016 and a copy mailed first class or placed in the appropriate attorney's box on this 22nd day of March, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

See attached list

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul S. McK
CLERK OF COURT

Court Reporter: Michael Watkins

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

ATTORNEYS FOR FOUNTAIN VS. FRED'S

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF BARNWELL
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2010CP0600101

Martha M Fountain, et al	Curtis Fountain	Fred's Inc Et Al Tippins-Polk Construction, Inc. Rhoad's Excavating Services, LLC	Llc Wildevco Southern Asphalt, LLC

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☒ See Page 2 for additional information.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk: _____

See Attached Order

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Wildevco, LLC	Tippins-Polk	\$305,418.30
Fred's	Tippins-Polk	76,691.82

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

2136

8/1/2016

3/10/16 Wayet A. Early, III
Circuit Court Judge

0136
Judge Code

8/1/16
Date

For Clerk of Court Office Use Only

This judgment was entered on **July 27, 2016**, and a copy mailed first class or placed in the appropriate attorney's box on **August 1, 2016**, to attorneys of record or to parties (when appearing pro se) as follows:

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ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Constance B. Mansfield

Court Reporter: Bethanie Creppon/Amanda Haffenden

Constance B. Mansfield - Deputy Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA
COUNTY OF BARNWELL

Martha M. Fountain and Curtis Fountain,

Plaintiffs,

vs.

Fred's, Inc. and Wildevco, LLC,

Defendants,

vs.

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

Third-Party Defendant.

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

Civil Action No. 2010-CP-06-101

ORDER

RHONDA D. McELVEEN
CLERK OF COURT
BARNWELL COUNTY, S.C.

2016 AUG - 1 AM 11:26

FILED FOR RECORD

This matter is before the Court upon the trial of the third-party claim of Fred's Stores of Tennessee, Inc., incorrectly identified as Fred's, Inc. ("Fred's") and Wildevco, LLC ("Wildevco") against Tippins-Polk Construction, Inc. ("Tippins-Polk") in the above-referenced matter.¹ Wildevco and Fred's each assert a claim of equitable indemnification² for damages sustained by them as a result of alleged faulty construction by Tippins-Polk of the subject Fred's store formerly located in Williston, South Carolina. The trial of the case proceeded in open court before this Judge on June 6, 2016 through June 7, 2016. For the reasons set forth herein, the Court enters judgment in favor of Wildevco and Fred's.

¹ As set forth herein below, all claims in the underlying case between Plaintiffs and Defendants were resolved by settlement. Tippins-Polk also filed fourth-party claims against two of its subcontractors, Southern Asphalt and Rhoad's Excavating. Summary judgment was granted in favor of Southern Asphalt in July of 2014. Rhoad's Excavating did not appear and an order of default was entered against it in July of 2013.

² Wildevco and Fred's also brought claims for negligence, breach of contract, and breach of warranty but prior to the trial of this matter agreed to proceed only on the claim of equitable indemnification.

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APPLICABLE LAW

In order to recover on a claim of equitable indemnity, the party seeking indemnification must show that: 1) the third party against whom indemnification is sought was at fault in causing the plaintiff's damages in the underlying action; 2) that the party seeking indemnification has no fault for the plaintiff's damages; and 3) the party seeking indemnification incurred expenses that were necessary to protect its interest in defending against the plaintiff's claims. *See Stoneledge at Lake Keowee Owners' Ass'n v. Clear View Constr., LLC*, 413 S.C. 615, 625, 776 S.E.2d 426, 432 (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 the underlying claims against it, the innocent party may recover the cost of settling the case if it makes the following showing: 1) the settlement is bona fide, with no 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. *See Otis Elevator v. Hardin Constr. Co. Group*, 316 S.C. 292, 297, 450 S.E.2d 41, 44 (1994) (citing *Griffin v. Van Norman*, 302 S.C. 520, 524, 397 S.E.2d 378, 380 (Ct. App. 1990)). In making this showing, the indemnitee is not required to prove the plaintiff's actual ability to recover the amount paid in settlement so long as the party seeking indemnification proves that it was *potentially* liable to the plaintiff in the underlying case. *See Otis Elevator*, 316 S.C. at 297, 450 S.E. 2d at 44.

FINDINGS OF FACT

Based on a review of the pleadings and considering the evidence presented at trial, including the deposition submissions of the parties, witness testimony, as well as exhibits, the Court makes the following findings of fact:

1. Wildevco is a development company and owns the property in Williston, South Carolina where the subject Fred's store was located and operated during the relevant time period. Pursuant to the Lease Agreement between Wildevco and Fred's, Wildevco agreed to have a Fred's store constructed on the premises and to lease the property to Fred's for a ten-year period commencing in 2005. The Lease Agreement included conceptual drawings for the Fred's facility.

2. Thaddeus "Tad" Barber is a partner in Wildevco and was responsible for overseeing the project. Mr. Barber graduated from Clemson University with a Bachelor of Science degree in Financial Management, obtained a Master of Business Administration from the University of South Carolina and is a commercial real estate broker. He has no education or formal training in construction, engineering or architecture.

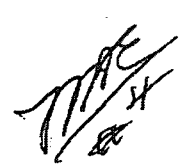
3. Wildevco hired Tippins-Polk as the general contractor for the Fred's project. Wildevco hired architects Chris Booker & Associates to prepare architectural drawings based on the conceptual drawings provided by Fred's and hired the engineering firm of Hass and Hilderbrand, Inc. to prepare the site plans for the premises. Those drawings and plans were then provided to Tippins-Polk and the facility was constructed with Tippins-Polk acting as the general contractor.

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4. The Construction Agreement between Wildevco and Tippins-Polk provided, *inter alia*, that Tippins-Polk was to execute the entire work described in the Contract Documents, which consisted of the Construction Agreement, the drawings furnished by Chris Booker & Associates and the site plans furnished by Hass & Hilderbrand, Inc.

5. The site plans provided for construction of the entrance of the store such that the sidewalk was to be flush or even with the parking lot and the entranceway area of the store. While the testimony indicated that there may have been some potential areas of confusion in the drawings and plans, including a possible discrepancy between the architectural drawings and the site plans, the site plans obligated the "contractor [to] notify the engineer for a review should discrepancies be discovered at the site or on the drawings." At no time did Tippins-Polk contact Hass & Hilderbrand to report any discrepancy or to request clarification with regard to the drawings and plans or the manner in which the Fred's store was to be constructed.

6. Rather than constructing a sidewalk that was flush with the parking lot and store entrance in accordance with the site plans, Tippins-Polk constructed an elevated sidewalk with a curb and curb ramp. In addition, the curb and ramp as constructed were defective as the curb did not comply with applicable building codes and/or industry standards for minimum height as the curb height was less than four (4) inches. Further, the flare on the right side of the curb ramp where Plaintiff Martha Fountain tripped extended into the walkway leading to the entrance doors of Fred's, which likewise did not comply with either the site plans or applicable standards.



7. During the construction process, Tad Barber and a representative of Fred's went to the premises periodically to ensure that construction of the premises was progressing. Neither Mr. Barber nor the Fred's representative conducted inspections to determine whether the construction specifically comported with the site plans nor were either trained or qualified to conduct such an inspection.

8. Following inspection by a Barnwell County Building Inspector, Barnwell County issued a certificate of occupancy for the Fred's store and the premises was ultimately turned over to Fred's as lessee, which opened the store in or about October 2005.

9. During the period between October 2005 and March 10, 2010, Wildevco properly maintained the premises but, did not discover the defect in the subject sidewalk curb and curb ramp.

10. During the period between October 2005 and March 10, 2010 Fred's employees completed routine inspections of the premises for trip hazards.

11. During the period between October 2005 and March 9, 2010 Fred's had no other incidents involving a patron tripping over the curb or curb ramp at the store where Mrs. Fountain tripped and fell.

12. On March 10, 2010, Martha Fountain tripped over the curb ramp and fell, sustaining injuries to her head, wrist and elbow. The injuries resulted in Mrs. Fountain having to undergo several surgeries, including the implantation and removal of hardware in her hand/wrist.

13. As a result of the injuries, Mrs. Fountain missed time from work and was unable to return to her prior employment due to lifting restrictions imposed by her injuries.

14. Mrs. Fountain is unable to perform many activities that she was able to perform prior to the accident, including sewing, playing the piano as well as lifting and grasping certain objects. The accident had a negative impact on Mrs. Fountain's marriage, causing financial strain and taking an emotional toll on both Mrs. Fountain and her husband.

15. In 2010, Mr. and Mrs. Fountain filed a lawsuit against Fred's and Wildevco alleging negligence as a result of the construction defect. Mrs. Fountain claimed over Ninety Thousand and 00/100 Dollars (\$90,000.00) in medical damages and lost wages. Mr. Fountain filed a loss of consortium claim for which he also sought damages.

16. Wildevco and Fred's filed third-party claims against Tippins-Polk for equitable indemnification, negligence, breach of contract and breach of warranty. Prior to trial, Wildevco and Fred's elected to proceed solely on the claim of equitable indemnification.

17. Mr. and Mrs. Fountain settled their claims against Wildevco and Fred's prior to the scheduled trial of the matter, for a total sum of Two Hundred Ninety Thousand and 00/100 Dollars (\$290,000.00). Wildevco paid Two Hundred Fifty

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Thousand and 00/100 Dollars³ (\$250,000.00) of the total settlement amount and Fred's paid Forty Thousand and 00/100 Dollars (\$40,000.00).

18. Wildevco incurred legal fees and costs in defending the claims by Martha and Curtis Fountain in the total amount of \$55,418.30. Fred's incurred legal fees and costs in defending the claims by Martha and Curtis Fountain in the total amount of \$36,691.82.

CONCLUSIONS OF LAW

Based on a review of the pleadings and considering the evidence presented at trial, including the deposition submissions of the parties, witness testimony, as well as exhibits, the Court makes the following conclusions of law based on the preponderance of the evidence:

1. A special relationship existed between Fred's and Tippins-Polk based on Tippins-Polk's agreement to construct a facility for a Fred's retail store with knowledge that the Fred's facility would be open for business to the public, as well as its selection as general contractor based on its prior construction of at least one other Fred's store. Thus, Tippins-Polk had a duty to Fred's to exercise due care in the construction of the subject Fred's premises.

2. Wildevco exercised due care and acted reasonably and with prudence with regard to the development of the Fred's facility and exercised due care and acted reasonably and with prudence with regard to the maintenance of the facility up to and including the date of Mrs. Fountain's accident on March 10, 2010.

³ The settlement payment of \$250,000.00 was paid on Wildevco's behalf by its insured, as were its legal fees and costs. As the insured, the damages, fees and costs paid on behalf of Wildevco are attributed to Wildevco herein for purposes of Wildevco's equitable indemnification claim.

3. Wildevco was without fault and was an innocent party with regard to both 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

4. Fred's was without fault and was an innocent party with regard to both the construction of the premises and its inspection and maintenance of the premises. Fred's 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 Fred's.

5. Wildevco and Fred's 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.

6. Engineers and architects were employed by Wildevco to render drawings and site plans for the premises and Tippins-Polk had a duty to construct the premises in accordance with those drawings and plans. By a preponderance of the evidence, Tippins-Polk did not construct the premises in accordance with the applicable drawings and plans.

7. Tippins-Polk breached its contractual obligation and its duty of care to Wildevco and Fred's in failing to construct the premises free of latent defects. *See Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 658 S.E.2d 80 (2008) (citing *Rutledge v. Dodenhoff*, 254 S.C. 407, 175 S.E.2d 792 (1970); *Lane v. Trenholm Bldg. Co.*, 67 S.C.



497, 229 S.E.2d 728 (1976); and *Kennedy v. Columbia Lumber & Mfg. Co., Inc.*, 299 S.C. 335, 384 S.E.2d 730 (1989).

8. The construction defects, for which Tippins-Polk is solely responsible, were the sole proximate cause of Mrs. Fountain's injuries after she tripped on the subject curb ramp and fell at the Fred's store on March 10, 2010. Thus, Tippins-Polk was solely at fault in causing Martha and Curtis Fountain's damages in the underlying action and Wildevco and Fred's were without fault in causing their damages.

9. Wildevco and Fred's incurred expenses that were necessary to protect their interests in defending against Plaintiffs' claims. The expenses incurred by Wildevco and Fred's were reasonable and necessary to protect their interests in defending against the claims of Mr. and Mrs. Fountain in the underlying case.

10. The settlement entered into between Wildevco and Fred's and the Plaintiffs in the underlying case was bona fide and without fraud or collusion by the parties.

11. The decision made by Wildevco and Fred's to settle the underlying case with the Plaintiffs was a reasonable means of protecting their interest.

12. The amount of the settlement of Two Hundred Ninety Thousand and 00/100 Dollars (\$290,000.00) is more than reasonable in light of the estimated damages alleged by Martha Fountain of over Ninety Thousand and 00/100 Dollars (\$90,000.00), including the nature of the injuries she sustained, the medical expenses, lost wages, permanent injuries and resulting physical limitations she suffered, as well as the damages alleged by her husband Curtis Fountain.



13. The amount of the settlement is also reasonable in light of the risk and extent of Wildevco and Fred's exposure if the Plaintiffs' underlying claims proceeded to trial.

14. Wildevco and Fred's are entitled to recover from Tippins-Polk on their respective claims of equitable indemnification.

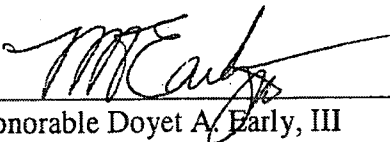
WHEREFORE, it is hereby ORDERED:

a. That judgment be entered against Tippins-Polk in favor of Wildevco, LLC in the total sum of Three Hundred Five Thousand, Four Hundred Eighteen and 30/100 Dollars (\$305,418.30) as indemnification for the portion of the settlement paid by or on behalf of Wildevco, LLC to the Plaintiffs Martha and Curtis Fountain in the underlying action and for legal fees and costs incurred by Wildevco, LLC in defending the underlying action by the Plaintiffs.

b. That judgment be entered against Tippins-Polk in favor of Fred's, Inc. in the total sum of Seventy Six Thousand Six Hundred Ninety-One and 82/100 Dollars (\$76,691.82) as indemnification for the portion of the settlement paid by Fred's, Inc. to the Plaintiffs Martha and Curtis Fountain in the underlying action and for legal fees and costs incurred by Fred's, Inc. in defending the underlying action by the Plaintiffs.

c. That post-judgment interest shall accrue in accordance with the applicable statutory rate.

IT IS SO ORDERED, this 27 day of July, 2016.



The Honorable Doyet A. Early, III
Circuit Court Judge

MIC

STATE OF SOUTH CAROLINA
COUNTY OF BARNWELL

Martha M. Fountain and Curtis Fountain,

Plaintiffs,

vs.

Fred's, Inc. and Wildevco, LLC,

Defendants,

v

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

Third-Party Defendant.

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

Civil Action No. 2010-CP-06-101

ORDER

RHONDA D. McELVEEN
CLERK OF COURT
BARNWELL COUNTY, S.C.

2017 FEB 13 PM 1:12

FILED FOR RECORD

This matter is before the Court upon the Third-Party Defendant Tippins-Polk's Motion to Make Additional Findings and Motion to Reconsider and/or Amend. Third-Party Plaintiffs Wildevco, LLC and Fred's, Inc. each filed responses in opposition to the Motion and a hearing was held in open court on September 12, 2016. After due consideration of the Motion, responses thereto, and oral argument presented by all of the parties, the Court finds that there exists no basis pursuant to Rules 52(b) or 59(e), SCRCP, or otherwise, to reconsider its prior decision in this matter or to alter or amend the Order filed in this matter on August 1, 2016. Accordingly, the Motion to Make Additional Findings and Motion to Reconsider and/or Amend are hereby DENIED.

IT IS SO ORDERED, this 6 day of Feb ~~2016~~ 2017.



The Honorable Doye A. Early, III
Judge, Second Judicial Circuit

Bamberg, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF BARNWELL)

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT
C.A. NO.: 2010-CP-06-101

MARTHA M. FOUNTAIN and)
CURTIS FOUNTAIN,)

Plaintiffs,)

-versus-)

FRED'S INC. and TAD BARBER,)
Individually, and d/b/a WILDEVCO, LLC,)

Defendants.)

-versus-)

TIPPINS-POLK CONSTRUCTION, INC.,)

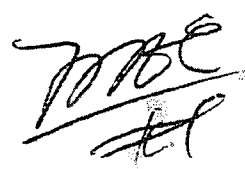
Third-Party Defendants.)

CONSENT ORDER

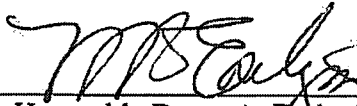
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2017 MAR 20 AM 11:32
RHONDA D McELVEEN
CLERK OF COURT
BARNWELL COUNTY, S.C.

WHEREFORE, the Third-Party Defendant Tippins-Polk Construction, Inc. ("Tippins-Polk") has moved, and provided notice to all parties, for leave of Court to deposit the judgment funds with the Court in Barnwell County pursuant to Rule 67, SCRCP and Russo v. Sutton, 317 S.C. 441, 454 S.E. 995 (1995), and whereby all parties consent to the motion;

IT IS ORDERED that Tippins-Polk is granted leave to deposit the judgment sums, totaling \$305,418.30 for Wildevco, LLC and \$76,691.82 for Fred's, Inc., into the Court pursuant to Rule 67, SCRCP and Russo v. Sutton, supra, and the Clerk shall accept these funds to be deposited into separate and interest bearing accounts with any bank or other financial institution, authorized to receive public funds and to hold such funds in trust until further Order of the Court.



IT IS SO ORDERED.


The Honorable Doyet A. Early, III

March 9, 2017
Bamberg, South Carolina

WE SO MOVE:

WALL TEMPLETON & HALDRUP, PA

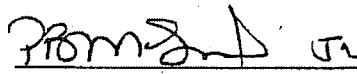

Morgan S. Templeton
Peden Brown McLeod, Jr.
Post Office Box 1200
Charleston, South Carolina 29402
(843) 329-9500
**ATTORNEY FOR DEFENDANT
TIPPINS-POLK CONSTRUCTION, INC.**

WE SO CONSENT:

GAFFNEY LEWIS & EDWARDS

CROWE LAFAVE, LLC


Br Regina Hollins Lewis
Lee Ellen Bagley
3700 Forest Drive, Suite 400
Columbia, South Carolina 29204
803-790-8838
**ATTORNEYS FOR DEFENDANT
WILDEVCO, LLC**


Gr Matthew C. LaFave
Post Office Box 1149
Columbia, South Carolina 29202
803-724-5727
**ATTORNEY FOR DEFENDANT FRED'S,
INC.**

FORM 4

**STATE OF SOUTH CAROLINA
COUNTY OF BARNWELL
IN THE COURT OF COMMON PLEAS**

**JUDGMENT IN A CIVIL CASE
CASE NUMBER 2010CP0600101**

Martha M Fountain, et al	Curtis Fountain	Fred's Inc Et Al Tippins-Polk Construction, Inc. Rhoad's Excavating Services, LLC	Llc Wildevco Southern Asphalt, LLC

PLAINTIFF(S)	DEFENDANT(S)
Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk: Order Denying Tippins-Polk's Motion to Reconsider....Amend.

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge	2136	2/15/2017
	Judge Code	Date

For Clerk of Court Office Use Only

This judgment was entered on **February 13, 2017**, and a copy mailed first class or placed in the appropriate attorney's box on **February 15, 2017**, to attorneys of record or to parties (when appearing pro se) as follows:

R. Steven Chandler PO Box 948 Bamberg, SC 29003

Mark David Ball PO Box 457 101 Mulberry St. Hampton, SC 29924

not mailed
not mailed

Morgan S. Templeton PO Box 1200 Charleston, SC 29402
O. Carlisle Edwards Jr. PO Box 650007 Mt. Pleasant, SC 29465

Peden Brown McLeod Jr. 145 King Street, Suite 300 Charleston, SC 29401

Matthew Clark LaFave PO Box 1149 Columbia, SC 29202
Regina Hollins Lewis Gaffney Lewis & Edwards, LLC 3700 Forest Drive, Suite 400 Columbia, SC 29204

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Constance B. Mansfield

Court Reporter

Constance B. Mansfield - Deputy Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRPC.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA)
COUNTY OF BARNWELL)

MARTHA M. FOUNTAIN and)
CURTIS FOUNTAIN,)

Plaintiffs,)

-versus-)

FRED'S INC. and TAD BARBER,)
Individually, and d/b/a WILDEVCO, LLC,)

Defendants.)

FRED'S INC. and TAD BARBER,)
Individually, and d/b/a WILDEVCO, LLC,)

Third-Party Plaintiffs,)

-versus-)

TIPPINS-POLK CONSTRUCTION, INC.,)
RHOAD'S EXCAVATING SERVICES,)
LLC, AND SOUTHERN ASPHALT, LLC,)

Third-Party Defendants.)

TIPPINS-POLK CONSTRUCTION, INC.,)

Fourth-Party Plaintiff,)

-versus-)

RHOAD'S EXCAVATING SERVICES,)
LLC and SOUTHERN ASPHALT, LLC,)

Fourth-Party Defendants.)

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT
C.A. NO.: 2010-CP-06-101

**MOTION TO MAKE ADDITIONAL
FINDINGS AND MOTION TO
RECONSIDER AND/OR AMEND**

FILED FOR RECORD
2016 AUG 15 PM 2:09
RECEIVED
CLERK OF COURT
BARNWELL COUNTY, S.C.

Third-Party Defendant, Tippins-Polk Construction, Inc. ("Tippins-Polk"), hereby gives notice and moves this Honorable Court, pursuant to South Carolina Rules of Civil Procedure, and more specifically Rule 52(b) and 59(e), SCRCPP, to reconsider and/or alter or amend its Order entered August 1, 2016, entering judgment against Tippins-Polk in favor of Wildevco, LLC ("Wildevco") and Fred's, Inc. ("Fred's"). Tippins-Polk's grounds for this Motion are that: (1) Wildevco and Fred's failed to prove that they were potentially liable and failed to prove they were without fault; (2) Wildevco admitted that it failed to follow its expert's recognized safety standard and thus, breached its duty to Plaintiff; (3) Wildevco and Fred's were not facing imputed liability, but rather liability arising from their own actions or inactions, and there was no special relationship with Fred's; (4) the Court failed to consider a similar incident that occurred at the Varnville Fred's store which established that Fred's was on notice of the condition that caused Plaintiff Martha Fountain to trip prior to the incident; (5) the Settlement Agreement between Plaintiffs, Wildevco and Fred's discharged Wildevco and Fred's "common liability" as joint tortfeasors; (6) Wildevco was at fault for providing defective plans for the construction; (7) Wildevco was at fault because it tasked Tad Barber, who the Court found to be unqualified, to oversee the construction project; and (8) Wildevco and Fred's are bound by they prayer for relief which only requested judgment against Tippins-Polk for a verdict or judgment issued against Wildevco and/or Fred's.

Tippins-Polk also moves to reconsider the Court's findings with regarding to the awarding of attorneys' fees because the evidence at trial established that both Wildevco and Fred's attorneys' fees also included attorneys' fees for prosecuting their claims for indemnification.

For the reasons set forth above, and based on the arguments and authorities below, Tippins-Polk's motion to reconsider should be granted, and an order be issued finding in favor of Tippins-

Polk as to Wildevco and Fred's claims for equitable indemnification.

MOTION TO RECONSIDER STANDARD

Under Rule 52(b), a party may move the court to amend its findings or make additional findings and may amend the judgment accordingly. Rule 52, SCRCP; see UNICO Dev. Servs., Inc. v. Oconee Geriatric, Inc., 305 S.C. 504, 506, 409 S.E.2d 425, 426 (Ct. App. 1991)(finding that an issue was precluded because "Geriatric made no motion under Rule 52(b) SCRCP and did not raise the issue by additional sustaining grounds.")

"It is proper to view a Rule 59(e) motion is not only as a vehicle to request the trial court 'alter or amend the judgment,' but also as a vehicle to seek 'reconsideration' of issues and arguments." Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004). "A motion under Rule 59(e) long has been viewed as 'motion for reconsideration' despite the absence of those words from the rule. Consequently, a party usually is allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented." Id. (citing Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992)). "There is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument. It is inherently unfair to disallow such an opportunity." Id.

The South Carolina Rules of Civil Procedure "contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party must file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it

for appellate review.” Id.

PROCEDURAL HISTORY

Plaintiffs filed this premises liability action on May 12, 2010, asserting claims against Fred’s and Wildevco for an alleged fall that occurred at Fred’s store located in Williston, South Carolina. Plt. Complt. ¶¶ 5 and 6. Plaintiffs alleged, and Fred’s admits, that Fred’s was doing business in Barnwell County; and Plaintiffs alleged, and Wildevco admits, that Wildevco was the owner of the premises. Id. ¶¶ 2,3; Fred’s/Wildevco’s Answer ¶¶ 3,4. Plaintiffs allege that on or about March 10, 2010, Plaintiff, Martha Fountain, was entering the Fred’s store as a patron and tripped on the raised sidewalk in front of the store’s entrance and fell. Id. The Plaintiffs’ specific claims against Fred’s and Wildevco are that they 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 discovery risks, to warn of or make safe unreasonable risks. Id. at ¶ 7. The Complaint further alleged that as a result of Fred’s and Wildevco’s failures Plaintiffs sustained damages. Id. at ¶ 8.

Two years after the filing of the Complaint, Fred’s and Wildevco filed an Amended Answer and Third-Party Complaint asserting claims against Tippins-Polk. In August 2015, Wildevco moved to amend their third-party complaint wherein Wildevco admitted in their memorandum that the case between Plaintiff and Defendants was a “premises liability matter.” Defendants Barber and Wildevco’s Memorandum in Support of Motion to Amend Third-Party Complaint, p. 1. Furthermore, Defendants’ memorandum stated that “Plaintiffs contend Defendants Fred’s Inc., Barber, and Wildevco have a duty to provide a safe premises for patrons of Freds’s, including Plaintiff Martha Fountain, and Defendants breached that duty, proximately

causing the injuries.” Id. Judge G. Thomas Cooper heard Wildevco’s motion to amend and granted the motion noting in his Order that the matter was a “premises liability” action.

Plaintiffs settled their claims with Wildevco and Fred’s on March 20th, 2016, and Wildevco and Fred’s claim for equitable indemnification proceeded to trial on April 6 and 7, 2016. The Court took the matter under advisement, and subsequently filed an Order and Judgment in favor of Wildevco and Fred’s on August 1, 2016. Counsel for Tippins-Polk received the filed Order and Judgment on August 3, 2016. Tippins-Polk now timely files this motion to reconsider.

EQUITABLE INDEMNIFICATION

In South Carolina, the right of indemnification may be created by contract or by operation of law “in cases of imputed fault or where some special relationship exists between the first and second parties.” Town of Winnsboro v. Wiedeman-Singleton, 398 S.E.2d 500, 502 (S.C. App. 1990), aff’d, 414 S.E.2d 118 (S.C. 1992). A plaintiff may maintain an equitable indemnification action if he was compelled to pay damages because of negligence imputed to him as the result of another’s tortious act.” Fowler v. Hunter, 388 S.C. 355, 363, 697 S.E.2d 531, 535 (2010)(citing Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Co., 336 S.C. 53, 518 S.E.2d 301 (Ct.App.1999)). “The right of equitable indemnity arises out of the relationship between the indemnity plaintiff and the indemnity defendant.” Inglease v. Beal, 403 S.C. 290, 742 S.E.2d 687 (2013). “Under the doctrine of equitable indemnity, ‘a right of indemnity exists whenever the relationship between the parties is such that either in law or in equity there is an obligation on one party to indemnify the other, as where one person is exposed to liability by the wrongful act of another in which he does not join.’” Id. (citing Stuck v. Pioneer Logging Mach., Inc., 279 S.C.

22, 301 S.E.2d 552 (1983).

The relationship among the indemnitor and indemnitee can not be an attenuated one for there to be a right to equitable indemnity. Rock Hill Telephone Co., Inc. v. Globe Communications, Inc., 363 S.C. 385, 611 S.E.2d 235 (2005). Where a relationship is with a “merely a remote or distant independent contractor” there is no special relationship that would give rise to a right of indemnity. Id. Where one party contracts with a second party to perform work, and the second party in turns hires a third party to perform the work, there is no special relationship between the first party and the third party under South Carolina law. Id.

“When a sufficient relationship between them exists, the indemnity plaintiff must prove the following elements to recover damages on an equitable indemnity claim: (1) the indemnity defendant is at fault in causing the damage of the third party; (2) the plaintiff has no fault for those damages; and (3) the plaintiff incurred expenses that were necessary to protect his interest in defending the third party’s claim.” Id. “The most important requirement for . . . equitable indemnity is that the party seeking to be indemnified is adjudged without fault and the indemnifying party is the one at fault.” Walterboro Cmty. Hosp. v. Meacher, 392 S.C. 479, 709 S.E.2d 71 (Ct. App. 2011). The party asserting an equitable indemnification cause of action must prove the elements of indemnity, including that the indemnitee was without fault. Walterboro Cmty Hosp. v. Meacher, 392 S.C. 479, 709 S.E.2d 71 (2010)(citing Fowler v. Hunter, 388 S.C. 355, 363 697 S.E.2d 531, 535 (2010)). If there is insufficient evidence of lack of fault the elements of equitable indemnification elements are not met, and the claim for equitable indemnification fails. Id. at 489, 709 S.E.2d at 76. As the Court’s Order notes “In making this showing, the indemnitee is not required to prove the plaintiff’s actual ability to recover the

amount paid in settlement so long as the party seeking indemnification proves that it was *potentially* liable to the plaintiff in the underlying case.” (citing Otis Elevator v. Hardin Constr. Co. Group, 316 S.C. 292, 291, 450 S.E.2d 41, 44 (1994)(emphasis contained in original)).

“The doctrine of unclean hands precludes a [party] from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant.” Straight v. Goss, 383 S.C. 180, 206-07, 678 S.E.2d 443, 457-58 (Ct. App. 2009)(quoting First Union Nat'l Bank of S.C. v. Soden, 333 S.C. 554, 568, 511 S.E.2d 372, 379 (Ct.App.1998)). “He who comes into equity must come with clean hands. It is far more than a mere banality. It is a self-imposed ordinance that closes the door of the court of equity to one tainted with inequity or bad faith relative to the matter in which he seeks relief.” Id. (quoting Emery v. Smith, 361 S.C. 207, 220, 603 S.E.2d 598, 605 (Ct.App.2004) (quoting Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 814, 65 S.Ct. 993, 89 L.Ed. 1381 (1945))).

PREMISES LIABILITY

“To establish negligence in a premises liability action, a plaintiff must prove the following three elements: (1) a duty of care owed by defendant to plaintiff; (2) defendant’s breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty.” Singleton v. Sherer, 377 S.C. 185, 200, 659 S.E.2d 196, 204 (Ct. App. 2008)(citing Hurst v. East Coast Hockey League, Inc., 371 S.C. 33, 37, 637 S.E.2d 560, 562 (2006)); See also Bramlette v. Charter-Medical-Columbia, 302 S.C. 68, 393 S.E.2d 914 (1990); Anderson v. Racetrac Petroleum, Inc., 296 S.C. 204, 371 S.E.2d 530 (1988); Shipes v. Piggly Wiggly St. Andrews, Inc., 269 S.C. 479, 238 S.E.2d 167 (1977); Kershaw Motor Co. v. Southern Ry., 136 S.C. 377, 134 S.E. 377 (1926); Sims v. Giles, 343 S.C. 708, 541 S.E.2d 857 (Ct. App.

2001); Small v. Pioneer Machinery, Inc., 329 S.C. 448, 494 S.E.2d 835 (Ct. App. 1997); Cook v. Food Lion, Inc., 328 S.C. 324, 491 S.E.2d 690 (Ct. App. 1997); Vinson v. Hartley, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996).

“The nature and scope of duty in a premises liability action, if any, is determined based upon the status or classification of the person injured at the time of his or her injury.” Id. (citing Sims v. Giles, 343 S.C. 708, 715, 541 S.E.2d 857, 861 (Ct.App.2001)). “South Carolina recognizes four general classifications of persons present on the property of another: adult trespassers, invitees, licensees, and children.” Id. “Different standards of care apply depending upon the classification of the person present.” Id.

“[An invitee is a person] who enters onto the property of another by express or implied invitation, his entry is connected with the owner’s business or with an activity the owner conducts or permits to be conducted on his land, and there is a mutuality of benefit or a benefit to the owner.” Id. (quoting Sims, 343 S.C. at 716-17, 541 S.E.2d at 862). “The law recognizes two types of invitees: the public invitee and the business visitor.” Id. (citing Sims, 343 S.C. at 717, 541 S.E.2d at 862). “A public invitee is one who is invited to enter or remain on the land as a member of the public for a purpose for which the land is held open to the public.” Id. (quoting Goode v. St. Stephens United Methodist Church, 329 S.C. 433, 441, 494 S.E.2d 827, 831 (Ct. App. 1997); Sims, 343 S.C. at 717, 541 S.E.2d at 862). “In contrast, a business visitor is an invitee whose purpose for entering the property is either directly or indirectly connected with the purpose for which the property owner uses the land.” Id. (citing Parker v. Stevenson Oil Co., 245 S.C. 275, 280, 140 S.E.2d 177, 179 (1965); Sims, 343 S.C. at 717, 541 S.E.2d at 862; Goode, 329 S.C. at 441, 494 S.E.2d at 831; Hoover v. Broome, 324 S.C. 531, 536, 479 S.E.2d 62, 65 (Ct.

App. 1996). "A customer of a store is classified as an invitee." Hoover v. Broome, *supra*. (citing Shipes v. Piggly Wiggly St. Andrews, Inc., 269 S.C. 479, 238 S.E.2d 167 (1977)).

"Storekeeper liability is founded up the duty of care a possessor of land owes to an invitee. Wintersteen v. Food Lion, Inc., 344 S.C. 32, 542 S.E.2d 728 (2001). "Generally a person owes an invitee the duty of exercising reasonable or ordinary care for his safety and is liable for any injury resulting from the breach of this duty." *Id.* (see also Sides v. Greenville Hosp. Sys., 362 S.C. 250, 256, 607 S.E.2d 362, 365 (Ct. App. 2004); Larimore v. Carolina Power & Light, 340 S.C. 438, 531 S.E.2d 535 (Ct. App. 2000)). "An invitee enters the premises with the implied assurance of preparation and reasonable care for his protection and safety while he is there." Landry v. Hilton Head Plantation Prop. Owners Ass'n, Inc., 317 S.C. 200, 452 S.E.2d 619 (1994)(see also Singleton v. Sherer, 377 S.C. 185, 202, 659 S.E.2d 196, 205 (Ct. App. 2008); Bryant v. City of North Charleston, 304 S.C. 123, 125, 403 S.E.2d 159, 161 (Ct.App.1991)). "A landowners owes an invitee a duty of care to discover risks and to warn of or eliminate foreseeable unreasonable risks." *Id.* (citing HUBBARD & FELIX at 80). To that extent, "the owner of the premises owes the customers the duty of exercising ordinary care to keep the passageways, sidewalks and such other parts of the premises as are ordinarily used by the customers in transacting business in a reasonably safe condition." O'Leary-Payne v. R.R. Hilton Head, II, Inc., 371 S.C. 340, 638 S.E.2d 96 (2006)(citing Bruno v. Pendleton Realty Co., 240 S.C. 46, 50-51, 124 S.E.2d 580, 582 (1962)).

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

customers of the merchants leasing the stores . . .” O’Leary-Payne v. R.R. Hilton Head, II, 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)). “However, ‘the owner of the premises owes the customers the duty of exercising ordinary care to keep the passageways, sidewalks and such other parts of the premises as are ordinarily used by the customers in transacting business in a reasonably safe condition.’” Id.

Similarly, the operator of a parking lot must use reasonable care to keep the premises used by invitees in a reasonably safe condition. Meadows v. Heritage Vill. Church & Missionary Fellowship, Inc., 305 S.C. 375, 377, 409 S.E.2d 349, 351 (1991)(citing Felder v. K-Mart Corp., 297 S.C. 446, 377 S.E.2d 332 (1989); Moore v. Levitre, 294 S.C. 453, 365 S.E.2d 730 (1988); Abeles v. Great Atlantic & Pacific Tea Co., 244 S.C. 508, 137 S.E.2d 604 (1964); Bruno v. Pendleton Realty Co., 240 S.C. 46, 124 S.E.2d 580 (1962)).

“To recover damages for injuries caused by a dangerous or defective condition on a storekeeper’s premises, the plaintiff must show either (1) that the injury was caused by a specific act of the defendant which created the dangerous condition; or (2) that the defendant had actual or constructive knowledge of the dangerous condition and failed to remedy it.” Id. (citing Wintersteen v. Food Lion, Inc., 344 S.C. 32, 35, 542 S.E.2d 728, 729 (2001)).

Constructive notice is a legal inference, which substitutes for actual notice. Major v. City of Hartsville, 410 S.C. 1, 3–4, 763 S.E.2d 348, 350 (2014)(citing Strother v. Lexington Cnty. Recreation Comm’n, 332 S.C. 54, 504 S.E.2d 117 (1998)). “Constructive notice arises when a condition has existed for such a period of time that a [property owner/occupant] in the use of reasonable care should have discovered the condition.” Id. (quoting Fickling v. City of

Charleston, 372 S.C. 597, 609–10 n. 34, 643 S.E.2d 110, 117 n. 34 (Ct.App.2007)). “Where a recurring condition is of such a nature as to amount to a continual condition, when coupled with other factors, the recurring condition may be sufficient to create a jury issue as to constructive notice.” Id. (citing Fickling, 372 S.C. at 601 n. 37, 643 S.E.2d at 117 n. 37).

“The mere fact that there is a difference between the levels in the different parts of the premises does not, in itself, indicate negligence unless, owing to the character, location and surrounding condition of the change of level, a reasonably careful person would not be likely to expect or see it.” Bruno v. Pendleton Realty Co., 240 S.C. 46, 51, 124 S.E.2d 580, 582 (1962)(citing Crocker v. WTAR Radio Corp., 194 Va. 572, 74 S.E.2d 51). “It is also true that where a dangerous condition in premises is latent and of which the owner knew or should have known, and is unknown to invitees, the owner is required to give proper warning in order to relieve himself from liability for injuries incurred by reason thereof.” Id. “A latent defect is one which an owner has, or should have, knowledge of, and of which an invitee is reasonably unaware.” Callander v. Charleston Doughnut Corp., 305 S.C. 123, 406 S.E.2d 361 (1991)(citing Wilson v. Duke Power Co., 273 S.C. 610, 258 S.E.2d 101 (1979); Bruno v. Pendleton Realty, supra.).

ARGUMENT

1. **Wildevco and Fred’s failed to prove that they were “potentially” liable to Plaintiffs, and failed to prove that they were without fault.**

Wildevco and Fred’s failed to prove all the elements of equitable indemnification as described by the Court’s Order, and therefore the equitable claims against Tippins-Polk fail. As noted in the Court’s Order, for Wildevco and Fred’s to be successful in its equitable

indemnification claims against Tippins-Polk, they must prove that: (1) Tippins-Polk was at fault in causing Plaintiffs' damages; (2) Wildevco and Fred's was not at fault for Plaintiffs' damages; and (3) Wildevco and Fred's sustained damages in protecting its interest in defending Plaintiffs' claims. The Court also noted that where one settles a claim and then seeks equitable indemnification the party seeking equitable indemnification must show: (1) the settlement is bona fide, with no fraud or collusion; (2) the decision to settle was reasonable; and (3) the amount of settlement was reasonable. Furthermore, the Court noted that the party seeking indemnification **must also prove** that they were "potentially" liable to Plaintiff in the underlying case.

Wildevco admitted in a memorandum in support of a motion to amend that this is a premises liability action, and that Plaintiffs' claims arose out of Wildevco and Fred's duty to provide safe premises for patrons, and that Wildevco and Fred's breached the duty. However, the Court's Order fails to even discuss premises liability law in South Carolina, and fails to discuss any evidence that Wildevco and Fred's were potentially liable to Plaintiff.

If Wildevco and Fred's failed to prove they were "potentially" liable to Plaintiff for premises liability claims, then there can be no recovery under equitable indemnification by a settling party based on the law cited by the Court. Otis Elevator, supra. There was no finding or conclusion of law that Wildevco and Fred's proved that they were potentially liable under premises liability. Accordingly, under the very case law cited by the Court, Wildevco and Fred's failed to meet their burden for a claim of equitable indemnification. Conversely, if they were "potentially" liable, they are not free from fault (ie. breached the duty of care as provided under shopkeeper liability in South Carolina, and, thus, cannot recover under a theory of equitable

indemnification. see O'Leary-Payne v. R.R. Hilton Head, II, Inc., supra.)

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

2. Wildevco admitted that it breached the standard of care owed to patrons.

Under South Carolina premises liability law, an owner/occupier owes patrons an independent, separate and distinct duty to exercise ordinary care to keep the passageways, sidewalks and such other parts of the premises as are ordinarily used by the customers in transacting business in a reasonably safe condition, and to discover risks and to warn of or eliminate foreseeable unreasonable risks. O'Leary-Payne v. R.R. Hilton Head, II, Inc., supra.; Landry v. Hilton Head Plantation Prop. Owners Ass'n, Inc., supra. Under these principals, there is no possibility, and no evidence, that Wildevco and Fred's have no fault in causing Plaintiff's injuries based on the testimony of the expert for Wildevco and Fred's, and the testimony of Tad Barber. Noticeably absent from the Court's Order is any reference to the testimony of Wildevco and Fred's safety expert, and more specifically their expert's testimony regarding the "recognized safety standard" of owners and occupants to inspect premises for tripping hazards. During trial, Wildevco and Fred's expert testified that there is a recognized safety standard for owners and occupants of public buildings to conduct inspection of the premises looking for tripping hazards similar to the condition that caused Plaintiffs' injuries. Wildevco and Fred's expert established that Wildevco and Fred's, as owners and occupier, have a duty to take affirmative efforts to

inspect for tripping hazards around the property.

Wildevco admitted that failed to follow the standard of care established by their expert. The Court's Order fails to discuss the testimony of Tad Barber that Wildevco did not inspect the premises looking for tripping hazards, and that Wildevco did not hire anyone to inspect the premises looking for tripping hazards. According to Wildevco and Fred's own safety expert, property owners and occupants of buildings open to the public should inspect for tripping hazards around the premises to warn of or eliminate hazardous conditions. However, Tad Barber outright denied that Wildevco every inspected for tripping hazards, or hired any one to inspect of tripping hazards. Wildevco breach its duty owed to patrons, including Plaintiffs, by failing to inspect for tripping hazards.

Under South Carolina premises liability law, "a landowner owes an invitee a duty of care to discover risks and to warn of or eliminate foreseeable unreasonable risks." Landry v. Hilton Head Plantation Prop. Owners Ass'n, Inc., *supra*. Wildevco and Fred's duty to Plaintiffs and other patrons is separate and apart from any duty related to the construction of the Fred's store. Plaintiffs' lawsuit against Wildevco and Fred's was based on the allegation that Wildevco and Fred's breached this duty to discover risks and to warn or eliminate risks. The Plaintiffs' claims against Wildevco and Fred's was not based on creating the condition.

Here it cannot be said that Wildevco did nothing wrong as Wildevco failed to adhere to the standard of care established by their safety expert. "Under these circumstances requires a finding that [Wildevco] cannot be 'exonerated from any liability for those damages.' See Inglese v. Beal, 403 S.C. 290, 742 S.E.2d 687 (2013)(quoting Walterboro Cmty. Hosp. v. Meacher, 392 S.E. 479, 709 S.E.2d 71 (Ct. App. 2011)). The testimony at trial is that Wildevco's failure to

inspect for tripping hazards was a failure to exercise its duty of care to discover and to warn of tripping hazards such as the condition that caused Plaintiff Martha Fountain to trip. This failure is sufficient to establish that Wildevco was at least 1% at fault for Plaintiff's injuries, and Wildevco's equitable claim is barred as a matter of law.¹

3. Wildevco and Fred's potential liability arose out of their own actions or inactions, not out of imputed liability; and there is no special relationship between Fred's and Tippins-Polk under South Carolina law.

The right of indemnification may be created by contract or by operation of law "in cases of imputed fault or where some special relationship exists between the first and second parties." Town of Winnsboro, supra. (emphasis added). Wildevco and Fred's were not faced with imputed fault, and there was no recognized special relationship between Fred's and Tippins-Polk.

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

¹ Applying the Court's conclusion logically, it stands for the premise that despite a shopkeeper's admission that it has an obligation to inspect its premises to discover hazards so as to avoid injury to its invitees, admittedly fails to perform that duty at any point in time, is subsequently sued by a patron as a result of the condition which existed for years, the shopkeeper has no liability. Instead, the Court's ruling mandates that the patron's sole recourse should lie against the builder (who was never sued by Plaintiff). Under this theory, what recourse does an injured patron have when the statute of repose has expired as to claims arising out of the construction of a building. Such a conclusion is counter to decades of premises liability jurisprudence.

Tippins-Polk.

Under South Carolina premises liability law, a plaintiff must prove that the defendant created the dangerous condition, or the defendant knew or should have known about the condition. In Plaintiffs' premises liability claims against Wildevco and Fred's, Plaintiffs would have to prove that Wildevco and Fred's created the condition which caused Plaintiffs' injuries, or prove that Wildevco and Fred's knew or should have known about the condition that caused Plaintiffs' injuries. The evidence is clear that Tippins Polk constructed the building and sidewalk, not Wildevco or Fred's.

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

As to Wildevco, there was no finding of fact or conclusion of law that there was a special relationship between Wildevco and Tippins-Polk. Without a special relationship, and without imputed fault there cannot be a right to equitable indemnification. Accordingly, Wildevco is not entitled to equitable indemnification from Tippins-Polk.

As to Fred's, there is not a special relationship with Tippins-Polk according to South Carolina law. The Court incorrectly found that there was a relationship between Wildevco and Tippins-Polk based on "Tippins-Polk's agreement to construct a facility for a Fred's retail store," and based on "its prior construction of at least one other Fred's store." Although the Court found

there was a special relationship, the Court also acknowledges that the construction agreement was only between Wildevco and Tippins-Polk. Therefore, Fred's was not a party to the construction agreement.

The Court's finding a special relationship between Fred's and Tippins-Polk conflicts with South Carolina case law. In a case in which the parties had an identical relationship to that of Fred's and Tippins-Polk, the Court of Appeals has held that there was no special relationship that would give rise to a right to equitable indemnification. Rock Hill Telephone, supra. The Court of Appeal in Rock Hill Telephone specifically found that there was no special relationship with "merely a remote or distant independent contractor." Id.

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

The relationships between Fred's, Wildevco and Tippins-Polk in this matter are identical to the relationships of the parties involved in the Rock Hill Telephone decision. The Court's findings of fact state that Fred's contracted with Wildevco to have a building built and for Fred's to lease the building as a Fred's store in Williston, South Carolina. Wildevco in turn contracted with Tippins-Polk to perform the work of constructing the building. Just as the relationships in

Rock Hill Telephone, there is not direct contract between Fred's and Tippins-Polk. Just as the subcontractor in Rock Hill Telephone, Tippins-Polk is "merely a remote or distant independent contractor." Accordingly, under South Carolina law, there is no special relationship between Fred's and Tippins-Polk that would give rise to equitable indemnification.

Since there is no imputed liability as to Wildevco and Fred's, any claim for equitable indemnification must be based on a special relationship with Tippins-Polk. There was no finding of fact or conclusion of law that a special relationship existed between Wildevco and Tippins-Polk, and under South Carolina law there is no special relationship between Fred's and Tippins-Polk. Therefore, Wildevco and Fred's have no right to equitable indemnification from Tippins-Polk.

4. The Court's failure to consider a prior similar incident at a Fred's store in Varnville is inconsistent with South Carolina law, and establishes Fred's liability.

As was proffered at trial by Tippins-Polk counsel, there was an identical trip and fall which occurred at a Fred's store in Varnville three months prior to Plaintiff Martha Fountain's trip and fall in Williston. Based on the proffered evidence, a patron of the Varnville Fred's store was entering the store in December 2009, and as she approached the entrance, she tripped on the same type curb/ramp transition on which Plaintiff Martha Fountain tripped at the Williston store in March 2010.

Evidence of similar acts is admissible in this state where there is some special relation between them which would tend to prove or disprove some fact in dispute. Oconee Roller Mills, Inc. v. Spitzer, 300 S.C. 358, 360, 387 S.E.2d 718, 719 (Ct. App. 1990)(citing Reed v. Clark, 277 S.C. 310, 286 S.E.2d 384 (1982)). One fact in dispute in this matter is whether Fred's was aware

that the curb/ramp transition at the entrance of the store in Williston was a potential tripping hazard. If Fred's was aware of a similar trip and fall at a Fred's store located in Varnville, then either Fred's knew or should have known that the curb/ramp transition was a potential tripping hazard, and Fred's should have warned or eliminated the condition prior to Plaintiff Martha Fountain's trip and fall.

As a result of the prior trip and fall at the Fred's store in Varnville, Fred's was on notice of the condition that caused Plaintiff Martha Fountain's trip and fall. Under South Carolina premises liability law, Fred's knew or should have known that the curb transition area where Plaintiff tripped could be a tripping hazard, but failed to warn or correct the condition prior to Plaintiff's trip and fall. Accordingly, Fred's was at least 1% at fault for Plaintiff's injuries, and Fred's equitable indemnification claims fail.

5. The Settlement Agreement between Plaintiffs, Wildevco and Fred's specifically "discharges any common liability of Wildevco and Fred's and any Joint Tortfeasor, including Tippins-Polk Construction, Inc. to Plaintiffs."

The Court's Order includes findings of fact related to the settlement between Plaintiffs, Wildevco and Fred's, but the Order fails to note that the settlement agreement discharged Wildevco and Fred's of any liability for contribution as joint tortfeasors. As the Court is aware, "there can be no [equitable] indemnity among mere joint tortfeasors." Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 64, 518 S.E.2d 301, 307 (Ct.App.1999). However, the Court failed to discuss in its Order the language of the settlement agreement between Plaintiff and Wildevco and Fred's which specifically released Wildevco and Fred's "common-liability."

The settlement agreement stated that "it is the intent of this Agreement to relieve

Wildevco and Fred's of any liability for contribution or indemnity to any person or entity that is or may be responsible or liable to Plaintiffs as joint tortfeasors . . ." The agreement further states that "this Agreement operate[s] as a satisfaction of any claim by Plaintiffs against any and all such Joint Tortfeasors, including Tippins-Polk Construction, Inc., and will reduce any damages recoverable against any and all such Joint Tortfeasors, to the full extent of the relative pro-rata share, if any, of the common liability of Wildevco and Fred's. As such, this agreement discharges any common liability of Wildevco and Fred's and any Joint Tortfeasors, including Tippins-Polk Construction, Inc. to Plaintiffs."

South Carolina courts "are cognizant that litigants are free to devise a settlement agreement in any manner that does not contravene public policy or the law." Ecclesiastes Prod. Ministries v. Outparcel Associates, LLC, 374 S.C. 483, 493, 649 S.E.2d 494, 499 (Ct. App. 2007)(quoting Poston by Poston v. Barnes, 294 S.C. 261, 263, 363 S.E.2d 888, 889 (1987)). "In fact, [the Court of Appeals] encourages such compromise agreements because they avoid costly litigation and delay to an injured party." Id. "However, these settlement agreements must be carefully scrutinized in order to determine their efficiency **and impact** upon the integrity of the judicial process." Id. (emphasis added).

From the language of the settlement agreement, the intent was to relieve Wildevco and Fred's liability for contribution as joint tortfeasors. Furthermore, the agreement stated it operated as a satisfaction and discharge of "common liability of Wildevco and Freds' and any Joint Tortfeasor, including Tippins-Polk." Based on this language, it is clear that Wildevco and Fred's intended to extinguish the common liability among Wildevco, Fred's and Tippins-Polk in order to preserve Wildevco and Fred's claim for contribution against Tippins-Polk.

Additionally “[s]ection 15-38-40(D)(2) provides: ‘If there is no judgment for the injury or wrongful death against the tortfeasor seeking contribution, his right of contribution is barred unless he has . . . **agreed** while action is pending against him to **discharge the common liability** and has within one year after the agreement paid the liability and commenced his action for contribution.’” *Id.* (emphasis added). Wildevco and Fred’s could not extinguish or discharge what did not exist. See Vermeer Carolina’s, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 68, 518 S.E.2d 301, 309 (Ct. App. 1999). As testified to by Wildevco’s attorney, Wildevco’s attorney prepared the settlement agreement. This settlement agreement specifically discharged Wildevco, Fred’s and Tippins-Polk’s common liability in order to preserve the claim for contribution. This discharge of common liability for Wildevco and Fred’s must be carefully scrutinized in order to determine the impact upon the integrity of the judicial process, including the equitable indemnification claims asserted against Tippins-Polk.

Here Wildevco and Fred’s have “agreed while [the] action is pending against [them] to discharge the common liability” in order to maintain a right to contribution against Tippins-Polk. However, at the same time, Wildevco and Fred’s took the position that Wildevco and Fred’s were not at fault in their claims for equitable indemnification against Tippins-Polk. Collateral and/or judicial estoppel operates to prohibit a party to a lawsuit from adopting a position in conflict with one earlier taken in the same or related litigation. Hawkins v. Bruno Yacht Sales, Inc., 342 S.C. 352, 536 S.E.2d 698 (Ct. App. 2000).

“Valid compromise and settlement is final, conclusive, and binding upon the parties; it is as binding as any contract the parties could make, and as binding as if its terms were embodied in a judgment; and, regardless of what the actual merits of the antecedent claim may have been, they

will not afterward be inquired into and examined.” 15 Am.Jur.(2d) Compromise and Settlement, s 21. Wildevco and Fred’s have taken the position that they were joint tortfeasors with Tippins-Polk in the settlement agreement. This position is clear from the language of the settlement agreement which was prepared by Wildevco’s attorney.

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

“Wildevco and Fred’s agreed to discharge their common liability, and that of all potential joint tortfeasors. Wildevco and Fred’s should not be allowed to take the position that they have no liability in Plaintiffs’ injuries under collateral/judicial estoppel in their claims for equitable indemnification. Accordingly, the Court should find that Wildevco and Fred’s have common liability as to Plaintiffs’ injuries and are prohibited from recovering under a claim for equitable indemnification because they have unclean hands.

6. The Court failed to find Wildevco at fault for producing defective plans to Tippins-Polk.

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

The testimony at trial was that the architectural plans had a curb, and the site plan had a curb on either side of the front of the store, but gradually reduced down to being flush at the entrance of the store. The site engineer testified that his own site plans were confusing, and that the architectural plans the site engineer used to prepare the site plans were not final drawings and were not the same as the architectural plans that were provided to Tippins-Polk for construction.. Additionally, the testimony from Tippins-Polk was that the site plans were read to indicate a curb along the front until the ramp in front of the entrance door. Tippins-Polk never found any discrepancies during construction and construed the plans to include a curb, as indicated on the architectural plans, and construed within the site plans.

"If a party furnishes specifications and plans for a contractor to follow in a construction job, he thereby impliedly warrants their sufficiency for the purpose in view." Hill v. Polar Pantries, 219 S.C. 263, 271, 64 S.E.2d 885, 888 (1951)(citing 17 C.J.S., Contracts, § 329, page 781). Based on the Court's findings of fact and the evidence at trial, Wildevco hired the architect and engineer to prepare drawings and plans, and Wildevco provided these drawings and plans to

Tippins-Polk. The Court also found that there were drawings and plans that had some areas of confusion and a possible discrepancy. Wildevco provided the drawings and plans to Tippins-Polk for the construction of the store, and thus impliedly warranted the sufficiency of the plans.

The testimony and the Court's finding establish that the plans/designs were not sufficient because of the confusion and discrepancies, as well as the fact that the site engineer was provided different architectural plans. These discrepancies related to the curb and handicap ramp at the store. Plaintiff tripped on the edge of the transition of the handicap ramp. Wildevco failed to provide sufficient drawings and plans to Tippins-Polk, and accordingly at least 1% at fault for Plaintiffs' injuries.

7. The Court failed to find Wildevco, as developer, at fault for tasking Tad Barber to oversee the project when Tad Barber was unqualified to oversee a construction project.

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

"In circumstances where an employer knew or should have known that its employment of a specific person created an undue risk of harm to the public, a plaintiff may claim that the

employer was itself negligent in hiring, supervising, or training the employee, or that the employer acted negligently in entrusting its employee . . . created an unreasonable risk of harm to the public.” James v. Kelly Trucking Co., 377 S.C. 628, 631, 661 S.E.2d 329, 330–31 (2008)(citing Restatement (Second) of Torts § 317 (1965)(Cited with approval in Degenhart v. Knights of Columbus, 309 S.C. 114, 116, 420 S.E.2d 495, 496 (1992)). As this recitation suggests, “the employer’s liability under such a theory does not rest on the negligence of another, but on the employer’s own negligence.” Id.

“It seems to be well settled that where ‘a person holds himself out as specially qualified to perform work of a particular character, there is an implied warranty that the work which he undertakes shall be of proper workmanship and reasonable fitness for its intended use.” Hill v. Polar Pantries, supra. The Court’s Order found that Wildevo was developer for the project, and found that Tad Barber was “responsible” for overseeing the project. However, the findings also state that Tad Barber was not qualified to oversee the project because he had no construction, engineering, or architectural background. The Court’s findings of fact establish that Wildevco failed to provide someone qualified to oversee the project, and as a result, the Wildevco failed to comply with the standard of care that was required from a developer. Accordingly, Wildevco is as least 1% at fault for Plaintiffs’ injuries.

8. Wildevco and Fred’s pleadings seek damages for verdict or judgment rendered against them, and does not seek damages arising out of a settlement.

“It is well settled that parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise.” Skull Creek Club Ltd. P’ship v. Cook & Book, Inc., 313 S.C. 283, 289, 437 S.E.2d 163, 166 (Ct. App. 1993)(quoting Elrod v. All, 243 S.C. 425,

134 S.E.2d 410 (1964)). "The allegations, statements, or admissions contained in a pleading are conclusive as against the pleader and a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are taken as true against the pleader for the purpose of the action." Id.

Wildevco and Fred's pleadings requested judgment against Tippins-Polk for an award or judgment issued in Plaintiff's favor. Wildevco and Fred's did not seek to recover from Tippins-Polk settlement payments made to Plaintiffs. Wildevco's Third Amended Complaint request a "judgment over and against [Tippins-Polk] for all or part of any verdict or judgment over and against [Wildevco]." Similarly, Fred's last Complaint filed requested that "they be awarded judgment over and against [Tippins-Polk] for all or party of any verdict or judgment which may be recovered by the Plaintiffs."

Wildevco and Fred's are judicially bound by their pray for relief that was limited to any amount of judgment or verdict issued against Wildevco and/or Fred's. There was no judgment or verdict issued against Wildevco and/or Fred's. Therefore, Wildevco and Fred's are not entitled to recover under the claim for equitable indemnification for settlement costs paid to Plaintiffs because the relief was not requested.

9. Both Wildevco and Fred's attorneys' fees submitted to the Court at trial contained both fees for defending Plaintiffs' claims and prosecuting the indemnification claims.

The attorneys' fees awarded by the Court are based on speculation and cannot be recovered. The attorneys' fees incurred in defending a lawsuit brought against a party because of the negligence or breach of contract by another party may be recoverable as damages in an equitable indemnification action, and not in prosecuting the indemnification claims. See Addy v.

Bolton, 257 S.C. 28, 183 S.E.2d 708 (1971). Town of Winnsboro v. Wiedeman-Singleton, Inc., 307 S.C. 128, 414 S.E.2d 118 (1992), aff'g, 303 S.C. 52, 398 S.E.2d 500 (Ct. App. 1990); Rhett v. Gray, No. 5066, 2012 WL 6604516 (S.C. Ct. App. Dec. 19, 2012). The amount of damages cannot be left to conjecture, guess, or speculation; however, mathematical certainty is not required. Moore v. Moore, 599 S.E.2d 467 (S.C. Ct. App. 2004).

Wildevco introduced a detailed billing statement as evidence of attorneys' fees. The billing statement was highlighted in several colors indicating tasks that were related solely to the defense of the Plaintiffs' claims, and indicating tasks that were related to both the defense of Plaintiffs' claims, and the prosecution of the indemnification claims. Counsel for Wildevco stated that the amount for those tasks related to both the defense and the prosecution of the indemnify claims was divided in half. There was no discussion from Counsel for Wildevco on how the fifty percent split was arrived at, and thus, any division is based on speculation and is not recoverable.

Fred's introduced the Affidavit of Denise M. Brockwell in support of its claim for attorneys' fees. However, unlike Wildevco's evidence, Fred's did not attempt to breakout the attorneys' fees for the defense of Plaintiffs' claims and fees for the prosecution of the indemnification claim. Therefore, Fred's attorneys' fees being sought of the defense of Plaintiffs' claims can only be determined by pure speculation, and are not recoverable.

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

CONCLUSION

Based on the foregoing authorities and arguments, Tippins-Polk is entitled to an order amending the Court's Order dated August 1, 2016, finding that Wildevco and Fred's were at least 1% at fault in Plaintiffs' injuries, and that their equitable indemnification claims fail because of unclean hands. Furthermore, based on the foregoing authorities and arguments, the Court should amend its Order filed August 1, 2016, and render judgment in favor of Tippins-Polk. In the alternative, the Court should amend its Order and Judgment to exclude attorneys' fees that are not exclusively for the defense of the Plaintiffs' claims.

Dated this 11th day of August 2016.

Respectfully submitted,

WALL TEMPLETON & HALDRUP, P.A.



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Attorneys for Tippins-Polk Construction, Inc.

STATE OF SOUTH CAROLINA

COUNTY OF BARNWELL

MARTHA FOUNTAIN and CURTIS
FOUNTAIN,

Plaintiff,

vs.

FRED'S INC., et al

Defendant.

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

CASE NO.: 2010-CP-06-101

MOTION AND ORDER INFORMATION

FORM AND COVERSHEET

FILED FOR RECORD
20 AUG 15 PM 2:09
CLERK OF COURT
JUDICIAL CIRCUIT
SOUTH CAROLINA

Plaintiff's Attorney:
Mark D. Ball, Bar No. _____
Address:
Post Office Box 457 Hampton, SC 29924
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Other: _____

Defendant's Attorney:
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Phone: 843-329-9500 Fax 843-329-9501
E-mail: brown.mcleod@walltempleton.com
Other: _____

- ☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion to Reconsider

Estimated Time Needed: 30 Minutes

Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

- ☐ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Promg A Jr

Signature of Attorney for ☐ Plaintiff / ☐ Defendant

8/11/16

Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$ 25.00

☐ EXEMPT:

(check reason)

- ☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☒ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other:

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: *CRM* Date Filed: *8/15/16*

☒ MOTION FEE COLLECTED: \$ 25.00

☐ CONTESTED - AMOUNT DUE: \$ _____

STATE OF SOUTH CAROLINA

COUNTY OF BARNWELL

Martha M. Fountain and Curtis Fountain,

Plaintiffs,

vs.

Fred's, Inc. and Wildevco, LLC,

Defendants, Third-Party Plaintiffs,

vs.

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

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

Civil Action No. 2010-CP-06-101

**WILDEVCO, LLC'S MEMORANDUM
IN RESPONSE TO TIPPINS-POLK
CONSTRUCTION, INC.'S MOTION TO
MAKE ADDITIONAL FINDINGS AND
MOTION TO RECONSIDER AND/OR
AMEND**

FILED FOR RECORD
2016 SEP 12 PM 1:08
HONORABLE COURT
CLERK OF COURT
BARNWELL COUNTY, S.C.

COMES NOW Defendant Wildevco, LLC (hereinafter "Wildevco"), by and through undersigned counsel, who hereby submits the following Memorandum in Response to Tippins-Polk Construction, Inc.'s (hereinafter "Tippins-Polk") Motion to Make Additional Findings and Motion to Reconsider and/or Amend (hereinafter "Motion"). Wildevco requests that this Honorable Court deny Tippins-Polk's Motion, and in support thereof, Wildevco shows as follows:

STATEMENT OF THE FACTS

The underlying case arises from a trip and fall by Plaintiff Martha Fountain on March 10, 2010, at the Fred's store in Williston, South Carolina. Plaintiff Martha Fountain asserts that she tripped on a defective handicap curb ramp in front of the store, which caused her to fall and sustain personal injury. The subject premises is owned and was developed by Wildevco, who hired Tippins-Polk as the general contractor on the project.

On May 12, 2010, Plaintiffs in the underlying action sued Defendants Fred's Inc. (hereinafter "Fred's"), and Wildevco (collectively, "Defendants") alleging negligence and loss of consortium.¹ On August 1, 2012, with the consent of Plaintiffs, Wildevco filed an Amended Answer and Third-Party Complaint against Tippins-Polk Construction, Inc. ("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 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 against Tippins-Polk.

Defendants settled the underlying action with Plaintiffs on March 20, 2016, and consummated the agreement on April 21, 2016. Defendants then proceeded to trial against Tippins-Polk on June 6-7, 2016, on the sole third-party claim of equitable indemnification for damages sustained by them as a result of the alleged faulty construction of the subject Fred's store. The Court entered judgment in favor of Defendants/Third-Party Plaintiffs Wildevco and Fred's on August 1, 2016. Thereafter, Tippins-Polk filed the present Motion, requesting the Court reconsider and/or alter or amend its Order on numerous grounds, set forth more fully below. Wildevco requests the Court deny Tippins-Polk's Motion. In the alternative, if the Court is inclined to alter or amend its Order, Wildevco requests it do so in the manner outlined below.

ARGUMENT

I. The Court made sufficient findings of fact as to equitable indemnification such that it should deny Tippins-Polk's request to alter or amend the Order dated August 1, 2016, in which the Court found in favor of Wildevco and Fred's.

¹ Plaintiffs also named Tad Barber, one of the principals of Wildevco, as a defendant in the initial action, but Mr. Barber was dismissed as a defendant shortly before the scheduled trial of this matter.

- a. **The Court's Order made a sufficient finding that Wildevco was potentially liable to Plaintiffs as required to establish a claim for equitable indemnification.**

Tippins-Polk first argues the Court's Order reflects that Wildevco failed to prove all elements of equitable indemnification, as the Order omits that Wildevco established it was potentially liable to Plaintiffs in the underlying case. However, a finding that Wildevco was potentially liable to Plaintiffs is necessarily encompassed within the Court's current findings of fact and conclusions of law; thus, the Court need not alter or amend its Order dated August 1, 2016.

Contrary to Tippins-Polk's argument, the absence of an explicit finding that Wildevco was potentially liable to Plaintiffs is not fatal to the Court's ultimate decision in favor of Wildevco on equitable indemnification. The Court specifically found that (1) Tippins-Polk was at fault in causing Plaintiffs' damages, (2) Wildevco had no fault in causing Plaintiffs' damages, and (3) Wildevco incurred expenses that were necessary to protect its interest in defending against Plaintiffs' claims as required to establish a claim of equitable indemnification. *See* Court Order, dated August 1, 2016, pgs. 8-9; *see also Inglese v. Beal*, 742 S.E.2d 687, 692 (S.C. Ct. App. 2013); *Walterboro Cmty. Hosp. v. Meacher*, 709 S.E.2d 71, 74 (S.C. Ct. App. 2011).

Furthermore, the Court specifically found in Paragraphs 9-13 that the settlement was bona fide, Wildevco's decision to settle was a reasonable means of protecting its interest in the present case, and the amount of the settlement was reasonable *in light of the third party's estimated damages and the risk and extent of defendant's exposure if the case had been tried*. *See* Court Order, dated August 1, 2016, p. 9-10. Thus, the Court implicitly ruled that Wildevco was potentially liable to Plaintiffs, and Wildevco's decision to settle as well as the amount of settlement was reasonable based upon that potential liability. Pursuant to the foregoing, any

further finding upon Wildevco's potential liability to Plaintiffs in the underlying action would be redundant. However, to the extent the Court is inclined to alter any portion of its Order based on Tippins-Polk's argument on this issue, Wildevco requests the Court add an express conclusion of law that Wildevco was potentially liable to Plaintiffs.

Tippins-Polk oddly puts forth the converse contention that even if the Court found Wildevco was potentially liable to Plaintiffs, Wildevco cannot recover under equitable indemnification. This converse contention produces an absurd result. If Wildevco is required to prove it was potentially liable to Plaintiffs to establish a claim of equitable indemnification, which Wildevco established and the Court ruled upon as set forth above, Tippins-Polk cannot argue that once the potential liability is proven, Wildevco cannot recover for equitable indemnification. Such an argument is circular and would undermine every claim of equitable indemnification. Simply put, Wildevco established all elements necessary to entitle it to equitable indemnification, as found by the Court in its final Order. Thus, the Court must deny Tippins-Polk's Motion on this ground.

- b. The Court correctly found that Wildevco was not at fault for the injuries sustained by Plaintiffs arising from a construction defect at the subject premises.**

Tippins-Polk next argues that Wildevco admitted a breach of the standard of care owed to patrons, and, thus, Wildevco was partly at fault for the Plaintiffs' damages. Specifically, Tippins-Polk asserts Wildevco failed to inspect the premises for tripping hazards. However, any failure to inspect on the part of Wildevco, which is denied, is not the proximate cause of Plaintiff's injuries. Thus, the Court should deny Tippins-Polk's Motion on this ground.

While Plaintiffs' first phrased their Complaint as one sounding in premises liability, as litigation continued it became evident that Plaintiffs alleged a construction defect that arose from

Tippins-Polk's negligent construction of the premises caused their damages. This case does not involve a foreign substance on the ground, such that Wildevco or Fred's may discover the risk and eliminate the foreseeable unreasonable risk. As stated by Wildevco's corporate representative, Wildevco had no knowledge or notice of the construction defect in the sidewalk curb ramp on which Plaintiff Martha tripped and fell. Further, as the developer, Wildevco also testified that it would not have had the requisite construction knowledge to be able to identify the construction defect in the subject sidewalk curb ramp. Wildevco provided the plans and specifications to Tippins-Polk, who failed to construct the premises according to those pertinent documents. Thus, the breach of care resulting in Plaintiff Martha's injuries rested solely on Tippins-Polk.

- c. **The Court sufficiently stated findings of fact and conclusions of law to establish the basis upon which Wildevco could allege a claim of equitable indemnification against Tippins-Polk.**

Tippins-Polk next alleges that the Court failed to make a finding of fact or conclusion of law that a special relationship existed between Wildevco and Tippins-Polk, and, thus, Tippins-Polk argues that Wildevco's claim of equitable indemnification was not viable. However, the Court sufficiently and correctly stated conclusions of law that set forth a special relationship between Wildevco and Tippins-Polk such that a ruling in favor of Wildevco on equitable indemnification was proper.

Equitable indemnity "is based upon the specific relation of the indemnitee to the indemnitor in dealing with a third party." *Rock Hill Tel. Co. v. Globe Communs., Inc.*, 363 S.C. 385, 389, 611 S.E.2d 235, 237 (2005). "In general, indemnity may be defined as a '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.'" *Id.* (quoting *First Gen. Servs. of Charleston, Inc. v. Miller*,

314 S.C. 439, 442, 445 S.E.2d 446, 449 (1994)). The right to indemnity arises by operation of law "in cases of imputed fault or where some special relationship exists between the first and second parties." *Id.* (quoting *First Gen. Servs. of Charleston, Inc.*, 314 S.C. at 442, 445 S.E.2d at 449). "[A] sufficient relationship exists when the at-fault party's negligence or breach of contract is directed at the non-faulting party and the non-faulting party incurs attorney fees and costs in defending itself against the other's conduct." *Toomer v. Norfolk S. Ry.*, 344 S.C. 486, 492, 544 S.E.2d 634, 637 (Ct. App. 2001) (emphasis added).

Pursuant to the Court's conclusions of law in Paragraphs 6-8, Wildevco proved a sufficient relationship existed when the Court found Tippins-Polk's failure to conform to the specifications and plans given to it for the subject premises was the sole cause of the Plaintiffs' injuries, which in turn caused Wildevco to incur attorney's fees and costs in defending itself against Tippins-Polk's conduct. *See* Court Order, dated August 1, 2016, pgs. 8-9. To the extent the Court is inclined to amend this portion of its Order, Wildevco requests the Court add a conclusion of law expressly finding that a special relationship existed between Wildevco and Tippins-Polk such that Wildevco established viable claim of equitable indemnification.

d.² The Court correctly concluded that the settlement agreement drafted by Wildevco did not preclude its equitable indemnification claim.

Tippins-Polk argues that Wildevco entered the trial with unclean hands by drafting its Release with Plaintiffs in a manner that does not foreclose the possibility of a contribution claim and was thus not entitled to judgment for its claim of equitable indemnification. However, the language of the Release is immaterial to Wildevco's entitlement to recovery under the theory of equitable indemnification. Thus, the Court correctly found that Wildevco was entitled to

² The fourth ground in Tippins-Polk's Motion pertains only to Fred's; thus, Wildevco does not address it in this Memorandum.

recovery under equitable indemnification as Tippins-Polk was solely responsible for Plaintiff's injuries.

Tippins-Polk fails to provide any case law for its argument that Wildevco, by drafting the Release in a manner that may permit it to seek a claim of contribution against Tippins-Polk, acted with unclean hands. Furthermore, and contrary to Tippins-Polk's assertion, Wildevco did not admit any liability for Plaintiffs' damages in allowing for a potential claim of contribution against Tippins-Polk, as reflected in Paragraph 8 of the Release, which states "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.*" (emphasis added).

Wildevco was well within its right to draft the Release in a manner allowing 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). Thus, the Court fully and properly considered all the facts when finding in favor of Wildevco on its claim of equitable indemnification, and Tippins-Polk's Motion should be denied.

- e. **The Court correctly found that Wildevco was not at fault for Plaintiffs' damages where Tippins-Polk did not construct the premises in compliance with the plans and specifications provided to it.**

Tippins-Polk argues the Court should reconsider its judgment in favor of Wildevco on the basis that Wildevco warranted the sufficiency of the plans and specifications in furnishing same to Tippins-Polk; thus, Tippins-Polk alleges discrepancies existed between the site plans and the architectural drawings, for which Wildevco is liable to Plaintiffs. However, the Court properly distinguished the present facts from case law cited by Tippins-Polk; thus, Tippins-Polk's Motion should be denied.

In *Hill v. Polar Pantries*, cited by Tippins-Polk, the same person who designed the plan also was involved in the construction project and held himself out to have special knowledge in the design of the construction project, which was a frozen food locker plant. 219 S.C. 263, 270, 64 S.E.2d 885, 887-88 (S.C. 1951). Here, the Court correctly made a finding of fact in Paragraph 4 that the site plans were furnished by Hass & Hilderbrand, Inc., and that any alleged discrepancies in the site plans were to be addressed with the supervising engineer for review, which Tippins-Polk never did. See Court Order, dated August 2, 2016, pg. 4. The Court then found that Tippins-Polk constructed an elevated sidewalk with a curb and curb ramp rather than a sidewalk flush with the parking lot and store entrance as reflected in the site plans. See Court Order, dated August 1, 2016, pg. 4. Importantly, the flare on the right side of the curb ramp where Plaintiff Martha Fountain tripped extended into the walkway leading to the entrance doors of Fred's, which did not comply with either the site plans provided or applicable industry standards. See Court Order, dated August 1, 2016, pg. 4. Thus, the Court correctly made conclusions of law in Paragraphs 5-8 that Wildevco reasonably relied upon Tippins-Polk's expertise and special knowledge in construction to ensure the premises was built in accordance

with the sit plans, and Tippins-Polk was solely responsible for the construction defect that caused Plaintiffs' damages in the underlying action. *See* Court Order, dated August 1, 2016, pg. 8. Accordingly, Tippins-Polk's Motion must be denied on this ground.

- f. The Court did not err in failing to find liability on the part of Wildevco based on Tad Barber's general management of the construction process for the Fred's store.**

Tippins-Polk asserts that the Court erred in failing to find liability on behalf of Wildevco permitting Tad Barber, a partner of Wildevco, to oversee the construction of the subject premises. However, the Court correctly concluded that Tad Barber lacked the knowledge and expertise to identify the latent construction defects in the premises. Accordingly, Tippins-Polk's Motion must be denied upon this ground.

Tippins-Polk mistakenly assumes the 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 should not have managed the construction project as Tippins-Polk suggests. Specifically, the fact that Tad Barber managed the construction project by hiring contractors, including Tippins-Polk, and overseeing the general progress of the project does not give rise to liability on the part of Wildevco. The Court specifically noted in trial that Mr. Barber 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. Tippins-Polk essentially alleges that Tad Barber was negligent in hiring it, which is not a viable claim. Thus, the Court should deny Tippins-Polk's Motion on this ground.

- g. The Court correctly awarded judgment in Wildevco's favor based upon the prayer for relief as stated in Wildevco's Third Amended Third-Party Complaint.**

Wildevco prayed for all relief requested in its Amended Answer to Plaintiffs' Complaint and further, for all relief requested in the Third Amended Third-Party Complaint, including any relief 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 Wildevco, together with costs and disbursements herein, as well as for all damages sustained by Wildevco, including attorneys' fees and costs, and for such other and further relief as the Court would deem just and proper.

The Court correctly found in favor of Wildevco on its claim for equitable indemnification and awarded judgment to Wildevco pursuant to the prayer for all damages sustained by Wildevco, including attorneys' fees and costs. Additionally, Wildevco requested the Court award any further relief as the Court would deem just and proper. Thus, the Court in the present case was well within its authority to grant judgment in favor of Wildevco based upon the prayer for relief in its Third Amended Third-Party Complaint as set forth above; thus, the Court should deny Tippins-Polk's Motion upon this ground.

- h. The Court correctly awarded Wildevco's attorney's fees based upon the amount incurred defending Plaintiffs' claims.**

Tippins-Polk asserts the Court failed to apportion the proper amount of attorney's incurred by Wildevco in defending the underlying action by awarding Wildevco attorney's fees related to the indemnification action. Specifically, Tippins-Polk alleges the Court improperly based its decision on speculation and conjecture in awarding 50% of those fees related to both the defense of Plaintiffs' claims and the prosecution of the indemnification claims. However, the Court properly awarded attorney's fee that were the natural and direct consequence of

Wildevco's defense in the underlying claim. Thus, the Court should deny Tippins-Polk's Motion.

The Court found Wildevco incurred costs and expenses, including attorney's fees, as a legal consequence of Tippins-Polk's negligent construction of the subject premises. *See* Court Order dated August 1, 2016, pg. 9; *McCoy v. Greenwave Enters, Inc.*, 408 S.C. 355, 359, 759 S.E.2d 136, 138 (2014) (explaining reasonable attorney's fees incurred in resisting the indemnified claim may be recovered in contractual or equitable indemnification). As Tippins-Polk acknowledges, Wildevco presented a detailed fee report, noting tasks that were specific to equitable indemnification and those tasks related to both the Plaintiffs' claims and the indemnification claim. 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. 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 requested fees were reasonable and the Court correctly granted the reimbursement. 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, the Court must deny Tippins-Polk's Motion upon this ground.

CONCLUSION

As set forth above, the Court fully and properly considered all of the facts before it and Tippins-Polk presents no argument upon which the Court should alter or amend its judgment. Based upon the foregoing reasons, this Court must deny Tippins-Polk's Motion.

{Signature page follows.}

Respectfully submitted,



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September 8, 2016

STATE OF SOUTH CAROLINA

COUNTY OF BARNWELL

Martha M. Fountain and Curtis Fountain,

Plaintiffs,

vs.

Fred's, Inc. and Wildevco, LLC,

Defendants,

vs.

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

Third-Party Defendant.

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

Civil Action No. 2010-CP-06-101

**MEMORANDUM IN OPPOSITION OF
THIRD-PARTY DEFENDANT'S
MOTION TO MAKE ADDITIONAL
FINDINGS AND MOTION TO
RECONSIDER AND/OR AMEND**

Defendant, Fred's Stores of Tennessee, Inc., incorrectly identified as Fred's, Inc., hereby submits this Memorandum in Opposition to Third Party-Defendant's Motion to Make Additional Findings and Motion to Reconsider and/or Amend.

CASE SUMMARY

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. Specifically, and pertinent to the instant motion being presented here, claims were made by Fred's and Wildevco for equitable indemnification. A trial was held over the course of April 6 and 7, 2016 before The Honorable Doyet A. Early, III. Eventually an Order and Judgment was requested by Judge Early and prepared by counsel for Fred's and Wildevco. The Order and Judgment was filed on August 3, 2016 and Tippins-Polk has filed this motion related thereto.

STANDARD OF REVIEW

Rule 52(b) and 59(e) of the South Carolina Rules of Civil Procedure are each methods by which a party may move the court to amend or make additional findings, which is precisely what Tippins-Polk has presented in this motion.

ARGUMENT

- 1. There was sufficient evidence presented to prove that Fred's was "potentially" liable to Plaintiffs, and proved that they were without fault.**

Tippins-Polk correctly points to a requirement for indemnification, which requires an indemnitee to prove "that he was *potentially* liable to the plaintiff." *Otis Elevator, Inc. v. Hardin Const. Co. Group, Inc.*, 316 S.C. 292, 297, 450 S.E.2d 41, 44 (1994). To support their contention Tippins-Polk merely points to the absence of a finding of fact or conclusion of law addressing the "potential liability" of Fred's or Wildevco.

During the trial of this matter Fred's and Wildevco presented lengthy and passionate testimony by Plaintiff, Martha Fountain as to the events that led up to her trip-and-fall incident; the occurrence of which were not disputed. Within the testimony proffered by Ms. Fountain

there was more than ample evidence upon which a jury could have found either or both Fred's and/or Wildevco liable thereby satisfying the "potentially liable" element in *Otis Elevator* for an indemnification claim to proceed. Furthermore, Fred's and Wildevco offered up the deposition testimony of E. Mitchell Griffith, Esquire of Griffith, Sharp & Liipfert, LLC. Mr. Griffith is a practicing attorney in the State of South Carolina, in good standing, and has been for nearly thirty-three (33) years. Mr. Griffith indicated that within his practice he has served largely as a defense attorney, which has included premises liability cases. Mr. Griffith, in rendering a conclusion as to the reasonableness of the settlement, indicated that one of the factors he looked at in this case was that of liability. *See Deposition of E. Mitchell Griffith*, p. 13, ll. 22. It was ultimately determined by Mr. Griffith, on account of the factors he relied upon, which included potential liability of Fred's and Wildevco that the settlement reached with Plaintiffs was reasonable thus logic dictates that there was some potential for liability in compliance with the requirements for pursuing indemnification.

Tippins-Polk attempts to make a rather circuitous argument noting that "if they [Fred's and Wildevco] where 'potentially' liable, they are not free from fault ... thus, cannot recover under a theory of equitable indemnification." The law in South Carolina on indemnification is clear and includes, as a prima facie showing establishment of "potential" liability, which stands in stark contrast to that of actual liability. Under Tippins-Polk's there can be no action ever advanced for equitable indemnification as to meet one of the evidentiary burdens, showing "potential liability" the party would be establishing that they are not free from fault thereby defeating their own claim.

In the instant proceedings Fred's directs the Court back to the evidence presented during the trial, which included largely excerpts from deposition transcripts on the issue of their being

without fault. During trial it was established that Fred's was not responsible for the maintenance, repair or inspection of the sidewalks, curbs or curb ramps as part its lease agreement with Wildevco. In fact, during the deposition of Mr. Tad Barber he specifically indicated that Fred's was not, in any way, responsible for the sidewalk and curbing at the entrances of the store. See *Deposition of Thaddeus Barber*, p. 47, lls. 9-12. Therefore, the evidence clearly establishes that Fred's was without fault as the alleged condition was not created by them and was one for which they were not responsible as the lessee. Finally, as counsel for Tippins-Polk himself acknowledged during the proceedings the store was regularly inspected throughout the day by Fred's searching from potential hazards, which was further proof that there were sufficient efforts by the store to maintain a reasonably safe premises as required by the law.

2. Fred's potential liability did not arise out of their own actions or inactions, but rather out of imputed liability.

The evidence in this case point to one clear and conclusive position, which is that of imputed fault on account of the actions and inactions of Tippins-Polk as the general contractor responsible for the construction of this premises. It is undisputed that Tippins-Polk was hired to serve as the general contractor responsible for the construction of the property where the subject incident occurred. Furthermore, it is also undisputed that the condition at issue was within the purview and control of Tippins-Polk as the general contractor and was not constructed by or in any way at the direction of Fred's. In fact, as admitted by Wildevco, Fred's was not responsible, in any way, for the sidewalk or curbs at this location thus the only method for potential liability of Fred's would come by way of imputed liability.

Ordinarily, if one person is compelled to pay damages because of negligence imputed to him as the result of a tort committed by another, he may maintain an action over for indemnity against the person whose wrong has thus been imputed

to him; but this is subject to the provision that no personal negligence of his own has joined in causing the injury.

Town of Winnsboro v. Wiedman-Singleton, Inc., 303 S.C. 52, 57, 398 S.E.2d 500, 503 (Ct.App. 1990); (quoting *Atlantic Coast Line R.R. Co. v. Whetstone*, 243 S.C. 61, 70, 132 S.E.2d 172, 176 (1963)).

The evidence presented in the trial of this case was that certain architectural plans and site plans were prepared at the request of Wildevco in light of a prototype rendering of a Fred's store. These plans were then submitted to Tippins-Polk for the purpose of constructing the property. It was established that Tippins-Polk in agreeing to serve as general contractor for this build agreed to do so in a manner that was compliant with all applicable building codes, which included, but was not limited to International Building Code 2003 and 1998 ICC/ANSI 117.1 standards for accessibility. Neither Fred's nor Wildevco had any responsibility during the construction process other than providing the aforementioned plans. Fred's and Wildevco, through the testimony of its expert J. Steven Hunt, establish that there were multiple code violations pertaining to the construction of the curb and curb ramp. Specifically, Mr. Hunt testified that the curb ramp at the highest point of the flare was lower than the permitted minimum height for a curb, which was four (4) inches. Furthermore, Mr. Hunt testified that the flare of the curb ramp was not plane but rather was wavy, with some areas rising where it should have continued to slop downward. Finally, Mr. Hunt testified that the curb ramp was not centered with the door, but rather the flare protruded into the natural walkway posing. Each of the foregoing issues identified by Mr. Hunt posed tripping hazards created by Tippins-Polk alone thus giving rise to Fred's claim for indemnification based upon imputed liability.

3. A special relationship existed between Fred's and Tippins-Polk under South Carolina law.

As a cursory matter Fred's first points to a sustainable claim for indemnification against Tippins-Polk under the accepted principle of imputed liability. It has been established 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." *Id.* 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 support of its position Tippins-Polk 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 not against a subcontractor but against the general contractor with whom a contract was made for services rendered.

The Order the Court found the relationship with Fred's and Tippins-Polk was not an attenuated action against a sub-contractor with whom Fred's had no connection with in its

involvement of the construction. Specifically, evidence was presented during the proceedings that Tippins-Polk had never previously done business with Wildevco but rather was presented with this opportunity on account of its previous relationship as a general contractor on the build of another Fred's store. Furthermore, it was noted the contract entered into by and between Tippins-Polk and Wildevco was clearly known to have been for the benefit of Fred's as they were directly referenced in the agreement and Reti Polk testified to knowing that the primary store in this shopping center was Fred's. Likewise, Mr. Barber testified to having never previously had any relationship with Tippins-Polk.

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 Fred's, and was created for their direct benefit as it described building a Fred's store. Moreover, Mr. Polk even testified to knowing the contract was for the building of a Fred's store thus it cannot 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.

4. The Court properly refused to consider a prior incident at a Fred's store in Varnville, which was consistent with South Carolina law.

Tippins-Polk, on at least two separate occasions during trial sought to broach the subject of a purportedly similar incident that was alleged to have occurred at a different Fred's store located in Varnville, South Carolina. Counsel for Fred's immediately objected to this line of

questioning and the objection was sustained by the Court. Upon calling Rett Polk to the witness stand counsel for Tippins-Polk once again attempted to present questions on the other alleged incident at the store located in Varnville, South Carolina. Though counsel for Fred's objected to this line of questioning Tippins-Polk's counsel was permitted to proffer testimony on this issue before the Court determined such evidence was inadmissible. However, in their brief Tippins-Polk blatantly overstates the similarities between the incident in Varnville and the incident involving Plaintiff Martha Fountain in Williston, as it was described as an "identical trip and fall."

The law on admissibility of similar incidents is well settled and such attempts are placed under heightened scrutiny given the potential for extreme prejudice. *Watson v. Ford Motor Co.*, 389 S.C. 434, 699 S.E.2d 169 (2010). In the case of *Barlotti v. Ocean Course Golf Club, LLC* an individual who had sustained injuries resulting from a slip and fall sought to introduce evidence of "a prior slip and fall on another bridge on the same golf course." 2014 WL 6977542. The Court noted "[e]vidence of similar accidents ... 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." *Id.*; (See *Watson Supra*, 389 S.C. at 453). However, the Court also indicated there is a requirement, before similar accidents or happenings are deemed admissible, that the party seeking such admission "establish a factual foundation to show substantial similarity because evidence of similar incidents may be extremely prejudicial." *Id.*; (See *Watson Supra*, 389 S.C. at 454). In *Barlotti* the prior incident that counsel sought to cross-examine a witness on occurred at the same course though notably, and significantly, on a different bridge and the fact that it was not the same bridge created enough difference to permit the barring of any such questioning on the prior incident. In the instant case the prior occurrence Tippins-Polk sought to

question witnesses on did not even occur at the same store let alone on the same curb ramp. Based upon the fact that the incident did not involve the same curb ramp at the Williston store it would be fundamentally impossible to present a sufficient factual foundation to show substantial similarity. Moreover, Tippins-Polk was unprepared to make such a showing, as the individual from whom they sought to elicit testimony and thereby create a factual foundation was not present during the prior incident thus making him unable to present any details with regard to the occurrence in Varnville. Tippins-Polk simply attempted to introduce evidence of an incident in Varnville and label it substantially similar by virtue of the fact that they were the general contractor of that store as well. By virtue of the Varnville accident happening at a different store and on a different curb ramp there are too many distinguishing factors between the event to consider the two substantially similar thus the Court properly excluded such evidence from this trial.

5. Liability was discharged as to Tippins-Polk Construction, Inc. only for the purpose of potentially proceeding with a contribution claim but was not a true joint tortfeasor.

Tippins-Polk correctly points out that "there can be no indemnification among mere joint tortfeasors." *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 64, 518 S.E.2d 301, 307 (Ct.App. 1999); (See also *Scott v. Fruehauf Corp.*, 302 S.C. 364, 396 S.E.2d 354 (1990); *Stuck v. Pioneer Logging Machinery, Inc.*, 279 S.C. 22, 301 S.E.2d 552 (1983); *Atlantic Coast Line R.R. v. Whetstone*, 243 S.C. 61, 132 S.E.2d 172 (1963)). However, as was further indicated that "[p]arties 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.* Additionally joint tortfeasors, as defined within Black's Law Dictionary 839 (6th ed. 1990), refers to "two or more persons jointly or severally liable in tort for

the same injury to person or property.” An analysis of the record in the case at bar leads to a clear and unequivocal conclusion that Fred’s and Tippins-Polk Construction were not “joint tortfeasors.” Tippins-Polk pointed out repeatedly that they were not sued by Plaintiffs thus inarguably could not be, in these proceedings, be held directly liable to the Plaintiffs for their injuries rather the only entities to which they could be responsible were Fred’s and Wildevco. Moreover, the only claim for which Tippins-Polk could be held liable was that of equitable indemnification to Fred’s and Wildevco. Therefore, under the foregoing reasoning these parties were not “joint tortfeasors” thus permitting a claim for indemnification to exist and continue.

6. **Fred’s prayer for relief included all damages sustained by them, including attorneys’ fees and costs, and for such other and further relief as the Court would deem just and appropriate.**

While there is certainly no dispute that Fred’s sought, as a part of its damages, an awarded judgment for all or part of a verdict or judgment recovered by Plaintiff’s against them. There can also be no dispute that the prayer for included language requesting “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.” *Id.* at 62. 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.

7. The defense of Plaintiffs' claims and prosecution of the indemnification were actions undertaken to both defend litigation and protect the Fred's 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." *Id.* at 61; (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 v. Bolton* 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 Fred's and Wildevco and only through later efforts came to include the equitable indemnification claim against Tippins-Polk. Even Tippins-Polk cannot contend that the actions taken that may have benefited Fred's in its claim for equitable indemnification were done to protect the interests of Fred's 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 Fred's did not create a dangerous condition on its premises. Mr. Hunt, particularly, was brought in to establish precisely all the manners in which Tippins-Polk breached its duty to create a premises 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 Tippins-Polk 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.

Tippins-Polk further contends the attorneys' 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 Tippins-Polk 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 Tippins-Polk consented, without objection, to the admission of the Affidavit of Denise M. Brockwell, which was provided to the Court as evidence of attorneys' fees and costs incurred and paid by Fred's in direct response to a suit brought by Plaintiffs. In *Freeman v. A & M Mobile Home Sales, Inc.*, 293 S.C. 255, 359 S.E.2d 532 (1987) a similar scenario presented itself when an attorney offered to simply present a court with an estimate of hours spent in the litigation of this case. 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. Based upon the foregoing precedent Tippins-Polk, which failed to object to the figures established by or in the Affidavit of Denise M. Brockwell during trial cannot now complain about the figures presented in the affidavit.

Under South Carolina law, there was sufficient evidence presented at the trial to support the Court's ruling in favor of Fred's as to their claim for equitable indemnification by Tippins-

Polk. Moreover, the Court was within its sound discretion to enter judgment in favor of Fred's in the amount of Seventy-Six Thousand Six Hundred Ninety-One and 82/100 (\$76,691.82) Dollars. Therefore, Fred's respectfully requests that the Court deny Plaintiff's Motion to Reconsider and/or Amend.

Respectfully submitted,



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PLAINTIFF, FRED'S STORES OF TENNESSEE, INC.

This 7th Day of September 2016
Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF BARNWELL

Martha M. Fountain and Curtis Fountain,

Plaintiffs,

vs.

Fred's Inc. and Tad Barber, individually and
d/b/a Wildevco, LLC,

Defendants,

vs.

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

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

Civil Action No. 2010-CP-06-101

**DEFENDANTS TAD BARBER,
INDIVIDUALLY AND D/B/A
WILDEVCO, LLC'S MEMORANDUM
IN SUPPORT OF MOTION TO AMEND
THIRD-PARTY COMPLAINT**

Pursuant to Rule 15 of the South Carolina Rules of Civil Procedure, Defendants/Third-Party Plaintiffs Tad Barber, individually and d/b/a Wildevco, LLC ("Wildevco") hereby submit this Memorandum in Support of their Motion to Amend Third-Party Complaint. This Honorable Court should permit the foregoing Defendants' requested amendment as justice so requires and no other party will be prejudiced by the granting of the Motion.

NATURE OF CASE AND PROCEDURAL HISTORY

The underlying action is a premises liability matter. Plaintiff Martha Fountain alleges that on March 10, 2010, as she was approaching the entrance to the Fred's store in Williston, South Carolina, she tripped on a portion of a handicap curb ramp in front of the store, which caused her to fall and sustain personal injury. Plaintiffs contend that Defendants Fred's Inc., Barber, and Wildevco (collectively, "Defendants") have a duty to provide a safe premises for patrons of Fred's, including Plaintiff Martha Fountain, and that Defendants breached that duty,

proximately causing the injuries and damages she allegedly sustained as a result of the incident in question. Plaintiff Curtis Fountain asserts a loss of consortium claim.

The subject premises is owned by Wildevco, of which Defendant Tad Barber is a member; the store is operated by Defendant Fred's, Inc. ("Fred's"). On August 1, 2012, with the consent of Plaintiffs, Defendants filed an Amended Answer and Third-Party Complaint against Tippins-Polk Construction, Inc. ("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. In their Third-Party Complaint, Defendants asserted causes of action for breach of agreement and/or warranties and negligence in connection with the construction of the subject Fred's store, seeking as relief in each of those causes of action indemnity or contribution from Tippins-Polk.

Thereafter, Tippins-Polk joined by Fourth-Party Complaint Southern Asphalt, LLC ("Southern Asphalt") and Rhoad's Excavating Services, LLC, which served as subcontractors on the construction project. Rhoad's Excavating Services, LLC has never appeared in this case, which resulted in an entry of default against it on July 16, 2013. The Court dismissed Tippins-Polk's Fourth-Party Complaint against Southern Asphalt by Order dated September 5, 2013; however, Defendants were granted permission to amend their Third-Party Complaint to allege causes of action directly against Southern Asphalt as a Third-Party Defendant. Following a hearing on April 2, 2014, the Court granted Southern Asphalt's Motion for Summary Judgment as to Defendants' causes of action presented in the Amended Third-Party Complaint by Order filed July 17, 2014, as it found that Defendants did not have a contractual or other special relationship with Southern Asphalt that would support a claim or cause of action against it.

On October 8, 2013, during the exchange of written discovery between Defendants and Tippins-Polk, counsel for Tippins-Polk informed then-counsel for Defendants, Clarke McCants, that no written contract existed between the parties that related to the construction of the subject Fred's store. See Exhibit "A," Affidavit of Clarke McCants, at ¶ 4. As such, counsel for Tippins-Polk requested Defendants limit their causes of action against Tippins-Polk to equitable indemnity and/or contribution, in the event of a verdict or judgment in favor of one or both of the Plaintiffs, as doing so would prevent the need for Tippins-Polk to depose Defendant Barber at that time. *Id.* Based solely upon the parties' inability to locate a written contract for the subject construction and counsel for Tippins-Polk's representation that no written contract existed, Defendants entered a Stipulation as to Third-Party Claims against Tippins-Polk Construction, Inc. ("Stipulation") on October 8, 2013. *Id.*; see also Exhibit "B," Stipulation.

Subsequently, Defendant Barber located the operative Construction Agreement between Tippins-Polk and Wildevco. *Id.* at ¶ 5. Counsel for Defendants produced the Construction Agreement to counsel for Tippins-Polk and informed him that Defendants were withdrawing the Stipulation as the basis for its entry was premised solely upon the absence of a contract between the parties. *Id.*

On April 2, 2014, a hearing was held on a Motion for Summary Judgment filed by Tippins-Polk as to Defendants' causes of action for equitable indemnification and contribution. During the hearing, Defendants' counsel reiterated that the Stipulation was withdrawn based upon the discovery of the applicable Construction Agreement. *Id.* at ¶ 6. Following the hearing, the Court issued a ruling on June 3, 2014, denying the Motion¹ and noting that whether or not the Stipulation was withdrawn did not affect its ruling. *Id.* An Order confirming the Court's ruling

¹ The Court also denied separate motions by Plaintiff and Tippins-Polk to sever the third-party claims. *Id.* at ¶ 6, footnote 1.

has not yet been entered and the parties are currently in the process of attempting to resolve the outstanding issue(s) that delayed submission of the proposed Order to the Court. See Ex. A, Affidavit, at ¶ 6, footnote 2.

On July 24, 2014, subsequent to the Court's denial of Tippins-Polk's Motion for Summary Judgment, counsel for Tippins-Polk deposed Defendant Barber both in his individual capacity and as the Rule 30(b)(6) designee for Wildevco.

On November 3, 2014, based upon the discovery of the Construction Agreement and the Court's denial of Tippins-Polk's Motion for Summary Judgment, counsel for Defendants filed a Notice of Motion and Motion to Amend Third-Party Complaint to clarify and more specifically allege causes of action for equitable indemnification and breach of the Construction Agreement in addition to the initial causes of action for breach of agreement and/or warranties and negligence. See Ex. A, Affidavit, at ¶ 8. That Motion has not yet been heard and was scheduled for hearing on September 9, 2015.

Subsequent to the filing of the Motion, former counsel for Defendants, Clarke McCants, withdrew and was relieved as counsel by Consent Order filed December 26, 2014. In conjunction therewith, Defendant Fred's retained separate counsel, Matthew C. LaFave, to represent it in the ongoing litigation. Defendants Tad Barber and Wildevco retained Thomas J. Keaveny, II, to represent them; Mr. Keaveny was subsequently relieved by Consent Order for Substitution of Counsel filed May 29, 2015. Gaffney Lewis & Edwards, LLC, including Lee Ellen Bagley, now represent Defendants Barber and Wildevco and, on their behalves, filed the subject Amended Motion to Amend Third-Party Complaint and to Rescind Stipulation.

STANDARD OF REVIEW

I. Rescission

An action to rescind a contract is in equity. *Smothers v. United States Fid. & Guar. Co.*, 322 S.C. 207, 210, 470 S.E.2d 858, 860 (Ct. App. 1996). A contract may be reformed or rescinded, "as the justice of the case may require, upon the ground of mistake, under these circumstances:

(1) Where the mistake is mutual and is in reference to the facts, or supposed facts, upon which the contract is based; (2) where the mistake is mutual and consists in the omission or insertion of some material element affecting the subject-matter or the terms and stipulations of the contract, inconsistent with those of the parol agreement which necessarily preceded it; (3) where the mistake is not mutual, [but] unilateral, and has been induced by the fraud, deceit, misrepresentations concealment, or imposition in any form of the party opposed in interest to the reformation or rescission, without negligence on the part of the party claiming the right; (4) where the mistake is not mutual, but unilateral, and is accompanied by very strong and extraordinary circumstances, ... which would make it a great wrong to enforce the agreements sustained by competent testimony of the clearest kind."

Id. (emphases added); *see also Truck South, Inc. v. Patel*, 339 S.C. 40, 49-50, 528 S.E.2d 424, 429 (2000). "In the absence of fraud which would justify shifting the loss to the party who opposes rescission, rescission is appropriate only if both parties can be returned to the status quo prior to the contract." *King v. Oxford*, 282 S.C. 307, 313, 318 S.E.2d 125, 128-29 (Ct. App. 1984).

II. Amendment of Pleadings

Rule 15(a) of the South Carolina Rules of Civil Procedure provides that leave to amend a party's pleadings shall be freely given by the Court when: (1) justice so requires; and (2) no other party will be prejudiced by the granting of the Motion. "The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it." *Tanner v. Florence Cnty. Treasurer*, 336 S.C. 552, 559, 521 S.E.2d 153, 156 (1999); *see also City of N. Myrtle Beach v. Lewis-Davis*, 360 S.C. 225, 232, 599 S.E.2d 462, 465 (Ct. App. 2004).

It is well-established that the party opposing the amendment has the burden of establishing prejudice. *Foggie v. CSX Transp., Inc.*, 315 S.C. 17, 22, 431, S.E.2d 587, 590 (1993); *Pruitt v. Bowers*, 330 S.C. 483, 489, 499 S.E.2d 250, 253 (Ct. App. 1998). The rule governing amendments "strongly favors amendments and the court is encouraged to freely grant leave to amend." *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 286, 607 S.E.2d 711, 716 (Ct. App. 2005); see also *Jarrell v. Seaboard Sys. R.R., Inc.*, 294 S.C. 183, 186, 363 S.E.2d 398, 399 (Ct. App. 1987).

ARGUMENT

I. Rescission of Stipulation

The Stipulation as to Third-Party Claims against Tippins-Polk ("Stipulation"), limiting Defendants' third-party claims to equitable indemnification and/or contribution, in the event that either Plaintiff recovers against Defendants, was premised entirely upon the absence of a written contract between Defendants and Third-Party Defendant Tippins-Polk. See Ex. A, Affidavit. This fact is attested to by then-counsel for Defendants and clearly evidenced by the fact that the Stipulation was signed by Defendants' counsel on the same day that counsel for Tippins-Polk represented that there was no written contract. *Id.* at ¶ 4, Ex. A-2; Ex. B, Stipulation. Defendants do not contend that counsel for Tippins-Polk attempted to mislead Defendants' counsel in any way by said representation; rather, it is apparent that the actions of both Defendants' counsel and counsel for Tippins-Polk were based upon the mutual mistake that no written contract related to construction of the subject premises existed. Given the subsequent discovery of the Construction Agreement between Tippins-Polk and Wildevco, it would be inequitable to enforce the Stipulation and prevent Defendants from proceeding on their claims of breach of agreement and/or warranties and negligence, which they asserted in their original

Third-Party Complaint prior to the signing of the Stipulation, as well as to prevent them from more specifically pleading causes of action for breach of the Construction Agreement and equitable indemnification (which was also in substance requested as relief in their original Third-Party Complaint). Moreover, rescission of the Stipulation will return both parties to the *status quo* prior to the contract and, as set forth more fully below, no prejudice will result to Tippins-Polk.

In the event that the Court deems that the Stipulation is not based upon a mutual mistake as to the existence of a written contract but, rather, a unilateral mistake of Defendants, the Court should nevertheless declare the Stipulation rescinded based upon the circumstances outlined above. The subject circumstances are strong and extraordinary as well as supported by clear and competent testimony, all of which demonstrate that enforcement of the Stipulation would be a great wrong and abridgment of Defendants' rights.

For the foregoing reasons, equity and justice requires that the Court declare the Stipulation rescinded. However, should the Court determine that the Stipulation is not subject to rescission, the Court should nevertheless, for the reasons set forth below, permit Defendants to amend their Third-Party Complaint in order to assert claims of breach of contract and negligence against Tippins-Polk independent of any potential recovery by Plaintiffs (as so limited in the Stipulation), as Defendants sustained their own separate damages as a result of Tippins-Polk's breach of contract and negligence in the construction of the subject premises.

II. Amendment of Third-Party Complaint

Defendants originally asserted causes of action for breach of agreement and/or warranties and negligence in connection with the construction of the subject Fred's store in their August 1, 2012 Third-Party Complaint against Tippins-Polk, seeking as relief in each of those causes of

action indemnity or contribution from Tippins-Polk. Subsequent to the filing thereof, based upon the mistaken belief that no written contract existed between Defendants and Tippins-Polk, Defendants agreed on October 8, 2013, that in the event that either Plaintiff recovers against Defendants in the underlying matter, the only relief they would seek against Third-Party Defendant Tippins-Polk would be equitable indemnification and/or contribution. See Ex. B, Stipulation. However, within the six (6) months that followed, the parties discovered the operative Construction Agreement between Tippins-Polk and Wildevco. At the latest, Tippins-Polk was placed on notice at the April 2, 2014 hearing of its Motion for Summary Judgment that Defendants considered the Stipulation no longer effective as a result of the existence of the Construction Agreement. See Ex. A, Affidavit.

Thereafter, Tippins-Polk had the opportunity to and did depose Defendant Barber, both in his individual and corporate representative capacity for Wildevco, on July 24, 2014. Tippins-Polk has been on notice for over sixteen (16) months of Defendants' position that the Stipulation was withdrawn; further, Defendants' Motion to Amend Third-Party Complaint, filed by former counsel for Defendants, Clarke McCants, has been pending for almost one (1) year. Moreover, the causes of action that Defendants seek to set forth in their Second Amended Complaint simply clarify or expound upon those asserted in their original Third-Party Complaint. Finally, due to the current Scheduling Order in place, it appears that the next term of Court during which this matter may be called for trial is scheduled for December 7, 2015, approximately two (2) months from now. Defendants are unaware of any reason why they or Tippins-Polk would be unable to complete any remaining discovery within that time period that may be necessary as a result of the amendment of the Third-Party Complaint.

Based upon the foregoing, justice requires that Defendants be permitted to amend their Third-Party Complaint, which will not result in prejudice to Third-Party Defendant Tippins-Polk or any other party.

CONCLUSION

The Stipulation as to Third-Party Claims against Tippins-Polk should be rescinded as it is based upon a mutual mistake or, alternatively, a unilateral mistake, as to the existence of the Construction Agreement, the circumstances of which would render it wholly inequitable to enforce the Stipulation. Further, Tippins-Polk will have ample opportunity to respond to all claims raised in Defendants Barber and Wildevco's proposed Second Amended Third-Party Complaint, attached hereto as Exhibit C, which are, essentially, clarifications of those causes of actions alleged in the original and amended Third-Party Complaint. Additionally, no party will be prejudiced by the granting of Defendants' Motion to Amend. Based upon the foregoing, justice and equity requires that the Court declare the Stipulation rescinded and permit Defendants to amend their Third-Party Complaint.

Respectfully submitted,


Lee Ellen Bagley, SC Bar No. 77672
Regina Hollins Lewis, SC Bar No. 68539
Randi Lynn Roberts, SC Bar No. 68888
GAFFNEY LEWIS & EDWARDS, LLC
3700 Forest Drive, Suite 400
Columbia, South Carolina 29204
803.790.8838 (telephone)
803.790.8841 (fax)

*Attorneys for Defendants Tad Barber,
Individually and d/b/a Wildevco, LLC*

August 28, 2015

EXHIBIT A

STATE OF SOUTH CAROLINA

COUNTY OF BARNWELL

Martha M. Fountain and Curtis Fountain,

Plaintiffs,

vs.

Fred's Inc. and Tad Barber, individually and
d/b/a Wildevco, LLC,

Defendants,

vs.

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

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

Civil Action No. 2010-CP-06-101

AFFIDAVIT OF CLARKE MCCANTS

PERSONALLY appeared before me Clarke W. McCants, III, who, being duly sworn, states:

1. This Affidavit is made upon personal knowledge. I am over 18 years of age and am competent to testify under oath.
2. During all times pertinent to the events referenced in this Affidavit, I represented Defendants, Third-Party Plaintiffs Fred's Inc. ("Fred's"), Tad Barber and Wildevco, LLC ("Wildevco") in the above-captioned matter. Unrelated to the events herein referenced, I subsequently withdrew and was relieved as counsel by Consent Order filed December 26, 2014. In conjunction therewith, Fred's retained separate counsel, Matthew C. LaFave, to represent it in the ongoing litigation. Tad Barber and Wildevco retained Thomas J. Keaveny, II, to represent them; Mr. Keaveny was subsequently relieved by Consent Order for Substitution of Counsel filed May 29, 2015. Gaffney Lewis & Edwards, LLC, including Lee Ellen Bagley, now

represent Defendants Barber and Wildevco.

3. On August 1, 2012, with the consent of Plaintiffs, I filed on behalf of Defendants Fred's, Barber and Wildevco (collectively, "Defendants") an Amended Answer and Third-Party Complaint against Tippins-Polk Construction, Inc. ("Tippins-Polk"), asserting causes of action for breach of agreement and/or warranties and negligence in connection with the construction of the subject Fred's store, seeking as relief in each of those causes of action indemnity or contribution from Tippins-Polk. See Amended Answer and Third-Party Complaint, attached hereto as Exhibit "A-1."

4. On October 8, 2013, during the exchange of written discovery between Defendants and Third-Party Defendant Tippins-Polk, counsel for Tippins-Polk informed me that no written contract existed between the parties related to the construction of the subject Fred's store. See Email, attached hereto as Exhibit "A-2." As such, counsel for Tippins-Polk asked if Defendants would limit their causes of action against it to equitable indemnity and/or contribution, in the event of a verdict or judgment in favor of one or both of the Plaintiffs, as doing so would prevent the need for Tippins-Polk to depose Defendant Tad Barber at that time. Based solely upon the parties' inability to locate a written contract for the subject construction and the aforementioned representation of counsel for Tippins-Polk, I agreed on behalf of Defendants and, on the same day, October 8, 2013, entered the Stipulation as to Third-Party Claims against Tippins-Polk Construction, Inc. ("Stipulation").

5. Subsequently, Defendant Tad Barber located the operative Construction Agreement between Tippins-Polk and Wildevco, which I produced to counsel for Tippins-Polk, informing him that, based upon its existence, Defendants were withdrawing the Stipulation as the basis for its entry was premised solely upon the absence of a contract between the parties.

6. During an April 2, 2014 hearing on Tippins-Polk's Motion for Summary Judgment as to Defendants' equitable indemnification and contribution claims, heard before The Honorable Edgar W. Dickson, I again reiterated Defendants' position that, based upon the discovery of the applicable Construction Agreement, the Stipulation was withdrawn. Judge Dickson noted in his June 3, 2014 ruling denying Tippins-Polk's Motion for Summary Judgment¹ that whether or not the Stipulation was withdrawn did not affect his ruling. See Email containing ruling, attached hereto as Exhibit "A-3"².

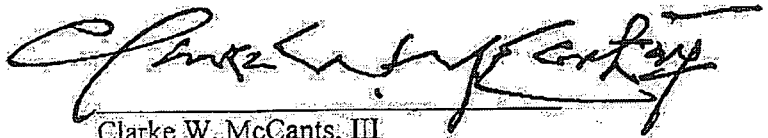
7. On July 24, 2014, subsequent to the Court's denial of Tippins-Polk's Motion for Summary Judgment, counsel for Tippins-Polk deposed Defendant Barber both in his individual capacity and as the Rule 30(b)(6) designee for Defendant Wildevco.

8. On November 3, 2014, based upon the discovery of the Construction Agreement and the Court's denial of Tippins-Polk's Motion for Summary Judgment, I filed a Notice of Motion and Motion to Amend Third-Party Complaint to clarify and more specifically allege causes of action for equitable indemnification and breach of the Construction Agreement, in addition to the originally filed causes of action for breach of agreement and/or warranties and negligence. See Notice of Motion and Motion, including a proposed Amended Answer and Third-Party Complaint, attached hereto as Exhibit "A-4."

¹ Judge Dickson also denied separate motions to sever filed by Tippins-Polk and Plaintiff as well as granted a motion for summary judgment filed by the previous Fourth-Party Defendant Southern Asphalt, LLC against Tippins-Polk and Defendants, which resulted in dismissal of that party. None of the foregoing motions have any bearing on the issue at bar.

² I did not submit a proposed order confirming the Court's ruling during my tenure as counsel for Defendants as there remained an outstanding question regarding Judge Dickson's ruling on a particular issue; therefore, a formal order has not yet been entered. It is my understanding that the parties are currently in the process of attempting to resolve the outstanding issue.

FURTHER THE AFFIANT SAYETH NAUGHT.

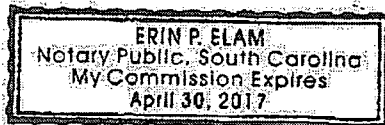


Clarke W. McCants, III
NANCE, MCCANTS & MASSEY
PO Box 2881
Aiken, SC 29802
(803) 649-6200

SWORN to before me this
28th day of August, 2015.



Notary Public for _____
My Commission Expires: _____



State of South Carolina)

County of Barnwell)

Martha M. Fountain and
Curtis Fountain)

Plaintiffs,)

v.)

Fred's Inc. and Tad Barber,
individually and d/b/a Wildevco, LLC,)

Defendants / Third-Party
Plaintiffs,)

Tippins-Polk Construction, Inc.,)

Third-Party Defendant.)

In the Court of Common Pleas.

CA No. 10-CP-06-101

**AMENDED ANSWER OF DEFENDANTS
AND THIRD-PARTY COMPLAINT
(Jury Trial Requested)**

FILED
2012 AUG -1 PM 12:57
RHONDA D. JOHNSON
CLERK OF COURT
BARNWELL COUNTY, S.C.

COME NOW the Defendants, Fred's Inc. and Tad Barber, individually and d/b/a Wildevco, LLC, answering the Plaintiffs' Complaint in the above-referenced matter, and presenting their Third-Party Complaint, as follows:

FOR A FIRST DEFENSE

1. The Defendants deny each and every allegation set forth in the Plaintiffs' Complaint which is not hereinafter specifically admitted or to which a response is not otherwise provided.
2. The Defendants, upon information and belief, admit the allegations set forth in Paragraph No. 1. of the Plaintiffs' Complaint.
3. With regard to the allegations set forth in Paragraph 2 of the Plaintiffs' Complaint the Defendant Fred's Inc. admits that it is a corporation organized and existing under the laws of the

State of Tennessee and transacts business in South Carolina.

4. With regard to the allegations set forth in Paragraph 3 of the Plaintiff's Complaint the Defendant Barber admits that he is a citizen and resident of Aiken County, South Carolina and the Defendant Wildevco admits that it is a limited liability company organized and existing under the laws of the State of South Carolina; further the Defendant Wildevco admits that it is the owner of the property where the incident forming the basis for this case took place.

5. With regard to the allegations set forth in Paragraphs 5 and 6 of the Plaintiffs' Complaint the Defendants admit, upon information and belief, that on or about the date alleged the Plaintiff Martha M. Fountain fell while present on the subject property. The Defendants, however, are without sufficient information or knowledge at the present time to admit or deny the remaining allegations set forth in said Paragraphs.

6. The Defendants deny the allegations set forth in Paragraphs 7, 8, 9 and 10 of the Plaintiff's Complaint.

FOR A SECOND DEFENSE

7. Any injuries or damages sustained by the Plaintiffs were due wholly and solely to the negligence, carelessness, recklessness, gross negligence, wilfulness and/or wantonness of the Plaintiffs, which combined and concurred with the negligence, carelessness, recklessness, gross negligence, wilfulness and/or wantonness of the Defendants, which is specifically denied by the Defendants, to cause and produce any damages sustained by the Plaintiffs herein, and without which such injuries or damages would not have occurred; the Defendants plead such negligence, carelessness, recklessness, gross negligence, wilfulness and/or wantonness on the part of the Plaintiffs and would ask that the Court compare the acts of the Parties, and if it is determined that

the Plaintiffs' negligence, carelessness, recklessness, gross negligence, wilfulness and/or wantonness is greater than the negligence, carelessness, recklessness, gross negligence, wilfulness and/or wantonness of the Defendants, which is specifically denied, then the Plaintiffs should be totally barred from recovery and if it is determined that the Plaintiffs' negligence, carelessness, recklessness, gross negligence, wilfulness and/or wantonness is less than that of the Defendants, then the amount of recovery available to the Plaintiffs should be reduced by the percentage of the Plaintiffs' own negligence, carelessness, recklessness, gross negligence, wilfulness and/or wantonness.

FOR A THIRD DEFENSE

8. The Plaintiffs' claims for punitive damages in this matter are barred by the provisions of the Constitutions of the State of South Carolina and the United States of America.

THIRD-PARTY COMPLAINT FOR A FIRST CAUSE OF ACTION

9. The Defendants and Third-Party Plaintiffs reallege those matters set forth above.

10. The Third-Party Defendant is a corporation organized and existing under the laws of the State of Georgia and transacts business in the State of South Carolina.

11. The Third-Party Defendant constructed, and / or through its employees, agents, servants and / or subcontractors was responsible for and oversaw construction of, the premises identified in the Plaintiffs' Complaint for this matter (attached hereto as Exhibit "A"), and pursuant to certain plans and specifications provided to the Third-Party Defendant.

12. The Third-Party Defendant expressly and impliedly agreed and / or warranted that construction of the premises in question would be undertaken in a suitable, workmanlike manner, free of defects and in accordance with all applicable construction and building standards, codes,

regulations and law.

13. If the Plaintiffs were injured or damaged as alleged in their Complaint, which allegations are hereby expressly denied, then such injuries or damages were caused in whole in or part by the Third-Party Defendant's breach of its agreement and / or warranties.

14. By reason of the foregoing, the Third-Party Defendant is or will be found by operation of law as the Party responsible in whole or in part for any alleged injuries or damages sustained by the Plaintiffs, and will be bound to indemnify the Third-Party Plaintiffs from and against, or contribute toward the satisfaction of, any judgment or verdict, in whole or in part, that may be entered for the Plaintiffs directly or indirectly against the Third-Party Plaintiffs.

**THIRD-PARTY COMPLAINT
FOR A SECOND CAUSE OF ACTION**

15. The Third-Party Plaintiff realleges those matter set forth above.

16. The Third-Party Defendant owed a duty of care in constructing and / or overseeing and supervising the construction of the premises in question.

17. The Third-Party Defendant breached such duty of care and was negligent, careless, wilful, grossly negligent, reckless and wanton with regard to the work and/or services provided, and in the following particulars:

- a. In failing to perform work and/or provide services in a workmanlike and quality manner;
- b. In failing to perform work and/or provide services in a workmanlike and quality manner and in accordance with those applicable plans and specifications;
- c. In failing to detect errors and failures in workmanship;
- d. In failing to hire and/or supervise and/or properly train and/or

equip his agents, employees, laborers, servants and/or contractors;

e. In failing to guard against the negligent acts of such agents, employees, laborers, servants and/or contractors;

f. In accepting and approving defective and/or non-conforming labor and/or services;

g. In failing to follow applicable building code requirements and otherwise comply with applicable laws, rules and regulations;

h. In failing to provide and/or supply proper and quality materials and goods in conjunction with the work and/or services provided; and

i. In failing to perform activities in accordance with a reasonable standard of care;

j. In otherwise failing to perform work and/or provide services as would a reasonably prudent person under similar circumstances; and

k. Such other and further particulars that may be proven at trial.

18. If the Plaintiffs were injured or damaged as alleged in their Complaint, which allegations are hereby expressly denied, then such injuries or damages were caused in whole in or part by the Third-Party Defendant's negligence in constructing and/or overseeing construction of the premises in question.

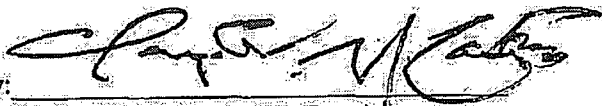
19. By reason of the foregoing, the Third-Party Defendant is or will be found by operation of law as the Party responsible in whole or in part for any alleged injuries or damages sustained by the Plaintiffs, and will be bound to indemnify the Third-Party Plaintiffs from and against, or contribute toward the satisfaction of, any judgment or verdict, in whole or in part, that may be entered for the Plaintiffs directly or indirectly against the Third-Party Plaintiffs.

JURY TRIAL REQUEST

20. The Third-Party Plaintiffs request a Jury Trial as to those matters set forth in the Third-Party Complaint.

WHEREFORE having fully answered the Defendants / Third-Party Plaintiffs pray that the Plaintiffs' Complaint be dismissed. In the alternative the Defendants / Third-Party Plaintiffs pray that they be awarded judgment over and against the Third-Party Defendant for all or part of any verdict or judgment which may be recovered by the Plaintiffs directly or indirectly against the Defendants / Third-Party Plaintiffs, together with its costs and disbursements herein. Further in the alternative the Defendants / Third-Party Plaintiffs pray that the Third-Party Defendant be ordered to contribute toward the satisfaction of any verdict or judgment obtained by the Plaintiffs under their Complaint, and for such other and further relief as the Court would deem just and proper.

NANCE, MCCANTS & MASSEY

By: 

Clarke W. McCants, III, Esquire

P. O. Box 2881

Aiken, SC 29802-2881

(803) 649-6200

Counsel for Defendants/Third-Party Plaintiffs

Dated: August 1, 2012

Subj: RE: Fountain, Martha M. / Consent Scheduling Order.pdf
Date: 10/8/2013 2:01:16 P.M. Eastern Daylight Time
From: Brown, McLeod@WallTempleton.com
To: MCCANTS3RD@aol.com

FILE

FYI. Here are Tippins Polk documents related to this job and incident. There is no written contract. I'll get formal responses out asap.
Brown

Peden Brown McLeod, Jr.
Attorney

Telephone: (843) 329-9500
Facsimile: (843) 329-9501



Wall Templeton
ATTORNEYS

Wall Templeton & Haldrup, P.A.
145 King Street, Suite 300 (29401)
Post Office Box 1200
Charleston, South Carolina 29402
www.WallTempleton.com

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From: MCCANTS3RD@aol.com [mailto:MCCANTS3RD@aol.com]
Sent: Tuesday, October 08, 2013 12:10 PM
To: LFreeman@pmped.com; Sandra Schultz; Brown, McLeod; Kristyn Robertson
Cc: MBall@pmped.com; steve@bamberglaw.com
Subject: Re: Fountain, Martha M. / Consent Scheduling Order.pdf

I have signed Order and attached it.

For everyone's information I have resolved my conflict for Friday and will make plans to attend the scheduled mediation for this matter.

Clarke

In a message dated 10/8/2013 10:59:02 A.M. Eastern Daylight Time, LFreeman@pmped.com writes:

All:

Please find the Consent Scheduling Order attached that I need for you to sign and return to me via email as soon as possible so that I can forward to Judge Early for his signature and the Clerk's office to let her know that we will need to be taken off the roster.

Thanks,
Lynn

EXHIBIT A-2

Saturday, October 12, 2013 AOL: MCCANTS3RD

CONFIDENTIALITY NOTICE

Unless otherwise indicated or obvious from the nature of the above communication, the information contained herein may be an attorney-client privilege and/or confidential information/work product. The communication is intended for the use of the individual or entity named above. If the reader of this transmission is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you are not the named addressee, you are not authorized to read, print, retain, copy or disseminate this message or any part of it. If you have received this message in error, please notify the sender immediately either by phone (803-943-2111) or reply to this e-mail and delete all copies of this message.

EXHIBIT A-2

Saturday, October 12, 2013 AOL: MCCANTS3RD

Lee Ellen Bagley

From: Lee Ellen Bagley
Sent: Friday, August 28, 2015 1:53 PM
To: Lee Ellen Bagley
Subject: Fountain v. Fred's et al. 10-CP-06-101

From: Dickson, Edgar W. Law Clerk (Robert Blanchard) []
Sent: Tuesday, June 03, 2014 10:15 AM
To: Amy Shumpert; Clarke W. McCants, III; Lynn Freeman; Mark D. Ball; O. Carlisle Edwards, Jr.; R. Steven Chandler;
; Brown McLeod; Kristyn Robertson; Sandra Schultz
Subject: Fountain v. Fred's et al. 10-CP-06-101

Good morning:

This letter is in reference to a hearing before Judge Dickson on April 2, 2014 in Barnwell.

After due deliberation and review of the case law and arguments of counsel, Judge Dickson is denying third party defendant Tippons-Polk's motion to for summary judgment and granting third party defendant Southern Asphalt's motion for summary judgment. The Court is denying Tippons-Polk's motion to sever.

"In determining whether summary judgment is proper, this court must view all evidence in the light most favorable to the non-moving party. Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Silvester v. Spring Valley Country Club, 344 S.C. 280, 285, 543 S.E.2d 563, 566 (Ct. App. 2001). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000). Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000). Accordingly, in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. Hancock v. Mid-South Management Co. Inc., 381 S.C. 326, 673 S.E.2d 801 (2009).

"Where there is no express contractual duty to indemnify another, indemnity nevertheless may be recovered if the evidence establishes an implied contract or if one party is exposed to liability by the action of another party who, in law or in equity, should make good the loss of the other." 41 Am. Jur. 2d Indemnity § 20. The right is created by operation of law "in cases of imputed fault or where some special relationship exists between the first and second parties." First Gen. Servs. of Charleston, Inc. v. Miller, 314 S.C. 439, 442, 445 S.E.2d 446, 448 (1994).

The Court finds that no special relationship exists between the defendants and Southern Asphalt, as their relationship is attenuated, and therefore defendants' equitable indemnification action against Southern Asphalt will not lie. See Rock Hill v. Globe Communications, 363 S.C. 385, 611 S.E.2d 235 (2005).

However, a special relationship does exist between Fred's Inc./ Wildevco and Tippons-Polk as contractor and property owner. See Addy v. Bolton, 257 S.C. 28, 183 S.E.2d 708 (1971). While Tippons-Polk argues that it cannot be held liable in equity because Fred's has unclean hands as a result of its own negligence. However, the question of Freds' Inc./ Wildevco's negligence is a question of fact currently in dispute between the parties. Therefore, summary judgment would not be proper as to this third-party defendant.

The Court is denying Tippons-Polk's motion to sever, as the Court believes judicial economy would be served by trying the case all at once.

As to the stipulation, whether or not it is withdrawn does not affect this ruling.

Mr. Edwards, Judge Dickson will sign your proposed Order granting summary judgment to Southern Asphalt. Mr. McCants, Judge Dickson asks that you prepare the order denying Tippons-Polk's motion for summary judgment and motion to sever. When the orders have been prepared, please send a copy to opposing counsel and mail or hand deliver the Order to this office with a self-addressed, stamped envelope for its prompt return.

If you have any questions or concerns, please contact this office by email or by phone at (803) 535-2187.

With Kind Regards,

Robert D. Blanchard
Law Clerk, Hon. Edgar W. Dickson
First Judicial Circuit
P.O. Box 1949
Orangeburg, SC 29116
803-535-2187 (phone)
803-535-2188 (fax)

18
06-23-10
06-23-10
STATE OF SOUTH CAROLINA
COUNTY OF BARNWELL

IN THE COURT OF COMMON PLEAS
2nd JUDICIAL CIRCUIT

CASE NO. 2010-CP-06-101

Martha Fountain and Curtis Fountain

Plaintiff

vs.

Fred's Inc and Tad Barber, individually and
JBA Wildevco, LLC, et al

Defendant

MOTION AND ORDER INFORMATION
FORM AND COVERSHEET

Plaintiff's Attorney:
R. Steven Chandler, Bar No. _____
Address:
P.O. Box 948, Bamberg, SC 29003
Phone: (803) 245-1800 Fax (803) _____
E-mail: steve@bamberglaw.com Other: _____

Defendant's Attorney:
Clarke W. McCants, III, Bar No. 3725
Address:
P.O. Box 2881, Aiken, SC 29802
Phone: (803) 649-6200 Fax (803) 649-5566
E-mail: mccants3rd@aol.com Other: _____

- ☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion to Amend Third-Party Complaint

Estimated Time Needed: 30 minutes

Court Reporter Needed: ☒ YES ☐ NO

SECTION II: Motion/Order Type

- ☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff ☒ Defendant

October 31, 2014
Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT \$ _____

☐ EXEMPT

(check reason)

- ☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)
☒ Proposed order submitted at request of the court, or,
reduced to writing from motion made in open court per judge's instructions.
Name of Court Reporter: _____
☐ Other: _____

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached order.
☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: CM Date Filed: 11/3/14

☒ MOTION FEE COLLECTED: \$ 25.00

☐ CONTESTED - AMOUNT DUE: \$ _____

SCCA 235 (11/2003)

EXHIBIT A-4

State of South Carolina

County of Barnwell

Martha M. Fountain and
Curtis Fountain

Plaintiffs.

v.

Fred's Inc. and Tad Barber
individually and d/b/a Wildevco, LLC

Defendants / Third-Party
Plaintiffs.

vs.

Tippins Polk Construction, Inc. and
Rhoads Excavating Services, LLC

Third-Party Defendants.

In the Court of Common Pleas

CA No. 10-CP-06-101

NOTICE OF MOTION AND MOTION
TO AMEND THIRD-PARTY COMPLAINT

FILED
CLERK OF COURT
JAN 12 2011
BARNWELL COUNTY
SOUTH CAROLINA

PLEASE TAKE NOTICE that the Defendants/Third-Party Plaintiffs, through the undersigned Counsel, will move before the Court, at such time and place as is hereafter directed, notice of which will be given to you, for an Order allowing the Defendants / Third-Party Plaintiffs to amend their Third-Party Complaint in this matter.

Counsel for the Defendants/Third-Party Defendants would respectfully show that no party is prejudiced by granting the relief requested and the interests of justice support allowing an amendment in this instance. A copy of such proposed Amended Third-Party Complaint is attached hereto.

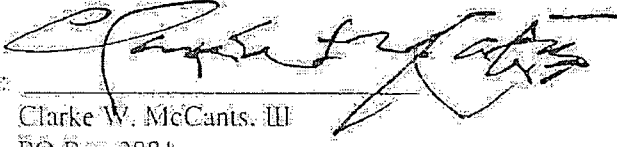
This motion is based upon the papers and pleadings of this case, and any affidavits

EXHIBIT A-4

of the Parties to be submitted at the hearing for this motion.

Counsel for the Defendants hereby affirms that he has attempted in good faith to resolve the matter contained in the motion before the filing of this motion.

NANCE, MCCANTS & MASSEY

By: 

Clarke W. McCants, III

PO Box 2881

Aiken, S.C. 29802

(803) 649-6200 x-21

Counsel for Defendants/Third-Party Plaintiffs

Dated: October 31, 2014.

State of South Carolina

County of Barnwell

Martha M. Fountain and
Curtis Fountain

Plaintiffs,

vs.

Fred's Inc. and Tad Barber,
individually and d/b/a Wildevco, LLC;

Defendants / Third-Party
Plaintiffs,

vs.

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

Third-Party Defendants.

In the Court of Common Pleas

CA No. 10-CP-06-101

**SECOND AMENDED
THIRD-PARTY SUMMONS**
(Jury Trial Requested)

TO THE THIRD-PARTY DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED AND REQUIRED to answer the Second Amended Third-Party Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of the Answer to the said Second Amended Third-Party Complaint on the subscriber at his office at 218 Newberry Street, S.W., (P. O. Box 2881), Aiken, SC 29802, within thirty days after service hereof, exclusive of the date of such service; and if you fail to answer the Second Amended Third-Party Complaint within the time before said, the Third-Party Plaintiffs in this action will apply to the Court for the relief demanded in the Second Amended Third-Party Complaint, and judgment by default will be rendered against you for the relief demanded in the Second Amended

Third-Party Complaint.

NANCE, MCCANTS & MASSEY

By: _____

Clarke W. McCants, III, Esquire

P. O. Box 2881

Aiken, SC 29802-2881

(803) 649-6200

Counsel for Defendants/Third-Party Plaintiffs

Dated: _____

State of South Carolina

County of Barnwell

Martha M. Fountain and
Curtis Fountain

Plaintiffs,

vs.

Fred's Inc. and Tad Barber,
individually and d/b/a Wildevco, LLC,

Defendants / Third-Party
Plaintiffs,

vs.

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

Third-Party Defendants.

In the Court of Common Pleas

CA No. 10-CP-06-101

**SECOND AMENDED ANSWER
AND THIRD-PARTY
COMPLAINT
(Jury Trial Requested)**

COME NOW the Defendants, Fred's Inc. and Tad Barber, individually and d/b/a Wildevco, LLC, answering the Plaintiffs' Complaint in the above-referenced matter, and presenting their Second Amended Third-Party Complaint, as follows:

FOR A FIRST DEFENSE

1. The Defendants deny each and every allegation set forth in the Plaintiffs' Complaint which is not hereinafter specifically admitted or to which a response is not otherwise provided.

2. The Defendants, upon information and belief, admit the allegations set forth in Paragraph 1 of the Plaintiffs' Complaint.

3. With regard to the allegations set forth in Paragraph 2 of the Plaintiffs' Complaint the Defendant Fred's, Inc., admits that it is a corporation organized and existing under the laws of the State of Tennessee and transacts business in South Carolina.

4. With regard to the allegations set forth in Paragraph 3 of the Plaintiff's Complaint the Defendant Barber admits that he is a citizen and resident of Aiken County, South Carolina and the Defendant Wildevco admits that it is a limited liability company organized and existing under the laws of the State of South Carolina; further the Defendant Wildevco admits that it is the owner of the property where the incident forming the basis for this case took place.

5. With regard to the allegations set forth in Paragraphs 5 and 6 of the Plaintiffs' Complaint the Defendants admit, upon information and belief, that on or about the date alleged the Plaintiff Martha M. Fountain fell while present on the subject property. The Defendants, however, are without sufficient information or knowledge at the present time to admit or deny the remaining allegations set forth in said Paragraphs.

6. The Defendants deny the allegations set forth in Paragraphs 7, 8, 9 and 10 of the Plaintiff's Complaint.

FOR A SECOND DEFENSE

7. Any injuries or damages sustained by the Plaintiffs were due wholly and solely to the negligence, carelessness, recklessness, gross negligence, wilfulness and/or wantonness of the Plaintiffs, which combined and concurred with the negligence, carelessness, recklessness, gross negligence, wilfulness and/or wantonness of the Defendants, which is specifically denied by the Defendants, to cause and produce any damages sustained by the Plaintiffs herein, and without which such injuries or damages would not have occurred; the Defendants plead such negligence,

carelessness, recklessness, gross negligence, wilfulness and/or wantonness on the part of the Plaintiffs and would ask that the Court compare the acts of the Parties, and if it is determined that the Plaintiffs' negligence, carelessness, recklessness, gross negligence, wilfulness and/or wantonness is greater than the negligence, carelessness, recklessness, gross negligence, wilfulness and/or wantonness of the Defendants, which is specifically denied, then the Plaintiffs should be totally barred from recovery and if it is determined that the Plaintiffs' negligence, carelessness, recklessness, gross negligence, wilfulness and/or wantonness is less than that of the Defendants, then the amount of recovery available to the Plaintiffs should be reduced by the percentage of the Plaintiffs' own negligence, carelessness, recklessness, gross negligence, wilfulness and/or wantonness.

FOR A THIRD DEFENSE

8. Any injuries or damages sustained by the Plaintiffs were due to the actions of a third party over whom the Defendants had no control nor right of control.

FOR A FOURTH DEFENSE

9. The Plaintiffs' claims for punitive damages in this matter are barred by the provisions of the Constitutions of the State of South Carolina and the United States of America.

SECOND AMENDED THIRD-PARTY COMPLAINT FOR A FIRST CAUSE OF ACTION

10. The Defendants/Third-Party Plaintiffs reallege those matters set forth above.

11. The Third-Party Defendant Tippins-Polk Construction, Inc. is a corporation organized and existing under the laws of the State of Georgia and transacts business in the State of South Carolina.

12. Upon information and belief the Third-Party Defendant Rhoad's Excavating

Services, LLC is a limited liability company organized and existing under the laws of the State of South Carolina.

13. The Third-Party Defendants individually and / or jointly constructed, and / or through its employees, agents, servants and / or subcontractors were responsible for and oversaw construction of, the premises identified in the Plaintiffs' Complaint for this matter (attached hereto as Exhibit "A"), and pursuant to certain plans and specifications.

14. The Third-Party Defendants, individually and / or jointly, expressly and impliedly agreed and / or warranted that construction of the premises in question would be undertaken in a suitable, workmanlike manner, free of defects and in accordance with all applicable construction and building standards, codes, regulations and law.

15. If the Plaintiffs were injured or damaged as alleged in their Complaint, which allegations are hereby expressly denied, then such injuries or damages were caused in whole in or part by the Third-Party Defendants' breach of their agreement and / or warranties, individually and / or jointly.

16. By reason of the foregoing, the Third-Party Defendants, individually, jointly and / or severally, are or will be found by operation of law as the Parties responsible in whole or in part for any alleged injuries or damages sustained by the Plaintiffs, and will be bound to indemnify the Third-Party Plaintiffs from and against, or contribute toward the satisfaction of, any judgment or verdict, in whole or in part, that may be entered for the Plaintiffs directly or indirectly against the Third-Party Plaintiffs.

**SECOND AMENDED THIRD-PARTY COMPLAINT
FOR A SECOND CAUSE OF ACTION**

17. The Defendants / Third-Party Plaintiffs reallege those matter set forth above.

18. The Third-Party Defendants owed a duty of care in constructing and / or overseeing and supervising the construction of the premises in question.

19. The Third-Party Defendants, individually and / or jointly breached such duty of care and were negligent, careless, wilful, grossly negligent, reckless and wanton with regard to the work and/or services provided, and in the following particulars:

- a. In failing to perform work and/or provide services in a workmanlike and quality manner;
- b. In failing to perform work and/or provide services in a workmanlike and quality manner and in accordance with those applicable plans and specifications;
- c. In failing to detect errors and failures in workmanship;
- d. In failing to hire and/or supervise and/or properly train and/or equip his agents, employees, laborers, servants and/or contractors;
- e. In failing to guard against the negligent acts of such agents, employees, laborers, servants and/or contractors;
- f. In accepting and approving defective and/or non-conforming labor and/or services;
- g. In failing to follow applicable building code requirements and otherwise comply with applicable laws, rules and regulations;
- h. In failing to provide and/or supply proper and quality materials and goods in conjunction with the work and/or services provided; and
- i. In failing to perform activities in accordance with a reasonable standard of care;
- j. In otherwise failing to perform work and/or provide services as

would a reasonably prudent person under similar circumstances; and

k. Such other and further particulars that may be proven at trial.

20. If the Plaintiffs were injured or damaged as alleged in their Complaint, which allegations are hereby expressly denied, then such injuries or damages were caused in whole in or part by the Third-Party Defendants' negligence, individually and /or jointly, in constructing and /or overseeing construction of the premises in question.

21. By reason of the foregoing, the Third-Party Defendants, individually, jointly and /or severally, are or will be found by operation of law as the Parties responsible in whole or in part for any alleged injuries or damages sustained by the Plaintiffs, and will be bound to indemnify the Third-Party Plaintiffs from and against, or contribute toward the satisfaction of, any judgment or verdict, in whole or in part, that may be entered for the Plaintiffs directly or indirectly against the Third-Party Plaintiffs.

SECOND AMENDED THIRD-PARTY COMPLAINT FOR A THIRD CAUSE OF ACTION

22. The Defendants /Third-Party Plaintiffs reallege those matters set forth above.

23. The Third-Party Plaintiffs allege that a special relationship exists between themselves and the Third-Party Defendants, individually and /or jointly.

24. The Plaintiffs have alleged that the premises identified in their Complaint were defectively designed and /or constructed.

25. If the allegations in the Plaintiffs' Complaint are proven to be true then the Third-Party Plaintiffs are entitled to full and complete indemnity from the Third-Party Defendants, individually, jointly and /or severally, for any and all liability imposed upon the Third-Party

Plaintiffs, and by virtue of the Third-Party Defendants actions and / or omissions, including being indemnified for the costs and attorneys' fees associated with defending this civil action. The Third-Party Plaintiffs respectfully assert that any negligence alleged to them is merely passive and not the cause of any alleged damages.

**SECOND AMENDED THIRD-PARTY COMPLAINT
FOR A FOURTH CAUSE OF ACTION**

26. The Defendants / Third-Party Plaintiffs reallege those matters set forth above.

27. On or about April 28, 2005 the Third-Party Defendant Tippins-Polk Construction, Inc. and the Defendant Wildevco, entered into a Construction Agreement, attached hereto as Exhibit "B".

28. By virtue of the nature of the work to be performed by the Third-Party Defendant Tippins-Polk any or all of the Defendants / Third-Party Plaintiffs should be considered beneficiaries of the rights and obligations set forth in the Construction Agreement.

29. Pursuant to the terms of said Construction Agreement the Third-Party Defendant Tippins-Polk agreed to construct the premises in question, and specifically agreed to execute the entire work described in the Contract Documents identified as part of the Construction Agreement.

30. The Third-Party Defendant Tippins-Polk breached the terms and provisions of the Construction Agreement.

31. Any or all of the Defendants / Third-Party Plaintiffs have sustained certain damages as a result of the breach of the Construction Agreement by the Third-Party Defendant Tippins-Polk.

32. Any or all of the Defendants / Third-Party Plaintiffs are informed and believe that

they are entitled to judgment against the Third-Party Defendant Tippins-Polk for such damages.

JURY TRIAL REQUEST

33. The Defendants/Third-Party Plaintiffs request a Jury Trial as to those matters set forth in the Third-Party Complaint.

WHEREFORE having fully answered the Defendants / Third-Party Plaintiffs pray that the Plaintiffs' Complaint be dismissed. In the alternative the Defendants / Third-Party Plaintiffs pray that they be awarded judgment over and against the Third-Party Defendants for all or part of any verdict or judgment which may be recovered by the Plaintiffs directly or indirectly against the Defendants / Third-Party Plaintiffs, together with its costs and disbursements herein. Further in the alternative any and all of the Defendants / Third-Party Plaintiffs pray for judgment against the Third-Party Defendant Tippins-Polk Construction, Inc. for damages. Further in the alternative the Defendants / Third-Party Plaintiffs pray that the Third-Party Defendants be ordered to contribute toward the satisfaction of any verdict or judgment obtained by the Plaintiffs under their Complaint, and for such other and further relief as the Court would deem just and proper.

NANCE, MCCANTS & MASSEY

By: _____

Clarke W. McCants, III, Esquire

P. O. Box 2881

Aiken, SC 29802-2881

(803) 649-6200

Counsel for Defendants/Third-Party Plaintiffs

Dated: _____

Construction Agreement

Agreement made as of 28th day of April, 2005, between the owner, Wildevco, LLC and the contractor, Tippins-Polk Construction, Inc., General Contractor, for the construction of one Fred's Store w/ strip center to be located in the Town of Williston, South Carolina, as set forth below.

Article 1. The Contract Documents

The Contract Documents consist of the Agreement and the Drawings with Specifications, thereon, furnished by Chris Booker & Associates and the Site Plans, furnished by Hass & Hilderbrand, Inc.

Article 2. The Work for this Contract

The Contractor shall execute the entire work described in the Contract Documents, specifically including the following Scope of Work:

Building Foundation, Building Slab, Truck Loading Dock, Pre-engineered metal building and Erection, Masonry Block Work, Metal Studs, Drywall Work, Wood Work, Acoustical Ceiling, FRP Wall Panels, Painting, Floor Finishes (Carpet & VCT), Storefront Glass work, Metal Doors and Frames, Drive-up window, Roll-up Shutters at Pharmacy Interior Openings, Dock Edge Leveler and Bumpers, Toiler Accessories, Installation of Fred's Furnished Cabinetry, Plumbing, Electrical, and Mechanical Systems (HVAC), Fire Sprinkler System, All Site Work (Clearing, Grubbing, Asphalt Paving, Site Utilities (Water & Sewer) - per site plans.

Exclusions: Architect Fees, Engineering Fees, Development Fees, Impact Fees, Building Permit Fees, Surveying, Soils Bearing and Concrete Testing.

Article 3. Date of Commencement:

The date of commencement shall be the date of issue of the Building Permit, as issued by the Town of Williston, South Carolina.

Article 4. Date of Substantial Completion:

The substantial completion shall be 120 calendar days after the commencement. Substantial completion shall be that date the building has been accepted by Fred's for their installation of store equipment by their set-up crew.

Article 5. Electrical Power

The electrical power account shall be handled by the owner and/or Fred's after the Testing and Balance Work has been completed by the HVAC contractor.

EXHIBIT B

EXHIBIT A-4

Construction Agreement, page 2

Article 6. Contract Sum

The Owner shall pay the Contractor (TPC, Inc.) in the current funds for the Contractor's performance of the Agreement the Contract Sum of Eight Hundred Eighty Five Thousand & 00/100 (\$885,000.00)

The owner shall pay the above Contract Sum in (7) draws as follows:

First Draw: Deposit Agreement 10% of Contract Sum.

Second Draw: Upon completion of Building Slab, 15% of Contract Sum.

Third Draw: Upon Building Delivery to Site, 20% of Contract Sum.

Fourth Draw: Upon Red Iron Erection, 15% of Contract Sum.

Fifth Draw: Upon 50% completion of Building Finishes, 15% of contract Sum.

Sixth Draw: Upon 100% Completion of Building Finishes, 15% of Contract Sum.

Final Draw: At time of Occupancy Permit, Balance of Contract Sum 10%.

Article 7: Any Changes, either additive or deductive, shall be in written form and bear the signatures of both parties.

Owner

Wildevco LLC

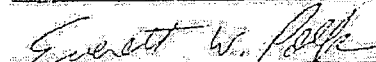


Meacher

Date: 4-28-05

Contractor

Tippins-Polk Construction, Inc.



Everett Polk, Co-owner

Date: 4-28-05

Project Schedule

(2005)	
May 4-25:	Rough Grading, Form and Pour Building Foundations and Slab/Plumbing Rough-in
May 25-28:	Start Building Erection
May 28-June 2:	Continue Building Erection and Sheeting - work on site work
June 5-9:	Start metal studs/ Electrical/ Mechanical work
June 12-30:	Continue Building Erection work/ Continue Electrical and Mechanical
July 2-6:	Start Interior Building Finishes
July 9-Aug. 10:	Building Finishes Continue/ Work on Truck Ramp
Aug. 13-24:	Paving - Complete Building/ Final Clean-up
Aug. 27-Sept. 1:	Final Inspection/ Punch out building

Schedule of Values

Labor, Materials, and Equipment:

Concrete Foundation & Slab	\$75,000.00
Pre-engineered metal bld. & Erection	\$215,000.00
Electrical	\$95,000.00
Plumbing	\$15,000.00
Mechanical	\$85,000.00
Masonry	\$20,000.00
Building Finishes	\$230,000.00
Grading, concrete curbing, utilities & paving Per site plans prepared by Hass & Hilderbrand	\$150,000.00
Total	\$885,000.00

CERTIFICATE OF SERVICE

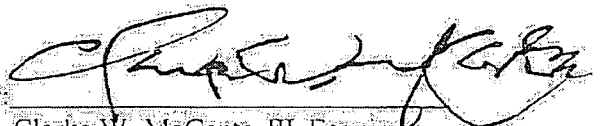
I HEREBY CERTIFY THAT I HAVE this date served a copy of the within and attached document(s) upon the following, by first class mail with sufficient postage affixed thereto to insure proper delivery:

Peden Brown McLeod, Jr., Esquire
Wall Templeton Attorneys
P.O. Box 1200
Charleston, SC 29402

R. Steven Chandler, Esquire
R. Steven Chandler, LLC
P.O. Box 948
Bamberg, SC 29003

Mark D. Ball, Esquire
Peters, Murdaugh, Parker, Eltzroth & Detrick, PA
P.O. Box 457
Hampton, SC 29924-0457

NANCE, MCCANTS & MASSEY

By: 
Clarke W. McCants, III, Esquire
P. O. Box 2881
Aiken, SC 29802
(803)649-6200

Dated: October 31, 2014

EXHIBIT A-4

EXHIBIT B

STATE OF SOUTH CAROLINA

COUNTY OF BARNWELL

MARTHA M. FOUNTAIN and
CURTIS FOUNTAIN,

Plaintiffs,

-versus-

FRED'S INC. and TAD BARBER,
Individually, and d/b/a WILDEVCO, LLC,

Defendants.

FRED'S INC. and TAD BARBER,
Individually, and d/b/a WILDEVCO, LLC,

Third-Party Plaintiffs,

-versus-

TIPPINS-POLK CONSTRUCTION, INC.,

Third-Party Defendant.

TIPPINS-POLK CONSTRUCTION, INC.,

Fourth-Party Plaintiff

-versus-

RHOAD'S EXCAVATING SERVICES,
LLC and SOUTHERN ASPHALT, LLC,

Fourth-Party Defendants.

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT
C.A. NO.: 2010-CP-06-101

STIPULATION AS TO THIRD-PARTY
CLAIMS AGAINST TIPPINS-POLK
CONSTRUCTION, INC.

COMES NOW Defendants/Third-Party Plaintiffs, Fred's Inc., and Tad Barber,
individually, and d/b/a Wildevco, LLC, stipulating that in the event that either or both of the

EXHIBIT B

Plaintiffs in this matter obtain a verdict or judgment against the Defendants / Third-Party

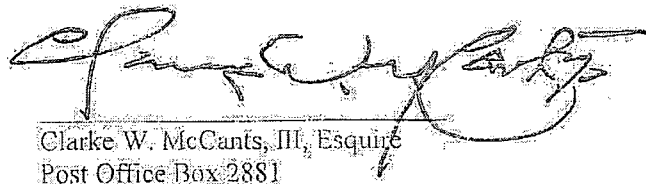
Plaintiffs, the Third-Party Plaintiffs agree and stipulate that any relief that they will seek as

against the Third-Party Defendant Tippins-Polk Construction, Inc. will be limited to equitable

indemnification and/or contribution.

AND IT IS SO STIPULATED!

Dated on this 8th day of October 2013.



Clarke W. McCants, III, Esquire

Post Office Box 2881

Aiken, SC 29802-2881

(803) 649-6200

Counsel for Defendants/Third-Party Plaintiffs

EXHIBIT B

EXHIBIT C

STATE OF SOUTH CAROLINA

COUNTY OF BARNWELL

Martha M. Fountain and
Curtis Fountain

Plaintiffs,

vs.

Fred's Inc. and Tad Barber,
individually and d/b/a Wildevco, LLC,

Defendants / Third-Party
Plaintiffs,

vs.

Tippins-Polk Construction, Inc.,

Third-Party Defendant.

IN THE COURT OF COMMON PLEAS

CA No. 10-CP-06-101

**SECOND AMENDED
THIRD-PARTY COMPLAINT**
(Jury Trial Requested)

COME NOW Defendants, Third-Party Plaintiffs Tad Barber, individually and d/b/a Wildevco, LLC ("Third-Party Plaintiffs") and, incorporating wholly herein by reference their first Amended Answer to Plaintiffs' Complaint, present their Second Amended Third-Party Complaint, as follows:

**SECOND AMENDED THIRD-PARTY COMPLAINT
FOR A FIRST CAUSE OF ACTION
(Breach of Agreement and/or Warranties)**

1. The Third-Party Defendant Tippins-Polk Construction, Inc. is a corporation organized and existing under the laws of the State of Georgia and transacts business in the State of South Carolina.
2. The Third-Party Defendant constructed and/or through its employees, agents, servants

and/or subcontractors, were responsible for and oversaw construction of the premises identified in the Plaintiffs' Complaint for this matter and did same pursuant to certain plans and specifications.

3. The Third-Party Defendant expressly and impliedly agreed and/or warranted that construction of the premises in question would be undertaken in a suitable, workmanlike manner, free of defects and in accordance with all applicable construction and building standards, codes, regulations and law.

4. If the Plaintiffs were injured or damaged as alleged in their Complaint, which allegations are hereby expressly denied, then such injuries or damages were caused in whole in or part by the Third-Party Defendant's breach of its agreement and/or warranties.

5. By reason of the foregoing, the Third-Party Defendant is or will be found by operation of law as the party responsible in whole or in part for any alleged injuries or damages sustained by the Plaintiffs, and will be bound to indemnify the Third-Party Plaintiffs from and against, or contribute toward the satisfaction of, any judgment or verdict, in whole or in part, that may be entered for the Plaintiffs directly or indirectly against the Third-Party Plaintiffs, in addition to indemnity for the costs and attorneys' fees incurred in defending against the Plaintiff.

6. Further, the Third-Party Plaintiffs have sustained certain damages as a result of the breach of the agreement and/or warranties by the Third-Party Defendant.

7. Based upon the foregoing, the Third-Party Plaintiffs are informed and believe that they are entitled to judgment against the Third-Party Defendant for all such damages sustained.

**SECOND AMENDED THIRD-PARTY COMPLAINT
FOR A SECOND CAUSE OF ACTION
(Negligence)**

8. The Third-Party Plaintiffs incorporate those matters set forth above as if fully alleged herein.

9. The Third-Party Defendants owed a duty of care in constructing and/or overseeing and supervising the construction of the premises in question.

10. The Third-Party Defendant breached such duty of care and was negligent, careless, wilful, grossly negligent, reckless and wanton with regard to the work and/or services provided, in the following particulars:

- a. In failing to perform work and/or provide services in a workmanlike and quality manner;
- b. In failing to perform work and/or provide services in a workmanlike and quality manner and in accordance with those applicable plans and specifications;
- c. In failing to detect errors and failures in workmanship;
- d. In failing to hire and/or supervise and/or properly train and/or equip its agents, employees, laborers, servants and/or contractors;
- e. In failing to guard against the negligent acts of such agents, employees, laborers, servants and/or contractors;
- f. In accepting and approving defective and/or non-conforming labor and/or services;
- g. In failing to follow applicable building code requirements and otherwise comply with applicable laws, rules and regulations;
- h. In failing to provide and/or supply proper and quality materials and goods in conjunction with the work and/or services provided; and
- i. In failing to perform activities in accordance with a reasonable standard of care;

- j. In otherwise failing to perform work and/or provide services as would a reasonably prudent person under similar circumstances; and
- k. Such other and further particulars that may be proven at trial.

11. If the Plaintiffs were injured or damaged as alleged in their Complaint, which allegations are hereby expressly denied, then such injuries or damages were caused in whole in or part by the Third-Party Defendant's negligence in constructing and/or overseeing construction of the premises in question.

12. By reason of the foregoing, the Third-Party Defendant is or will be found by operation of law as the party responsible in whole or in part for any alleged injuries or damages sustained by the Plaintiffs, and will be bound to indemnify the Third-Party Plaintiffs from and against, or contribute toward the satisfaction of, any judgment or verdict, in whole or in part, that may be entered for the Plaintiffs directly or indirectly against the Third-Party Plaintiffs, in addition to indemnity for the costs and attorneys' fees incurred in defending against the Plaintiff.

13. Further, the Third-Party Plaintiffs have sustained certain damages as a result of the negligence of the Third-Party Defendant.

14. Based upon the foregoing, the Third-Party Plaintiffs are informed and believe that they are entitled to judgment against the Third-Party Defendant for all such damages sustained.

**SECOND AMENDED THIRD-PARTY COMPLAINT
FOR A THIRD CAUSE OF ACTION
(Equitable Indemnification)**

15. The Third-Party Plaintiffs incorporate those matters set forth above as if fully alleged herein.

16. The Third-Party Plaintiffs allege that a special relationship exists between

themselves and the Third-Party Defendant by virtue of their relationship as owner and contractor, respectively.

17. The Plaintiffs allege that the premises identified in their Complaint is defectively designed and/or constructed.

18. If the allegations in the Plaintiffs' Complaint are proven to be true, then the Third-Party Plaintiffs are entitled to full and complete indemnity from the Third-Party Defendant for any and all liability imposed upon the Third-Party Plaintiffs 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. The Third-Party Plaintiffs respectfully assert that any negligence or other act or omission alleged against them is merely passive and not the cause of any of Plaintiffs' alleged damages.

**SECOND AMENDED THIRD-PARTY COMPLAINT
FOR A FOURTH CAUSE OF ACTION
(Breach of Contract)**

19. The Third-Party Plaintiffs incorporate those matters set forth above as if fully alleged herein.

20. On or about April 28, 2005, the Third-Party Defendant Tippins-Polk Construction, Inc. and the Third-Party Plaintiff Wildevco, LLC entered into a Construction Agreement, attached hereto as Exhibit "A," for the purpose of constructing a retail development, including the subject Fred's store.

21. Pursuant to the terms of said Construction Agreement, the Third-Party Defendant agreed to construct the premises in question and specifically agreed to execute the entire work described in the Contract Documents identified as part of the Construction Agreement.

22. The Third-Party Defendant breached the terms and provisions of the Construction Agreement.

23. The Third-Party Plaintiffs have sustained certain damages as a result of the breach of the Construction Agreement by the Third-Party Defendant.

24. Based upon the foregoing, the Third-Party Plaintiffs are informed and believe that they are entitled to judgment against the Third-Party Defendant for all such damages sustained.

WHEREFORE, the Defendants/Third-Party Plaintiffs pray for all relief requested in their Amended Answer to Plaintiffs' Complaint and, further, for all relief requested in this Second 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 Defendants/Third-Party Plaintiffs, together with costs and disbursements herein, as well as for all damages sustained by Defendants/Third-Party Plaintiffs, including attorneys' fees and costs, and for such other and further relief as the Court would deem just and proper.

Regina Hollins Lewis, SC Bar No. 68539
Lee Ellen Bagley, SC Bar No. 77672
Randi Lynn Roberts, SC Bar No. 68888
GAFFNEY LEWIS & EDWARDS, LLC
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*Attorneys for Defendants Tad Barber,
Individually and d/b/a Wildevco, LLC*

_____, 2015

STATE OF SOUTH CAROLINA

COUNTY OF BARNWELL

Martha M. Fountain and Curtis Fountain,

Plaintiffs,

vs.

Fred's, Inc. and Wildevco, LLC,

Defendants, Third-Party Plaintiffs,

vs.

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

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

Civil Action No. 2010-CP-06-101

**DEFENDANT WILDEVCO, LLC'S
MEMORANDUM IN SUPPORT OF
MOTION TO AMEND THIRD
AMENDED THIRD-PARTY
COMPLAINT PURSUANT TO RULE
15, SCRPC**

Pursuant to Rule 15 of the South Carolina Rules of Civil Procedure, Defendant Wildevco, LLC ("Wildevco") hereby submits this Memorandum in Support of its Motion to Amend Third Amended Third-Party Complaint (hereinafter "Third-Party Complaint"). This Honorable Court should permit the foregoing Defendant's requested amendment as the presentation of the merits of the action will be subserved thereby and no party will be prejudiced by the granting of this Motion.

FACTS

The underlying case arises from a trip and fall by Plaintiff Martha Fountain on March 10, 2010 at the Fred's store in Williston, South Carolina. Plaintiff Martha Fountain asserts that she tripped on a defective handicap curb ramp in front of the store, which caused her to fall and sustain personal injury. The subject premises is owned and was developed by Wildevco, who hired Tippins-Polk as the general contractor on the project.

On May 12, 2010, Plaintiffs in the underlying action sued Defendants Fred's Inc. (hereinafter "Fred's"), and Wildevco (collectively, "Defendants") alleging negligence and loss of consortium.¹ On August 1, 2012, with the consent of Plaintiffs, Wildevco filed an Amended Answer and Third-Party Complaint against Tippins-Polk Construction, Inc. ("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 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 against Tippins-Polk. Defendants settled the underlying action with Plaintiffs on March 20, 2016, and consummated the agreement on April 21, 2016. Wildevco now proceeds to trial on only the Third-Party Complaint. In light of its formal, executed settlement with Plaintiffs, Wildevco also moves this Court to permit an amendment to the Third-Party Complaint to include a cause of action for contribution for the reasons set forth below.

LEGAL STANDARD FOR AMENDMENT OF COMPLAINTS

Rule 15(a) of the South Carolina Rules of Civil Procedure provides that leave to amend a party's pleadings shall be freely given by the Court when: (1) justice so requires; and (2) no other party will be prejudiced by the granting of the Motion. "The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it." *Tanner v. Florence Cnty. Treasurer*, 336 S.C. 552, 559, 521 S.E.2d 153, 156 (1999); *see also City of N. Myrtle Beach v. Lewis-Davis*, 360 S.C. 225, 232, 599 S.E.2d 462, 465 (Ct. App. 2004). It is well-established that the party opposing the amendment has the burden of establishing

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

prejudice. *Foggie v. CSX Transp., Inc.*, 315 S.C. 17, 22, 431, S.E.2d 587, 590 (1993); *Pruitt v. Bowers*, 330 S.C. 483, 489, 499 S.E.2d 250, 253 (Ct. App. 1998). The rule governing amendments "strongly favors amendments and the court is encouraged to freely grant leave to amend." *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 286, 607 S.E.2d 711, 716 (Ct. App. 2005) (trial court abused its discretion in denying party's motion made on morning of trial to amend answer to assert damages cap); see also *Jarrell v. Seaboard Sys. R.R., Inc.*, 294 S.C. 183, 186, 363 S.E.2d 398, 399 (Ct. App. 1987).

ARGUMENT

I. Rule 15(b) & (c) of the South Carolina Rules of Civil Procedure

"A motion to amend pleadings is left to the sound discretion of the trial judge." *Woods v. Rabon*, 295 S.C. 343, 347, 368 S.E.2d 471, 473-74 (Ct. App. 1988). Rule 15(b), SCRCF provides that

[i]f evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court shall upon motion grant a continuance reasonably necessary to enable the objecting party to meet such evidence. Upon allowing any such amendment or evidence the Court shall state in the record the reason or reasons for allowing the amendment or evidence.

"Simply because an amendment to conform to proof was made late in the trial affords no basis for holding that the amendment comes too late." See *Soil & Material Engineers, Inc. v. Folly Assocs.*, 293 S.C. 498, 501, 361 S.E.2d 779, 781 (Ct. App. 1987). "Rather, as the rule makes clear, the question is one of prejudice to the opposing party." *Id.*

As a threshold matter, while case law is clear that a denial of a motion to amend under Rule 15(b) cannot be based on its timing alone, Wildevco's right to assert contribution only became ripe once Defendants' formally settled with Plaintiff and paid the settlement amount on April 21, 2016. *First Gen. Servs. v. Miller*, 314 S.C. 439, 444, 445 S.E.2d 446, 448 (S.C. 1994), cited by *RIM Assoc. v. Blackwell*, 359 S.C. 170, 179, 597 S.E.2d 182, 187 (S.C. Ct. App. 2004). Thus, Wildevco was not dilatory in bringing this Motion.² As to the merit of Wildevco's motion, the proposed amendment of the Third-Party Complaint to conform to proof will not cause any prejudice to Tippins-Polk, as Tippins-Polk has had a full opportunity to prepare for the issue now being raised formally. See *id.* Tippins-Polk is fully prepared to defend against Wildevco's current claim of equitable indemnification, which includes a prayer for relief that Tippins-Polk be bound to indemnify Wildevco from and against, or contribute toward the satisfaction of, any judgment or verdict, in whole or in part, that may be entered for the Plaintiffs directly or indirectly against Wildevco; thus, Tippins-Polk will require no further discovery to defend against a cause of action for contribution pursuant to section 15-38-40 of the South Carolina Code. Wildevco asserts contribution simply as an alternative theory upon which the Court may grant relief should the Court find Tippins-Polk is not solely liable for the alleged incident but only partially liable.³ In short, Tippins-Polk is not prejudiced because it will not be required to introduce additional or different evidence to prevail in the amended action.

To the extent Tippins-Polk argues the statute of repose and/or the statute of limitations precludes Wildevco's proposed claim of contribution, Rule 15(c) of the South Carolina Rules of Civil Procedures provides in pertinent part: "whenever the claim or defense asserted in the

² Similarly, Tippins-Polk cannot prevail on its argument that Wildevco is judicially estopped from asserting contribution or waived its right to assert contribution as referenced in its counsel's letter to the Court, dated June 3, 2016. Wildevco's claim of contribution was simply not ripe at the time of the March 24, 2016 or at any other point prior to the consummation of the settlement agreement with Plaintiffs on April 21, 2016.

³ However, Wildevco expressly denies any liability arising from the underlying action.

amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading.” Indeed, “[t]he purpose of Rule 15(c) is to salvage causes of action otherwise barred by the statute of limitations.” *Thomas Grayson*, 318 S.C. 82, 87-88, 456 S.E.2d 377, 380 (1995). It is well-established that the test to allow relation back pursuant to Rule 15(c), SCRCP, is whether the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth in the original pleading. *Id.* at 88, 456 S.E.2d at 380. Wildevco’s claim of contribution certainly arose out of the occurrence set forth in the original pleading, the underlying tort claims instituted by Plaintiffs. Thus, the proposed amendment of the Third Party Complaint relates back pursuant to Rule 15(c), SCRCP, and Wildevco is not precluded by the statute of repose and/or the statute of limitations from asserting its claim of contribution, as Wildevco filed its original Third-Party Complaint against Tippins-Polk on August 1, 2012, well within the applicable statute of repose⁴ and statute of limitations. Accordingly, the Court should permit Wildevco to amend its Third Party Complaint to assert contribution for the reasons set forth above.

II. Wildevco has a viable claim for contribution pursuant to Section 15-38-40(D) of the South Carolina Code and accordingly, the motion to amend should be granted.

Wildevco’s proposed claim of contribution against Tippins-Polk remains viable pursuant to Rule 15-38-40(D)(2), SCRCP, despite the expiration of the statute of limitations on Plaintiff’s underlying claim. Rule 15-38-40(D), SCRCP, which addresses this precise situation, provides:

If there is no judgment for the injury or wrongful death against the tortfeasor seeking contribution, his right of contribution is barred *unless* he has either (1) discharged by payment the common liability within the statute of limitations period applicable to claimant’s right of action against him and has commenced his

⁴ The certificate of occupancy was granted in October of 2005; thus, the statute of repose expired on or about October of 2013.

action for contribution within one year after payment, or (2) agreed while action is pending against him to discharge the common liability and has within one year after the agreement paid the liability and commenced his action for contribution.

(emphasis added). As Plaintiffs and Defendants did not discharge the common liability within the statute of limitations applicable to Plaintiffs' claims to allow Wildevco to pursue contribution under the first prong, Wildevco pursues contribution under the second prong of the statute. Discharge of the defending joint tortfeasor's common liability, as required in the second prong, must have resulted directly from the settlement of the underlying claim. *G & P Trucking v. Parks Auto Sales Serv. & Salvage, Inc.*, 357 S.C. 82, 88, 591 S.E.2d 42, 45 (Ct. App. 2003).

Here, while Plaintiffs' action was pending against it, Wildevco and Fred's agreed to discharge the common liability of all potential joint tortfeasors. See *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 54, 747 S.E.2d 178, 188 (2013) (finding the settlement agreement discharging the common liability must be made while the underlying tort action was still pending to proceed with a third-party contribution claim under Rule 15-38-40(D)(2); SCRCPP). Plaintiffs and Defendants' agreement is reflected in the executed Release in the underlying action, which states in pertinent part:

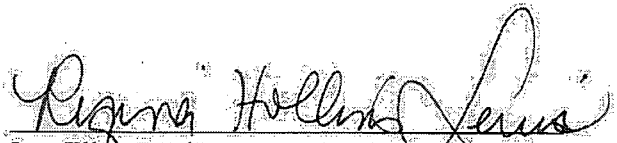
Plaintiffs agree that it is the intent of this Agreement to relieve Wildevco and Fred's of any liability for contribution or indemnity to any person or entity that is or may be responsible or liable to Plaintiffs as joint tortfeasors, joint obligors or indemnitors ("Joint Tortfeasors") for any damages 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.**

See Excerpt from Executed Release, dated April 21, 2016 (emphasis supplied); *compare G & P Trucking*, 357 S.C. at 89, 591 S.E.2d at 45 (finding no evidence of a release that discharged liability of joint tortfeasors for claims asserted in the underlying action; thus, third-party action for contribution was barred). It is undisputed that Wildevco meets the final requirement of section 15-38-40(D)(2), SCRCP, as it has commenced this action of contribution and paid the settlement amount to Plaintiffs within one year of the settlement agreement, which was consummated on April 21, 2016. Thus, Wildevco's proposed contribution claim remains viable against Tippins-Polk, and it should be allowed to amend the Third-Party Complaint to conform to proof pursuant to Rule 15(b), SCRCP.

CONCLUSION

Based upon the forgoing, this Court must grant Wildevco's Motion to Amend Third Amended Third-Party Complaint pursuant to Rule 15(b) and (c) of the South Carolina Rules of Civil Procedure.

Respectfully submitted,



Lee Ellen Bagley, SC Bar No. 77672
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Randi Lynn Roberts, SC Bar No. 78888
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Attorneys for Defendant Wildevco, LLC

June 3, 2016

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF BARNWELL)

CIVIL ACTION NUMBER: 2010-CP-06-

Martha M. Fountain and
Curtis Fountain,

Plaintiffs,

vs.

COMPLAINT
(Jury Trial Demanded)

Fred's Inc. and Tad Barber,
individually and d/b/a
Wildevco, LLC,

Defendants.

FILED FOR RECORD
MAY 12 PM 1:41
BARNWELL COUNTY, S.C.

The Plaintiff Martha M. Fountain and Plaintiff Curtis Fountain above named, complaining of the Defendants herein, would respectfully show unto the Court:

1. The Plaintiff's are citizens and residents of Barnwell County, South Carolina;
2. The Defendant, Fred's Inc. is a corporation organized and existing under the laws of the State of South Carolina, licensed and doing business in Barnwell County;
3. The Defendant, Tad Barber, individually and doing business as Wildevco, LLC is a citizen and resident of Aiken County, South Carolina and at all times relevant hereto, is the owner/landlord of the property where the incident occurred;
4. That at all times mentioned in this complaint, Plaintiffs are husband and wife;
5. That on or about March 10, 2010, Plaintiff, Martha Fountain, came as a member of the public to purchase some items from the Defendant, Fred's Inc. retail store in Williston, South Carolina;
6. That as Plaintiff, Martha Fountain, was entering the store she tripped on the raised sidewalk in front of the store's entrance and fell; that as a direct and proximate result thereof, the Plaintiff sustained serious, severe and permanent injuries as set forth below;

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pg 2

7. That the direct and proximate cause of the injuries was the careless, negligent, recklessness, willfulness, wanton and grossly negligent, conduct of the Defendants in the following particulars to wit:

AS TO THE DEFENDANT FRED'S INC.

- (a) In failing to keep and maintain the area of the premises as are ordinarily used by customers in transacting business in a reasonably safe condition;
- (b) In failing to take reasonable precautions to avoid an unsafe condition from existing at said store;
- (c) In failing to warn customers of the dangerous condition then and there existing;
- (d) In failing to inspect said premises;
- (e) In failing to remedy the condition as required by law;
- (f) In failing to discover risks and to warn of or make safe existing unreasonable risks;
- (g) In such other particulars that the evidence may establish.

AS TO DEFENDANTS TAD BARBER AND WILDEVCO, LLC

- (a) In failing to keep and maintain the area of the premises as are ordinarily used by customers in transacting business in a reasonably safe condition;
- (b) In failing to take reasonable precautions to avoid an unsafe condition from existing at said store;
- (c) In failing to warn customers of the dangerous condition then and there existing;
- (d) In failing to inspect said premises;
- (e) In failing to remedy the condition as required by law;
- (f) In failing to discover risks and to warn of or make safe existing unreasonable risks;
- (g) In such other particulars that the evidence may establish.

CBM
09/3

8. By reason and in consequence of the aforementioned conduct of the Defendants, the Plaintiff, Martha Fountain, sustained serious, severe and permanent injuries to numerous parts of her body; that the injuries were of such a nature as to require her to spend money for doctor's care and other medical necessities; that the Plaintiff, Martha Fountain, has suffered and will continue to suffer great pain, humiliation and mental anguish.

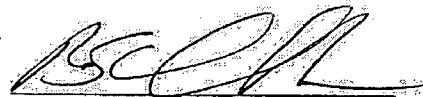
9. Before suffering these injuries, Plaintiff, Martha Fountain, was able to and did perform all the duties of a wife and did perform all of these duties, including assisting in maintaining the home and providing companionship, affection, moral support and solace to Plaintiff, Curtis Fountain. As a direct and proximate result of the aforementioned negligence of the Defendants, Plaintiff, Martha Fountain, has been unable to perform these duties as she had previously and does not believe she will be able to perform them in the future. Plaintiff, Curtis Fountain, is therefore deprived and will be permanently deprived of his spouse's consortium, all to Plaintiff's damage, in a total amount to be established by proof at trial.

10. Plaintiffs are informed and believe they are entitled to an award of actual and punitive damages:

WHEREFORE the Plaintiffs pray for judgment against the Defendants for actual damages and punitive damages in an amount determined fair and reasonable by a jury and for whatever additional further relief this court deems just and proper.

May 10, 2010

R. STEVEN CHANDLER, LLC



R. STEVEN CHANDLER
POST OFFICE BOX 948
BAMBERG, SC 29003
PHONE: 803-245-1800
FAX: 803-245-0077

ATTORNEY FOR PLAINTIFFS

cm
pg 4

STATE OF SOUTH CAROLINA

COUNTY OF BARNWELL

Martha M. Fountain and
Curtis Fountain

Plaintiffs,

vs.

Fred's Inc. and Tad Barber
individually and d/b/a
Wildevco, LLC,

Defendant.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NUMBER: 2010-CP-06- 101

SUMMONS

*CAME TO HAND 27th May 2010
AND EXECUTED ON FRED'S INC.
By Serving Fred's Inc. Legal P.P.
Bradley McAdory*

FILED FOR REC.
2010 MAY 12
RHONDA D. McELVEEN
CLERK OF COURT
BARNWELL CO.

TO THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy
of which is herewith served upon you, and to serve a copy of your answer to this complaint upon
the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive
of the day of such service, and if you fail to answer the complaint, judgment by default will be
rendered against you for the relief demanded in the complaint.

*MARGARET M. TUTTLE, J. (Shank)
Daphne Wilber 668
10:24am*

May 10, 2010

R. STEVEN CHANDLER, LLC

RSC
R. STEVEN CHANDLER
POST OFFICE BOX 948
BAMBERG, SC 29003
PHONE: 803-245-1800
FAX: 803-245-0077
Steve@BambergLaw.com

ATTORNEY FOR PLAINTIFFS

STATE OF SOUTH CAROLINA
COUNTY OF BARNWELL
I, Rhonda D. McElveen, Clerk of Court for Barnwell County,
South Carolina do hereby certify that the foregoing
constitutes a true and correct copy of the original
documents which have been filed in my office this

MAY 12 2010

Rhonda D. McElveen
Clerk of Court, Barnwell County, SC
By: *CBN*

State of South Carolina	)	
	)	In the Court of Common Pleas
County of Barnwell	)	
Martha M. Fountain and	)	
Curtis Fountain.	)	CA No. 10-CP-06-101
	)	
Plaintiffs,	)	ANSWER OF DEFENDANTS
	)	
v.	)	
	)	
Fred's Inc. and Tad Barber,	)	
individually and d/b/a Wildevco, LLC,	)	
	)	
Defendants.	)	

COME NOW the Defendants, Fred's Inc. and Tad Barber, individually and d/b/a Wildevco, LLC, answering the Plaintiffs' Complaint in the above-referenced matter, as follows:

FOR A FIRST DEFENSE

1. The Defendants deny each and every allegation set forth in the Plaintiffs' Complaint which is not hereinafter specifically admitted or to which a response is not otherwise provided.
2. The Defendants, upon information and belief, admit the allegations set forth in Paragraph No. 1. of the Plaintiffs' Complaint.
3. With regard to the allegations set forth in Paragraph 2 of the Plaintiffs' Complaint the Defendant Fred's Inc. admits that it is a corporation organized and existing under the laws of the State of Tennessee and transacts business in South Carolina.
4. With regard to the allegations set forth in Paragraph 3 of the Plaintiff's Complaint the Defendant Barber admits that he is a citizen and resident of Aiken County, South Carolina and

the Defendant Wildevco admits that it is a limited liability company organized and existing under the laws of the State of South Carolina; further the Defendant Wildevco admits that it is the owner of the property where the incident forming the basis for this case took place.

5. With regard to the allegations set forth in Paragraphs 5 and 6 of the Plaintiffs' Complaint the Defendants admit, upon information and belief, that on or about the date alleged the Plaintiff Martha M. Fountain fell while present on the subject property. The Defendants, however, are without sufficient information or knowledge at the present time to admit or deny the remaining allegations set forth in said Paragraphs.

6. The Defendants deny the allegations set forth in Paragraphs 7, 8, 9 and 10 of the Plaintiff's Complaint.

FOR A SECOND DEFENSE

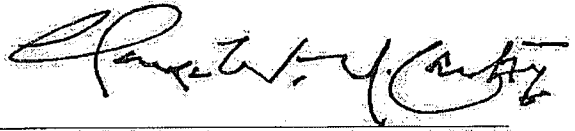
7. Any injuries or damages sustained by the Plaintiffs were due wholly and solely to the negligence, carelessness, recklessness, gross negligence, wilfulness and/or wantonness of the Plaintiffs, which combined and concurred with the negligence, carelessness, recklessness, gross negligence, wilfulness and/or wantonness of the Defendants, which is specifically denied by the Defendants, to cause and produce any damages sustained by the Plaintiffs herein, and without which such injuries or damages would not have occurred; the Defendants plead such negligence, carelessness, recklessness, gross negligence, wilfulness and/or wantonness on the part of the Plaintiffs and would ask that the Court compare the acts of the Parties, and if it is determined that the Plaintiffs' negligence, carelessness, recklessness, gross negligence, wilfulness and/or wantonness is greater than the negligence, carelessness, recklessness, gross negligence, wilfulness and/or wantonness of the Defendants, which is specifically denied, then the Plaintiffs should be totally

barred from recovery and if it is determined that the Plaintiffs' negligence, carelessness, recklessness, gross negligence, wilfulness and/or wantonness is less than that of the Defendants, then the amount of recovery available to the Plaintiffs should be reduced by the percentage of the Plaintiffs' own negligence, carelessness, recklessness, gross negligence, wilfulness and/or wantonness.

FOR A THIRD DEFENSE

8. The Plaintiffs' claims for punitive damages in this matter are barred by the provisions of the Constitutions of the State of South Carolina and the United States of America.

NANCE, MCCANTS & MASSEY

By: 

Clarke W. McCants, III, Esquire
P. O. Box 2881
Aiken, SC 29802-2881
(803) 649-6200
Counsel for Defendants

Dated: July 12, 2010

State of South Carolina)

County of Barnwell)

Martha M. Fountain and
Curtis Fountain)

Plaintiffs,)

vs.)

Fred's Inc. and Tad Barber,
individually and d/b/a Wildevco, LLC,)

Defendants / Third-Party
Plaintiffs,)

vs.)

Tippins-Polk Construction, Inc.,
Rhoad's Excavating Services, LLC and
Southern Asphalt, LLC)

Third-Party Defendants /of whom
Tippins-Polk Construction, Inc. is
a Fourth-Party Plaintiff,)

vs.)

Rhoad's Excavating Services, LLC and
Southern Asphalt, LLC,)

Fourth-Party Defendants.)

In the Court of Common Pleas

CA No. 10-CP-06-101

**AMENDED THIRD-PARTY
SUMMONS**
(Jury Trial Requested)

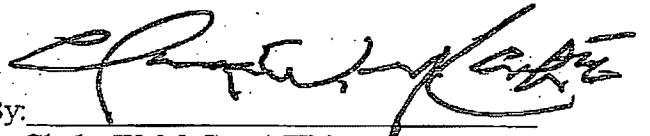
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RHONDA D. McELVEEN
CLERK OF COURT
BARNWELL COUNTY, S.C.

TO THE THIRD-PARTY DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED AND REQUIRED to answer the Amended
Third-Party Complaint in this action, of which a copy is herewith served upon you, and to serve a
copy of the Answer to the said Amended Third-Party Complaint on the subscriber at his office at 218

Newberry Street, S.W.,(P. O. Box 2881), Aiken, SC 29802, within thirty days after service hereof, exclusive of the date of such service; and if you fail to answer the Amended Third-Party Complaint within the time before said, the Third-Party Plaintiffs in this action will apply to the Court for the relief demanded in the Amended Third-Party Complaint, and judgment by default will be rendered against you for the relief demanded in the Amended Third-Party Complaint.

NANCE, McCANTS & MASSEY

By: 

Clarke W. McCants, III, Esquire

P. O. Box 2881

Aiken, SC 29802

(803) 649-6200

Counsel for Third-Party Plaintiffs

Dated: September 11, 2013

State of South Carolina)

County of Barnwell)

Martha M. Fountain and
Curtis Fountain)

Plaintiffs,)

vs.)

Fred's Inc. and Tad Barber,
individually and d/b/a Wildevco, LLC,)

Defendants / Third-Party
Plaintiffs,)

vs.)

Tippins-Polk Construction, Inc.,
Rhoad's Excavating Services, LLC and
Southern Asphalt, LLC)

Third-Party Defendants /of whom
Tippins-Polk Construction, Inc. is
a Fourth-Party Plaintiff,)

vs.)

Rhoad's Excavating Services, LLC and
Southern Asphalt, LLC,)

Fourth-Party Defendants.)

In the Court of Common Pleas

CA No. 10-CP-06-101

**AMENDED ANSWER AND
THIRD-PARTY COMPLAINT**
(Jury Trial Requested)

RHONDA D. McELVEEN
CLERK OF COURT
BARNWELL COUNTY, S.C.

2013 NOV -6 PM 1:37

FILED FOR RECORD

COME NOW the Defendants, Fred's Inc. and Tad Barber, individually and d/b/a Wildevco, LLC, answering the Plaintiffs' Complaint in the above-referenced matter, and presenting their Amended Third-Party Complaint, as follows:

FOR A FIRST DEFENSE

1. The Defendants deny each and every allegation set forth in the Plaintiffs' Complaint which is not hereinafter specifically admitted or to which a response is not otherwise provided.

2. The Defendants, upon information and belief, admit the allegations set forth in Paragraph No. 1. of the Plaintiffs' Complaint.

3. With regard to the allegations set forth in Paragraph 2 of the Plaintiffs' Complaint the Defendant Fred's Inc. admits that it is a corporation organized and existing under the laws of the State of Tennessee and transacts business in South Carolina.

4. With regard to the allegations set forth in Paragraph 3 of the Plaintiff's Complaint the Defendant Barber admits that he is a citizen and resident of Aiken County, South Carolina and the Defendant Wildevco admits that it is a limited liability company organized and existing under the laws of the State of South Carolina; further the Defendant Wildevco admits that it is the owner of the property where the incident forming the basis for this case took place.

5. With regard to the allegations set forth in Paragraphs 5 and 6 of the Plaintiffs' Complaint the Defendants admit, upon information and belief, that on or about the date alleged the Plaintiff Martha M. Fountain fell while present on the subject property. The Defendants, however, are without sufficient information or knowledge at the present time to admit or deny the remaining allegations set forth in said Paragraphs.

6. The Defendants deny the allegations set forth in Paragraphs 7, 8, 9 and 10 of the Plaintiff's Complaint.

FOR A SECOND DEFENSE

7. Any injuries or damages sustained by the Plaintiffs were due wholly and solely to the negligence, carelessness, recklessness, gross negligence, wilfulness and/or wantonness of the Plaintiffs, which combined and concurred with the negligence, carelessness, recklessness, gross negligence, wilfulness and/or wantonness of the Defendants, which is specifically denied by the Defendants, to cause and produce any damages sustained by the Plaintiffs herein, and without which such injuries or damages would not have occurred; the Defendants plead such negligence, carelessness, recklessness, gross negligence, wilfulness and/or wantonness on the part of the Plaintiffs and would ask that the Court compare the acts of the Parties, and if it is determined that the Plaintiffs' negligence, carelessness, recklessness, gross negligence, wilfulness and/or wantonness is greater than the negligence, carelessness, recklessness, gross negligence, wilfulness and/or wantonness of the Defendants, which is specifically denied, then the Plaintiffs should be totally barred from recovery and if it is determined that the Plaintiffs' negligence, carelessness, recklessness, gross negligence, wilfulness and/or wantonness is less than that of the Defendants, then the amount of recovery available to the Plaintiffs should be reduced by the percentage of the Plaintiffs' own negligence, carelessness, recklessness, gross negligence, wilfulness and/or wantonness.

FOR A THIRD DEFENSE

8. The Plaintiffs' claims for punitive damages in this matter are barred by the provisions of the Constitutions of the State of South Carolina and the United States of America.

AMENDED THIRD-PARTY COMPLAINT FOR A FIRST CAUSE OF ACTION

9. The Defendants and Third-Party Plaintiffs reallege those matters set forth above.

10. The Third-Party Defendant Tippins-Polk Construction, Inc. is a corporation organized and existing under the laws of the State of Georgia and transacts business in the State of South Carolina.

11. Upon information and belief the Third-Party Defendant Rhoad's Excavating Services, LLC is a limited liability company organized and existing under the laws of the State of South Carolina.

12. Upon information and belief the Third-Party Defendant Southern Asphalt, LLC is a limited liability company organized and existing under the laws of the State of Georgia and conducted business, in whole or in part, at all times relevant hereto in Barnwell County, South Carolina.

13. The Third-Party Defendants individually and / or jointly constructed, and / or through its employees, agents, servants and / or subcontractors were responsible for and oversaw construction of, the premises identified in the Plaintiffs' Complaint for this matter, and pursuant to certain plans and specifications.

14. The Third-Party Defendants, individually and / or jointly, expressly and impliedly agreed and / or warranted that construction of the premises in question would be undertaken in a suitable, workmanlike manner, free of defects and in accordance with all applicable construction and building standards, codes, regulations and law.

15. If the Plaintiffs were injured or damaged as alleged in their Complaint, which allegations are hereby expressly denied, then such injuries or damages were caused in whole in or part by the Third-Party Defendants' breach of their agreement and / or warranties, individually and / or jointly.

16. By reason of the foregoing, the Third-Party Defendants, individually, jointly and / or severally, are or will be found by operation of law as the Parties responsible in whole or in part for any alleged injuries or damages sustained by the Plaintiffs, and will be bound to indemnify the Third-Party Plaintiffs from and against, or contribute toward the satisfaction of, any judgment or verdict, in whole or in part, that may be entered for the Plaintiffs directly or indirectly against the Third-Party Plaintiffs.

**AMENDED THIRD-PARTY COMPLAINT
FOR A SECOND CAUSE OF ACTION**

17. The Third-Party Plaintiff realleges those matter set forth above.

18. The Third-Party Defendants owed a duty of care in constructing and / or overseeing and supervising the construction of the premises in question.

19. The Third-Party Defendants, individually and / or jointly breached such duty of care and were negligent, careless, wilful, grossly negligent, reckless and wanton with regard to the work and/or services provided, and in the following particulars:

- a. In failing to perform work and/or provide services in a workmanlike and quality manner;
- b. In failing to perform work and/or provide services in a workmanlike and quality manner and in accordance with those applicable plans and specifications;
- c. In failing to detect errors and failures in workmanship;
- d. In failing to hire and/or supervise and/or properly train and/or equip his agents, employees, laborers, servants and/or contractors;
- e. In failing to guard against the negligent acts of such agents, employees, laborers, servants and/or contractors;
- f. In accepting and approving defective and/or non-conforming labor

and/ or services;

g. In failing to follow applicable building code requirements and otherwise comply with applicable laws, rules and regulations;

h. In failing to provide and/or supply proper and quality materials and goods in conjunction with the work and/or services provided; and

i. In failing to perform activities in accordance with a reasonable standard of care;

j. In otherwise failing to perform work and/or provide services as would a reasonably prudent person under similar circumstances; and

k. Such other and further particulars that may be proven at trial.

20. If the If the Plaintiffs were injured or damaged as alleged in their Complaint, which allegations are hereby expressly denied, then such injuries or damages were caused in whole in or part by the Third-Party Defendants' negligence, individually and / or jointly, in constructing and / or overseeing construction of the premises in question.

21. By reason of the foregoing, the Third-Party Defendants, individually, jointly and / or severally, are or will be found by operation of law as the Parties responsible in whole or in part for any alleged injuries or damages sustained by the Plaintiffs, and will be bound to indemnify the Third-Party Plaintiffs from and against, or contribute toward the satisfaction of, any judgment or verdict, in whole or in part, that may be entered for the Plaintiffs directly or indirectly against the Third-Party Plaintiffs.

AMENDED THIRD-PARTY COMPLAINT FOR A THIRD CAUSE OF ACTION

22. The Third-Party Plaintiffs reallege those matters set forth above.

23. The Third-Party Plaintiffs allege that a special relationship exists between

themselves and the Third-Party Defendants, individually and / or jointly.

24. The Plaintiffs have alleged that the premises identified in their Complaint were defectively designed and / or constructed.

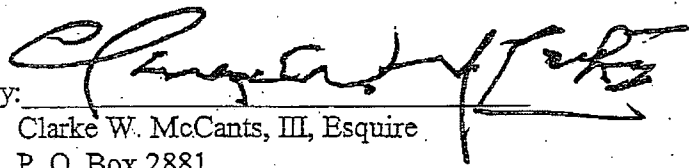
25. If the allegations in the Plaintiffs' Complaint are proven to be true then the Third-Party Plaintiffs are entitled to full and complete indemnity from the Third-Party Defendants, individually, jointly and / or severally, for any and all liability imposed upon the Third-Party Plaintiffs, and by virtue of the Third-Party Defendants actions and / or omissions, including being indemnified for the costs and attorneys' fees associated with defending this civil action. The Third-Party Plaintiffs respectfully assert that any negligence alleged to them is merely passive and not the cause of any alleged damages.

JURY TRIAL REQUEST

26. The Third-Party Plaintiffs request a Jury Trial as to those matters set forth in the Third-Party Complaint.

WHEREFORE having fully answered the Defendants / Third-Party Plaintiffs pray that the Plaintiffs' Complaint be dismissed. In the alternative the Defendants / Third-Party Plaintiffs pray that they be awarded judgment over and against the Third-Party Defendants for all or part of any verdict or judgment which may be recovered by the Plaintiffs directly or indirectly against the Defendants / Third-Party Plaintiffs, together with its costs and disbursements herein. Further in the alternative the Defendants / Third-Party Plaintiffs pray that the Third-Party Defendants be ordered to contribute toward the satisfaction of any verdict or judgment obtained by the Plaintiffs under their Complaint, and for such other and further relief as the Court would deem just and proper.

NANCE, MCCANTS & MASSEY

By: 

Clarke W. McCants, III, Esquire

P. O. Box 2881

Aiken, SC 29802-2881

(803) 649-6200

Counsel for Defendants/Third-Party Plaintiffs

Dated: September 11, 2013

STATE OF SOUTH CAROLINA

COUNTY OF BARNWELL

Martha M. Fountain and Curtis Fountain,

Plaintiffs,

vs.

Fred's, Inc. and Wildevco, LLC,

Defendants, Third-Party Plaintiffs

vs.

Tippins-Polk Construction, Inc.,

Third-Party Defendant.

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

Civil Action No. 2010-CP-06-101

**WILDEVCO, LLC'S
THIRD AMENDED
THIRD-PARTY COMPLAINT**

FILED FOR RECORD
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CLERK OF COURT
JANET L. HENRY, CLERK

COMES NOW Defendant, Third-Party Plaintiff Wildevco, LLC ("Third-Party Plaintiff") and, incorporating wholly herein by reference its first Amended Answer to Plaintiffs' Complaint, presents its Third Amended Third-Party Complaint, as follows:

**FOR A FIRST CAUSE OF ACTION
(Breach of Agreement and/or Warranties)**

1. The Third-Party Defendant Tippins-Polk Construction, Inc. is a corporation organized and existing under the laws of the State of Georgia and transacts business in the State of South Carolina.
2. The Third-Party Defendant constructed and/or through its employees, agents, servants and/or subcontractors, were responsible for and oversaw construction of the premises identified in the Plaintiffs' Complaint for this matter and did same pursuant to certain plans and specifications.
3. The Third-Party Defendant expressly and impliedly agreed and/or warranted that

construction of the premises in question would be undertaken in a suitable, workmanlike manner, free of defects and in accordance with all applicable construction and building standards, codes, regulations and law.

4. If the Plaintiffs were injured or damaged as alleged in their Complaint, which allegations are hereby expressly denied, then such injuries or damages were caused in whole in or part by the Third-Party Defendant's breach of its agreement and/or warranties.

5. By reason of the foregoing, the Third-Party Defendant is or will be found by operation of law as the party responsible in whole or in part for any alleged injuries or damages sustained by the Plaintiffs, and will be bound to indemnify the Third-Party Plaintiff from and against, or contribute toward the satisfaction of, any judgment or verdict, in whole or in part, that may be entered for the Plaintiffs directly or indirectly against the Third-Party Plaintiff, in addition to indemnity for the costs and attorneys' fees incurred in defending against the Plaintiff.

6. Further, the Third-Party Plaintiff has sustained certain damages as a result of the breach of the agreement and/or warranties by the Third-Party Defendant.

7. Based upon the foregoing, the Third-Party Plaintiff is informed and believes that it is entitled to judgment against the Third-Party Defendant for all such damages sustained.

**FOR A SECOND CAUSE OF ACTION
(Negligence)**

8. The Third-Party Plaintiff incorporates those matters set forth above as if fully alleged herein.

9. The Third-Party Defendant owed a duty of care in constructing and/or overseeing and supervising the construction of the premises in question.

10. The Third-Party Defendant breached such duty of care and was negligent,

careless, willful, grossly negligent, reckless and wanton with regard to the work and/or services provided, in the following particulars:

- a. In failing to perform work and/or provide services in a workmanlike and quality manner;
- b. In failing to perform work and/or provide services in a workmanlike and quality manner and in accordance with those applicable plans and specifications;
- c. In failing to detect errors and failures in workmanship;
- d. In failing to hire and/or supervise and/or properly train and/or equip its agents, employees, laborers, servants and/or contractors;
- e. In failing to guard against the negligent acts of such agents, employees, laborers, servants and/or contractors;
- f. In accepting and approving defective and/or non-conforming labor and/ or services;
- g. In failing to follow applicable building code requirements and otherwise comply with applicable laws, rules and regulations;
- h. In failing to provide and/or supply proper and quality materials and goods in conjunction with the work and/or services provided; and
- i. In failing to perform activities in accordance with a reasonable standard of care;
- j. In otherwise failing to perform work and/or provide services as would a reasonably prudent person under similar circumstances; and
- k. Such other and further particulars that may be proven at trial.

11. If the Plaintiffs were injured or damaged as alleged in their Complaint, which allegations are hereby expressly denied, then such injuries or damages were caused in whole in or part by the Third-Party Defendant's negligence in constructing and/or overseeing construction of the premises in question.

12. By reason of the foregoing, the Third-Party Defendant is or will be found by operation of law as the party responsible in whole or in part for any alleged injuries or damages sustained by the Plaintiffs, and will be bound to indemnify the Third-Party Plaintiff from and against, or contribute toward the satisfaction of, any judgment or verdict, in whole or in part, that may be entered for the Plaintiffs directly or indirectly against the Third-Party Plaintiff, in addition to indemnity for the costs and attorneys' fees incurred in defending against the Plaintiff.

13. Further, the Third-Party Plaintiff has sustained certain damages as a result of the negligence of the Third-Party Defendant.

14. Based upon the foregoing, the Third-Party Plaintiff is informed and believes that it is entitled to judgment against the Third-Party Defendant for all such damages sustained.

**FOR A THIRD CAUSE OF ACTION
(Equitable Indemnification)**

15. The Third-Party Plaintiff incorporates those matters set forth above as if fully alleged herein.

16. The Third-Party Plaintiff alleges that a special relationship exists between it and the Third-Party Defendant by virtue of their relationship as owner and contractor, respectively.

17. The Plaintiffs allege, through expert testimony, that the subject premises on which the alleged incident occurred was defectively designed and/or constructed, including that it failed to comply with applicable standards.

18. If the allegations in the Plaintiffs' Complaint are proven to be true, then the Third-Party Plaintiff is entitled to full and complete indemnity from the Third-Party Defendant 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. The Third-Party Plaintiff respectfully asserts that any negligence or other act or omission alleged against it is merely passive and not the cause of any of Plaintiffs' alleged damages.

**FOR A FOURTH CAUSE OF ACTION
(Breach of Contract)**

19. The Third-Party Plaintiff incorporates those matters set forth above as if fully alleged herein.

20. On or about April 28, 2005, the Third-Party Defendant Tippins-Polk Construction, Inc. and the Third-Party Plaintiff Wildevco, LLC entered into a Construction Agreement, attached hereto as Exhibit "A," for the purpose of constructing a retail development, including the subject Fred's store.

21. Pursuant to the terms of said Construction Agreement, the Third-Party Defendant agreed to construct the premises in question and specifically agreed to execute the entire work described in the Contract Documents identified as part of the Construction Agreement.

22. The Third-Party Defendant breached the terms and provisions of the Construction Agreement.

23. The Third-Party Plaintiff has sustained certain damages as a result of the breach of the Construction Agreement by the Third-Party Defendant.

24. Based upon the foregoing, the Third-Party Plaintiff is informed and believes that it is entitled to judgment against the Third-Party Defendant for all such damages sustained.

WHEREFORE, the Defendant/Third-Party Plaintiff Wildevco, LLC prays for all relief requested in its Amended Answer to Plaintiffs' 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.



Regina Hollins Lewis, SC Bar No. 68539

Lee Ellen Bagley, SC Bar No. 77672

Randi Lynn Roberts, SC Bar No. 68888

GAFFNEY LEWIS & EDWARDS, LLC

3700 Forest Drive, Suite 400

Columbia, South Carolina 29204

803.790.8838 (telephone)

803.790.8841 (fax)

*Attorneys for Defendant, Third-Party
Plaintiff Wildevco, LLC*

February 17, 2016

1 STATE OF SOUTH CAROLINA

2 COURT OF COMMON PLEAS

3 COUNTY OF BARNWELL

4 2010-CP-06-101

5 Martha M. Fountain

6 vs.

7 Fred's Incorporated, Inc., et al.

8
9 Barnwell, South Carolina

10 March 21, 2016

11 Before the Honorable Brian Gibbons

12
13 APPEARANCES

14 For the Plaintiff: Peden Brown McCleod, Jr.

15 For the Defendant: Regina Lewis

16
17 Reported by: Michael C. Watkins

18 Official Court Reporter

1 THE COURT: This is Fountain versus Fred's and others,
2 And it's my understanding y'all -- we had a brief
3 conference in chambers, I got word last night that this
4 case had apparently settled. I was under -- you know, I
5 thought it was a global resolution or settlement. It's my
6 understanding it is not and so I'm going to let y'all tell
7 me what's going on and then we'll go from there.

8 MS. LEWIS: All right. Thank you, Your Honor. May it
9 please the Court? I'm Regina Lewis and I represent
10 Wildevco in both actions. You are correct, Your Honor
11 there was an action between the plaintiffs and Wildevco and
12 Fred's as the defendants, and then there was a third party
13 claim by Fred's and Wildevco against Tippins-Polk, which
14 was the general contractor in the matter. We were able to
15 settle yesterday afternoon the claims between plaintiff and
16 Wildevco and Fred's, leaving the third party complaint --
17 the third party action against Wildevco against --

18 THE COURT: When was that third party action filed?

19 MS. LEWIS: It was filed in 2012, Your Honor. This
20 case started, I think, in 2010 or thereabouts.

21 THE COURT: Case rocked along for two years and then
22 y'all brought in the third party.

23 MS. LEWIS: That is correct, Your Honor. There were
24 several lawyers before us so it wasn't our firm, but this
25 case, yes --

1 THE COURT: Well, the reason I asked that is because
2 the case is six years old, I'm not the administrative
3 judge, I know there was some concern that the clerk
4 mentioned to me about that.

5 MS. LEWIS: That is correct, Your Honor. And we were
6 on for a date certain trial with regard -- and there was no
7 distinction made between the two cases at the time that it
8 was put on by Judge Early for a date certain trial. But
9 given the fact that the case settled as to the plaintiffs
10 on yesterday, there are certain elements of the claim that
11 we have now as the plaintiffs and Wildevco that we sought a
12 continuance for, one of which is that the settlement hasn't
13 been consummated. We just reached an amount yesterday, we
14 need to execute settlement documents. One element of our
15 damages will be the legal fees and costs of defense in the
16 case, we will have to obtain information about the -- get
17 those figures together as well. You know, as well one of
18 the elements of our claim is reasonableness of the
19 settlement, Your Honor, and we anticipate that we would
20 like to present testimony -- independent testimony with
21 regard to reasonableness of the settlement. And just given
22 the timeline and the lateness of the hour of the case
23 settling with the plaintiff, we will need additional time
24 to be able to do that, and just a brief amount of time.
25 I'm not sure when the next term of court is but we would be

1 happy to go forward there. There have been some mention of
2 possibly removing the case at this juncture so I don't know
3 if it will stay in state court or go to federal court. But
4 that's the basis for our request for a continuance in this
5 matter.

6 THE COURT: Okay. Yes, sir?

7 MR. MCCLEOD: Thank you, Your Honor. Brown McCleod on
8 behalf of Tippins-Polk. As the defendants' attorneys
9 indicated in chambers, what's left are some equitable
10 indemnification claims. So we believe, you know -- these
11 have been part of this case since we were added. It's a
12 date certain trial court ordered by Judge Early, and now
13 we're having another circuit court judge amending a prior
14 order requiring us to try this thing today. We're here.
15 If the first party claims would have gone forward we would
16 be trying the third party claim, so what's the difference?
17 This thing has been dragging on far too long and it has
18 been continued and continued, we finally get a lockdown and
19 then we get this. They've known all along what their
20 damages are. It's either attorney or no attorney fees, I'm
21 not sure, but they've got claims, they have an obligation
22 to produce these damages at trial. Who knows how they
23 could have gotten them. I'm sure they've got a bookkeeper
24 that can say this is how much time we spent, sure.

25 THE COURT: While you're pausing, is the equitable

1 indemnification claim, is that going to be pursued non-jury
2 or jury?

3 MS. LEWIS: That's correct, Your Honor, that would be
4 a bench trial.

5 THE COURT: Okay. Go ahead.

6 MR. MCCLEOD: So we believe because of the fact that
7 we had a court order asking us -- or requiring us to try
8 this thing today, the whole case, and like she said, it
9 didn't distinguish one or the other so it was both first
10 party and the third party claims. The Court has required
11 us to do it, they're now coming before the Court asking for
12 a continuance and they should know what the elements of
13 their claims are at this point. And so we believe we're
14 entitled to a dismissal for failure to prosecute based on
15 Rule 41B, and the failure to prosecute because they didn't
16 follow Judge Early's order as well as asking for a
17 continuance.

18 THE COURT: All right. In response?

19 MS. LEWIS: Well, Your Honor, I'm not quite clear on
20 what the failure to follow Judge Early's order is. I
21 guess, you know, in candor I'm not sure that if we had
22 taken this specific issue up with Judge Early -- I know he
23 was frustrated that the case had been going on for a long
24 period of time and he did want it to be tried at a date
25 certain today, but there was going to be a motion to sever

1 Tippins-Polk out of this case anyway and that would have
2 either been brought by the plaintiff indicating he was
3 going to bring a motion to sever, we were going to bring a
4 motion to sever, he didn't, and so there was that issue
5 that was going to be heard pretrial because of confusion to
6 the jury of trying to try both of those cases at the same
7 time in any event. Your Honor, this has not been from a
8 lack of effort or doing work on the part of either of the
9 defendants in this case. This case came about -- literally
10 we have been trying to settle this case for weeks now and
11 we literally got it settled yesterday at probably about
12 4:00 p.m., so we have the amount there that we have to deal
13 with. And we do have to -- this is not the only law firm
14 that has been involved. There was a conflict issue, we had
15 at least two other counsel on behalf of the defendant, so
16 we would have to get from our insurance company the bills
17 for that. We don't have access to those invoices and those
18 bills, we don't know how much they are, they're not from
19 our firm, so we do have to gather some information with
20 regard to the damages on that. And I don't -- obviously if
21 our choice is dismissing the case versus trying it we will
22 go forward and try it with the information that we have,
23 but we do think that it's a fair and reasonable argument
24 that we're making and a fair and reasonable request to ask
25 for a brief continuance until the next term of court, and I

1 think the Court certainly has discretion to do that. The
2 element of the claim -- you know, of our claim that is --
3 has been there but is new based on the facts including the
4 amount of the settlement, Your Honor, is the reasonableness
5 of the settlement. We don't know about the reasonableness
6 of the settlement until we figure out whether it's settled
7 and what the settlement amount is. And so that -- for that
8 to be an element of our claim we think it's fair to allow
9 us time to bring in a witness to address that issue. Of
10 course, we were going to name the plaintiff's counsel, and
11 if Mr. Brown wants to agree to him being the person and he
12 doesn't have any objection to that then we can talk about
13 that. But that is one element of the equitable
14 indemnification claim that obviously has always been an
15 element that we would need to address in light of the
16 specific terms of the settlement in this case.

17 THE COURT: Any other lawyers wish to be heard on this
18 issue? All right. Let's do this. All right. I'm looking
19 at the schedule. I'm going to grant the motion to continue
20 the equitable indemnification claim. Now, having said
21 that, you know, with Judge Early being the administrative
22 judge, him being on top of this as much as he's been on top
23 of this, I'm not ruling on your dismissal motion, but
24 certainly you have leave to bring that up in front of Judge
25 Early. Okay.

1 MR. MCCLEOD: Yes, Your Honor. Thank you.

2 THE COURT: Now, having said that, I'm looking at the
3 schedule. There are three terms of common plea non-jury in
4 the Second Circuit over the next three months. Judge
5 Benjamin will be over here the week of April 18th, that's
6 for the whole circuit. So Madam Clerk --

7 THE CLERK: That's going to be that Thursday -- either
8 that Wednesday or that Thursday in Bamberg.

9 THE COURT: Okay. I'm throwing these dates out for
10 you. So that one will be Thursday, April -- Wednesday,
11 April 20th. Then you're looking at Judge Early here June
12 6th, you may want to wait for him, Mr. McCleod, and then
13 June 13th with Judge Early as well. So that's kind of your
14 schedule in this small county over the next couple of
15 months. I will continue it with the understanding,
16 however, that it has to be resolved one way or the other
17 within the next 90 days.

18 (End of the hearing.)

19

20

21

22

23

24

25

State of South Carolina
County of Barnwell

Court of Common Pleas

Martha M. Fountain	)	
	)	
Plaintiff,	)	Transcript of Record
v.	)	2010-CP-06-00101
	)	
Fred's Inc., et al	)	
	)	
<u>Defendant.</u>	)	

June 6, 2017
Barnwell, South Carolina

B E F O R E:

The Honorable Doyet A. Early, III, Judge.

A P P E A R A N C E S:

Lee Ellen Bagley, Esquire
Regina Hollins Lewis, Esquire
Attorneys for Third-Party Plaintiff WILDEVCO

Peden Brown McLeod, Jr., Esquire
Attorney for the Defendant Tippins-Polk
Construction

Matthew LaFave, Esquire
Attorney for Defendant Fred's Stores of
Tennessee

Bethanie K. Creppon
Circuit Court Reporter

I N D E X

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P R O C E E D I N G S

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4

THE COURT: All right. Motion to amend.

5

MS. BAGLEY: May it please the Court, Your

6

Honor.

7

THE COURT: Yes, ma'am.

8

MS. BAGLEY: Defendants -- well, now

9

third-party plaintiffs, WILDEVCO and Fred's --

10

THE COURT: Y'all make this jointly?

11

MR. LAFAVE: We do, Your Honor.

12

MS. BAGLEY: And I have a filed copy.

13

THE COURT: Thank you. How about everyone

14

identify themselves for my court reporter, please.

15

MS. BAGLEY: Lee Ellen Bagley on behalf of

16

WILDEVCO.

17

MS. LEWIS: Good morning, Your Honor. Regina

18

Hollins Lewis also on behalf of WILDEVCO.

19

MR. LAFAVE: Good morning, Your Honor. Matt

20

LaFave on behalf of Fred's Stores of Tennessee.

21

MR. MCLEOD: Brown McLeod on behalf of

22

Tippins-Polk Construction.

23

THE COURT: Thank you. Okay. Ms. Bagley?

24

MS. BAGLEY: Yes, sir. May it please the

25

Court, Your Honor --

1 THE COURT: Why did you wait so long to file
2 this?

3 MS. BAGLEY: Well, Your Honor, the contribution
4 claim was not ripe until we consummated the
5 settlement on --

6 THE COURT: How long ago did you consummate the
7 settlement?

8 MS. BAGLEY: April 21st.

9 THE COURT: And today is --

10 MS. BAGLEY: June the 6th.

11 THE COURT: June the 6th, D Day.

12 MS. BAGLEY: Yes, sir.

13 THE COURT: Go ahead.

14 MS. BAGLEY: Thank you, Your Honor. Pursuant
15 to Rule 15 of the South Carolina Rules of Civil
16 Procedure, WILDEVCO and Fred's move to amend their
17 third-party complaint to assert a cause of action
18 for contribution pursuant to the South Carolina
19 Contribution Among Tort-Feasors Act.

20 Your Honor, the burden is on the non-moving
21 party in this instance to show prejudice would
22 result from the amendment. As you know, the
23 decision to grant an amendment is within your sound
24 discretion, but the rule does provide that that
25 amendment shall be freely given when justice so

1 requires and, Your Honor, we believe that's the case
2 here.

3 As stated, we did not consummate settlement
4 with the plaintiffs until April 21st, which is when
5 any claim for contribution would arise under the
6 statute and, therefore, we're asking to amend.
7 While we believe --

8 THE COURT: When did y'all bring in
9 Tippins-Polk Construction? This case was filed in
10 May of 2010.

11 MS. BAGLEY: Yes, sir. The first third-party
12 complaint was filed August 1st of 2012.

13 THE COURT: 8/1/12?

14 MS. BAGLEY: Yes, sir. And therefore, Your
15 Honor, we also maintain that the amendment would
16 relate back to the date of the original third-party
17 complaint so as to prevent any defense on the basis
18 of the statute of limitations or statute of repose.

19 Your Honor, while the motion to amend is made
20 now on this date of trial, I would note that simply
21 because an amendment is made at trial does not
22 afford a basis for holding when the amendment comes
23 too late --

24 THE COURT: Well, oftentimes we would allow the
25 amendment to form to the proof presented, but this

1 is adding a whole new concept to where we are this
2 morning.

3 MS. BAGLEY: That's correct, Your Honor. And,
4 quite honestly, we just needed time to assess
5 whether we were in a position to or were able to
6 bring a contribution claim.

7 THE COURT: Well, I'm not fussing at you, I'm
8 just telling you what the facts are.

9 MS. BAGLEY: Sure. And I understand that, Your
10 Honor. Your Honor, we'd show that Tippins-Polk
11 cannot show that it would be prejudiced in any way
12 by the adding of this alternative theory of recovery
13 the defense is able to assert. And defense of the
14 contribution claim are the same defenses as to the
15 equitable indemnification claim and there's no
16 additional discovery that would be needed on that
17 claim, therefore we think there is no prejudice that
18 would result to Tippins-Polk and, therefore, the
19 amendment should be allowed.

20 I would note, Your Honor, that it's our
21 position that WILDEVCO is entitled to full
22 indemnification pursuant to the equitable
23 indemnification claim, but would like to amend its
24 complaint to add this alternative theory under the
25 contribution statute in the event that Your Honor

1 finds that WILDEVCO and Fred's are not entitled to
2 equitable indemnification.

3 THE COURT: Thank you, ma'am.

4 MS. BAGLEY: Thank you, Judge.

5 MR. MCLEOD: Your Honor, Brown McLeod on behalf
6 of Tippins-Polk.

7 THE COURT: Why do you object to it? Looks
8 like to me it's in your best interest.

9 MR. MCLEOD: Well, Your Honor --

10 THE COURT: Well, you know, if I -- looks like
11 to me it's a chance for you to get out with less
12 than full indemnification. You're all or none right
13 now.

14 MR. MCLEOD: It is, Your Honor.

15 THE COURT: And then it could be -- instead of
16 all or none, it could be just a little bit instead
17 of all.

18 MR. MCLEOD: That's correct, Your Honor. But
19 as you've mentioned earlier, they filed this on the
20 day of trial.

21 THE COURT: I understand that.

22 MR. MCLEOD: We believe judicial estoppel stops
23 them from --

24 THE COURT: I understand that. But doesn't
25 that give you a position to protect your client

1 better? Think about it.

2 MR. MCLEOD: Your Honor, I think we would like
3 a jury to determine the allocation of fault, if
4 that's the case, Your Honor. But I'd like to get on
5 the record my grounds for opposing this: Judicial
6 estoppel. You know, they showed up on the date
7 certain date, April -- March 21st, and sought a
8 continuance. During their motion for continuance,
9 they settled the day before with the plaintiff.
10 They knew that at that point that this case was
11 settled and contribution is obviously a cause of
12 action they could pursue. They told the Court on
13 the record that the only claim left was equitable
14 indemnification and we want a jury trial.

15 This case had gone along on the jury roster.
16 We moved at that time, at that hearing for
17 continuance, for a motion to dismiss for failure to
18 prosecute. Your Honor heard it in Aiken, as you
19 recall, April 27th, six days after the settlement
20 agreement was signed, and they stood before the
21 Court at that point in Aiken and said the remaining
22 claim was equitable indemnification --

23 THE COURT: Correct. That's what it was.

24 MR. MCLEOD: -- and we want a jury trial. So
25 again they represented to the Court, after the

1 settlement agreement has been signed, and then tells
2 the Court that's the sole remaining cause of action.

3 THE COURT: Correct.

4 MR. MCLEOD: It's clearly judicial estoppel.
5 They're now trying to take a different position the
6 date of trial and assert another claim. And we
7 believe that they are --

8 THE COURT: Or alternate theory of recovery.

9 MR. MCLEOD: But it's also a different -- it's
10 a new cause of action, Your Honor.

11 THE COURT: I understand.

12 MR. MCLEOD: And we believe if contribution --
13 if it's amended to allow contribution, we would like
14 to have a jury trial.

15 The second reason is the statute of repose has
16 run on a claim for contribution. The building was
17 built in 2005, this incident was in 2010. They're
18 now, in 2016, trying to assert the contribution
19 claim. The statute of repose has run, the eight
20 years has run.

21 They're going to argue that it relates back,
22 but, Your Honor, how can -- and counsel for WILDEVCO
23 said it's just been now created, it just now exists.
24 How can someone relate something back to a time it
25 didn't exist? So, therefore, the relation back

1 fails at this time. Plus there's plenty of cases
2 that talks about the statute -- Rule 15(c) deals
3 with the statute of limitations, not the statute of
4 repose. The case doesn't say it doesn't deal with
5 the statute of repose, but all South Carolina cases
6 refer to the statute of limitations.

7 Here we've got a statute of repose issue.
8 We've briefed it clearly in a memo, and I'll be glad
9 to provide that to the Court --

10 THE COURT: You already have.

11 MR. MCLEOD: Okay. You have a copy of it. All
12 right.

13 THE COURT: Well, I have. And, guess what,
14 I've read it.

15 MR. MCLEOD: Thank you, Your Honor.

16 Also, there can be no common liability. And
17 they didn't extinguish any liability when they filed
18 the settlement agreement because the statute of
19 limitations, as to any claim the plaintiff could
20 have brought against Tippins-Polk, would have
21 expired in 2013, three years after the incident.

22 So then they signed the settlement agreement
23 trying to -- or the plaintiff signs the settlement
24 agreement trying to extinguish liability that had
25 already been extinguished by the statute of

1. limitations.

2 THE COURT: Anything else? I agree with what
3 you're saying, pretty much. But the end result may
4 be that you have a better shot the other way in
5 protecting your client in that if I rule adverse to
6 you on the equitable indemnification, you may get
7 stuck with the whole load; if I have an opportunity
8 to look at contribution, your exposure may not be
9 nearly as great as all or none. Do you understand
10 that?

11 MR. MCLEOD: Yes, Your Honor.

12 THE COURT: Very well.

13 Ms. Bagley, anything in reply?

14 MS. BAGLEY: Your Honor, I would just like to
15 note that the purpose of Rule 15(c) is to salvage
16 causes of action otherwise barred by the statute of
17 limitations. Additionally, the contribution statute
18 provides two scenarios; one where a claim is
19 resolved within the plaintiff's -- underlying
20 plaintiff's statute of limitations, and if that's
21 not done, then in the second scenario where it is
22 resolved while the case is pending, which is what
23 was done here.

24 With regard to any judicial estoppel argument,
25 Your Honor, you're correct that the equitable

1 indemnification claim was the only claim pending at
2 that time. Contribution -- cause of action for
3 contribution does not arise until settlement funds
4 are paid, which had not been done at that point?

5 THE COURT: What's your response to his
6 request, if I grant your amendment, that it be done
7 by way of a jury trial as opposed to by the Court?

8 MS. BAGLEY: Well, we'd like to take care of
9 everything today, Your Honor. I think that would
10 serve the interest of judicial economy.

11 THE COURT: Anything else by anybody?

12 MS. BAGLEY: Yes. Additionally, Your Honor, if
13 he is -- if Tippins-Polk is entitled to a jury
14 trial, then we'd request a bifurcation of the claims
15 and go ahead with the equitable indemnification
16 today.

17 THE COURT: All right. I'm going to deny your
18 motion to amend. I find it to not be timely,
19 properly filed. You've had ample opportunity to
20 file it instead of the morning of trial -- or to be
21 heard on the morning of trial and filed last week.
22 As we've discussed all along, we've had a claim for
23 equitable indemnification, that's sort of where
24 we've been the whole time, even though sitting up
25 here, it might be -- gives Mr. McLeod an opportunity

1 to reduce his exposure. But that's his decision,
2 not mine. I'm going to deny it.

3 All right. Now, anything else we have this
4 morning before we continue? Motion for summary
5 judgment?

6 MR. MCLEOD: Yes, Your Honor.

7 THE COURT: Where is your motion?

8 MR. MCLEOD: I filed it this morning.

9 THE COURT: Filed it this morning?

10 MR. MCLEOD: Yes, sir. May I approach, Your
11 Honor?

12 THE COURT: Yes, sir, you may. All right.
13 Mr. McLeod, you say you're entitled to summary
14 judgment as a matter of law against Fred's and Tad
15 Barber individually.

16 MR. MCLEOD: Yes, sir. And Tad Barber has
17 since been dismissed, so he no longer has any claims
18 against us. So we'd like to, I guess, amend that
19 just as to Fred's.

20 THE COURT: Just as to Fred's.

21 MR. MCLEOD: Yes, Your Honor.

22 THE COURT: And you say there's no special
23 relationship existing between Fred's and your client
24 Tippins-Polk.

25 MR. MCLEOD: That's correct, Your Honor.

1 THE COURT: Tippins-Polk was contracted -- or
2 contracted with WILDEVCO to build the building in
3 Williston -- is that correct?

4 MR. MCLEOD: Yes, Your Honor.

5 THE COURT: -- to construct the building in
6 Williston which was to eventually be a Fred's.

7 MR. MCLEOD: Yes, Your Honor. And we believe
8 the benefit ultimately went to WILDEVCO because they
9 were receiving lease payments from Fred's. And as
10 it stands today, Fred's doesn't exist there anymore
11 anyway. So I think that the whole purpose behind
12 construction was to benefit WILDEVCO. Fred's was
13 not a member to the contract, so we believe there's
14 no special relationship.

15 THE COURT: So what we have is that WILDEVCO, I
16 assume, had a relationship -- some type of
17 relationship with Fred's. Fred's are all over these
18 small towns --

19 MR. MCLEOD: Yes, Your Honor.

20 THE COURT: -- and normally Fred's will lease
21 from the owner; in this case, WILDEVCO. There was
22 no building present, but apparently WILDEVCO and
23 Fred's had some arrangement that WILDEVCO will have
24 the building built or build the building and they
25 would enter a lease with Fred's to lease the

1 building from WILDEVCO. And when all that took
2 place, I assume WILDEVCO then contracted with your
3 client, Tippins-Polk, to construct the building.

4 The building was constructed, your client went
5 about his business. Fred's leased from WILDEVCO,
6 this lady went there some years later, allegedly
7 fell going up into the store, allegedly, as a result
8 of alleged faulty construction.

9 MR. MCLEOD: Yes, Your Honor.

10 THE COURT: But you say there's no relationship
11 that existed in law between Fred's, who would have
12 been the lessee, to WILDEVCO, the lessor, and the
13 contract was between your guy and the lessor,
14 WILDEVCO.

15 MR. MCLEOD: WILDEVCO, yes, Your Honor. We
16 don't believe there's -- I couldn't find any case
17 law that said that there was a special relationship
18 that would give rise to equitable indemnification.
19 There's been case law out there where a
20 subcontractor is not tied all the way to the owner,
21 but they both contracted with the same person. So
22 we're in similar circumstances here.

23 So we believe the Court should find there is no
24 special relationship because there is no contract
25 between Tippins-Polk and Fred's.

1 THE COURT: Well, I guess everybody agrees
2 there's no contract between Fred's and your client.

3 MR. MCLEOD: Yes, Your Honor.

4 THE COURT: I mean, that's the facts.

5 MR. MCLEOD: Yes, Your Honor.

6 THE COURT: That's the undisputed fact. I
7 suspect that it's undisputed that your client knew
8 that it was building a Fred's --

9 MR. MCLEOD: Yes, Your Honor.

10 THE COURT: -- for WILDEVCO. I mean -- well,
11 yeah, WILDEVCO.

12 MR. MCLEOD: Yes, Your Honor.

13 THE COURT: Does that not create an issue of
14 fact as to whether or not there was some type of
15 relationship between Fred and your client?

16 MR. MCLEOD: Yes, Your Honor.

17 THE COURT: If it's an issue of fact, then how
18 can I grant summary judgment?

19 MR. MCLEOD: Yes, Your Honor.

20 THE COURT: All right. I'm going to deny it on
21 summary judgment. It may be more proper on directed
22 verdict once I hear what the evidence shows. I
23 understand what your position is and I will be
24 cognizant of it as we move along.

25 MR. MCLEOD: Thank you, Your Honor.

1 THE COURT: All right. Anything else? All
2 right. Are y'all ready to proceed?

3 MS. LEWIS: We're ready to proceed, Your Honor.

4 THE COURT: You want to make an opening
5 statement? We're doing this nonjury.

6 MS. LEWIS: I understand.

7 THE COURT: You can do a small opening
8 statement.

9 MS. LEWIS: I'll try to make it very small,
10 Your Honor.

11 THE COURT: Well, you know how that is with
12 lawyers sometimes.

13 MS. LEWIS: Yes, Your Honor.

14 THE COURT: But bear in mind, we don't have 12
15 people over there who have no idea what's going on,
16 you only got one.

17 MS. LEWIS: I understand. I will try to govern
18 myself accordingly, Your Honor. May it please the
19 Court.

20 THE COURT: Yes, ma'am.

21 MS. LEWIS: As the Court alluded to, this case
22 arises from a slip-and-fall that occurred at the
23 Fred's store on March 10th of 2010, and WILDEVCO was
24 the landlord and leased that property to Fred's for
25 a period of ten years.

1 THE COURT: That's correct.

2 MS. LEWIS: And we're here seeking equitable
3 indemnification from Tippins-Polk who was the
4 general contractor. This is Mr. Tad Barber who is
5 with WILDEVCO.

6 THE COURT: Mr. Barber, good morning.

7 MR. BARBER: Good morning.

8 MS. LEWIS: As the Court knows, after the fall,
9 Ms. Fountain and her husband sued WILDEVCO and
10 Fred's. That case went on for a number of years and
11 ultimately settled for a total of \$290,000 on the
12 day prior to the scheduled trial.

13 THE COURT: And I think y'all said it was
14 apportionment, Fred's and WILDEVCO.

15 MS. LEWIS: Correct, Your Honor. WILDEVCO
16 paid -- or WILDEVCO's insurer paid \$250,000 of the
17 settlement and Fred's paid \$40,000 of the
18 settlement. So we're here today seeking
19 indemnification for the cost of the settlement as
20 well as the legal costs in defending the underlying
21 case which, Your Honor, we will present evidence on
22 tomorrow, but I estimate will be in or about the
23 neighborhood of \$75,000. We're trying to separate
24 out the cost of this lawsuit from the bills and --
25 as we're entitled only to --

1 THE COURT: Yes, ma'am.

2 MS. LEWIS: -- the defense of the underlying
3 case.

4 Also, as the Court is aware, to recover on
5 equitable indemnification, we have to show three
6 things; one, that Tippins-Polk was at fault in
7 causing the plaintiff's damages; that WILDEVCO was
8 not at fault for causing the plaintiff's damages;
9 and that WILDEVCO incurred expenses that were
10 necessary to protect his interest. And one of the
11 factors we must also show is that the settlement in
12 this case was reasonable, was bona fide without any
13 fraud or collusion, and that it was a reasonable
14 means of protecting WILDEVCO's interests.

15 I'd just ask the Court to keep in mind, as I'm
16 sure the Court is aware, is that we don't have to
17 prove that Mr. and Mrs. Fountain would have
18 collected \$290,000; we just have to show that there
19 was potential liability on the part of WILDEVCO and
20 Fred's and that WILDEVCO and Fred's were not at
21 fault. So that's what the evidence will show today.
22 And we're going to --

23 THE COURT: Well, what if I find that WILDEVCO
24 was slightly at fault and that as being the general
25 contractor and failing to, perhaps, recognize the

1 alleged problem when it came about, obviously during
2 construction, what if I find they have some
3 responsibility?

4 MS. LEWIS: Well, Your Honor --

5 THE COURT: Does that preclude any equitable
6 indemnification?

7 MS. LEWIS: I think your point earlier is this
8 is an all-or-nothing. We have to show that WILDEVCO
9 was an innocent party, and we think the evidence is
10 going to show that in this case. We have an expert,
11 Steve Hunt, who will be coming in to testify that
12 the premises were not constructed in accordance with
13 the site plans that were provided by WILDEVCO.
14 WILDEVCO had an engineer, of course, draw up those
15 plans -- an architect first to draw the general
16 plans, but then an engineer to look at the site and
17 draw the site plans for the specifications of that
18 lot.

19 And what the expert will say -- Mr. Hunt will
20 tell the Court is that the plan called for --
21 Ms. Fountain tripped and fell over a curb ramp. So
22 the curb was about two and a half inches, there was
23 a flare, and Ms. Fountain tripped over the area of
24 the ramp.

25 Mr. Hunt will testify that the site plans

1 called for the sidewalk to be flush with the
2 asphalt, with the parking lot, so there would be no
3 transition or no raised area and, therefore, no trip
4 hazard, and that Tippins-Polk constructed a ramp not
5 in accordance with the site plans.

6 But on top of that, the curb height was not the
7 requisite height; it should have been at least four
8 inches. And what Mr. Hunt will say is if you have
9 that difference in height there, that it is more
10 visible to someone walking in and they can perceive
11 the difference and it's not a trip hazard.

12 THE COURT: Well, what responsibility does the
13 general contractor have to ensure that the sub
14 complies with the building code and with the plans
15 and specifications?

16 MS. LEWIS: The general contractor, Your Honor,
17 would be the responsible party for that because, as
18 to WILDEVCO, WILDEVCO has hired and are relying on
19 the general contractor to ensure that the entire
20 project is done in accordance with the site plans.

21 THE COURT: And the general contractor is...

22 MS. LEWIS: Is Tippins-Polk. That's correct,
23 Your Honor.

24 THE COURT: So it would be like me building a
25 house and I contract with you to build me a house

1 and I don't know diddly-squat about building codes
2 and engineering plans and all that; I say,
3 Ms. Lewis, you build my house and I move in when I
4 get a certificate of occupancy. What responsibility
5 do I have for making sure that the steps have the
6 right --

7 MS. LEWIS: Absolutely analogous, Your Honor.

8 THE COURT: So that's sort of where we are with
9 this?

10 MS. LEWIS: That's where we are with this. And
11 it's not the type of defect -- Mr. Barber is going
12 to tell you that he doesn't have the education,
13 training, and qualifications -- we wouldn't have
14 looked at that and said -- you know, if there's an
15 obvious defect, maybe. But this was not something
16 he could have looked at and said, oh, wow, it's two
17 and a half inches and not four and it's not done
18 correctly. So --

19 THE COURT: Or would have even known that it's
20 supposed to be two and a half.

21 MS. LEWIS: Or would have even known that.
22 Absolutely. So that's our case, Your Honor. And we
23 will be asking, you know, at the end of the
24 evidence, that the Court does grant the equitable
25 indemnification claim and indemnify WILDEVCO for its

1 legal fees, costs, and the cost of the settlement.

2 THE COURT: Thank you.

3 MR. LAFAVE: Thank you, Your Honor. May it
4 please the Court. I'll be brief and not retread
5 some of the same ground. But only pertaining to
6 Fred's is what I'm here for. I'll take this back
7 just a little bit, Your Honor.

8 There was a construction agreement entered into
9 April 20th, 2005. It's undisputed that the
10 construction agreement was signed by Mr. Barber as
11 well as Mr. Polk on behalf of Tippins-Polk. But in
12 the opening paragraph of the construction agreement,
13 it clearly indicates that this is being done for the
14 construction of a Fred's store with strip center
15 located in the town of Williston.

16 Again, there's been memos that were presented
17 to WILDEVCO for the job that indicate that the job
18 is Fred's. It's clear and unequivocal from the
19 evidence that will be presented, Your Honor, that
20 Tippins-Polk understood it was building a premises
21 in Williston, South Carolina for the benefit of
22 Fred's.

23 THE COURT: Had they built other Fred's?

24 MR. LAFAVE: Tippins-Polk? They have. And
25 that's what the other part of the evidence will

1 show, Your Honor, is Mr. Polk, in his own deposition
2 indicates this is the first job that they had ever
3 picked up for WILDEVCO and they believed it to be as
4 a result of their previous dealings with and
5 construction of other Fred's stores throughout the
6 Georgia area. They've since gone on to build
7 several other Fred's stores after the construction
8 of this premises, including the one in Hampton
9 County --

10 THE COURT: Well, it's not unusual in the
11 industry to get a good contractor that comes in and
12 knows what Fred wants and they build them all over
13 the place. You see it with Family Dollar, Dollar
14 General, Walmart. There's a guy right here in
15 Barnwell that built a lot of Walmarts over the
16 years. They know what Walmart wants, Walmart
17 knows -- they act together and they go from place to
18 place to build them.

19 MR. LAFAVE: That's correct.

20 THE COURT: So that's sort of the situation
21 here you're telling me?

22 MR. LAFAVE: It is, Your Honor. And it's
23 understood that they were building this premises for
24 Fred's. So to argue that there was no benefit to
25 Fred's, the evidence is clearly going to contradict

1 that.

2 THE COURT: Well, we'll see.

3 MR. LAFAVE: The other issue, Your Honor, is
4 Fred's -- along the same lines as the equitable
5 indemnification claim, we have to establish that we
6 were not at fault in this. And we're even, in this
7 particular instance, the evidence is going to show,
8 another step removed because we're the lessee. And
9 under the lease agreement, which we have and will
10 present into evidence, it indicates that Fred's is
11 not responsible for the maintenance and repair of
12 the sidewalks, the curbs, the curb ramps, the
13 parking lots, things of that nature, nor under the
14 lease agreement are they responsible for ensuring
15 that the building is built to code and is always at
16 all times, at least the exterior of the building, in
17 compliance with the applicable building codes.

18 Much like Mr. Barber, they are a retailer, Your
19 Honor; they're not in the business of building,
20 constructing premises, understanding what the codes
21 are, understanding what the industry standards are.
22 And they rely, as did Mr. Barber, on the contractor
23 to come in who signs an agreement, who takes the
24 plans.

25 The plans clearly say we will build this in

1 compliance with the ANSI standards, the ADA
2 standards, will build it in compliance with the
3 industry standards, and they're the ones that
4 undertake that responsibility. And their violation
5 and breach of that responsibility is what leads us
6 here today to the incident that involved
7 Ms. Fountain. Thank you.

8 THE COURT: Mr. McLeod?

9 MR. MCLEOD: Your Honor, I've got Brett Polk
10 here on behalf of Tippins-Polk. This building was
11 built in 2005, completed in October of 2005. Four
12 and a half years later, after the completion of the
13 building, the plaintiff tripped.

14 It's a little bit different than somebody
15 coming and building your house. These folks are
16 open for business, inviting folks in. They've got a
17 separate duty to protect their customers. And we
18 believe that based on that duty and four and a half
19 years, they should have recognized this is a
20 possible tripping hazard. And in fact, the evidence
21 will show, Fred's was aware of similar tripping
22 hazards prior to this incident. Now when this thing
23 was --

24 THE COURT: What is the tripping hazard?

25 MR. MCLEOD: Well, it's an alleged tripping

1 hazard, and it's that ramp. So no matter -- you see
2 them all around the neighborhood. It's the
3 transition that goes down from the curb. It doesn't
4 matter how big the curb is, it's this transition.
5 She tripped over an area of between an inch to
6 under. It's hard to say.

7 THE COURT: Did it comply -- did the
8 construction of it comply with all of the applicable
9 building codes?

10 MR. MCLEOD: It did, Your Honor. They got a
11 CO. We got a witness who will testify it complied
12 with all of the building codes. So, yes, Your
13 Honor, it --

14 THE COURT: So your position is she tripped
15 over something other than the breach of the building
16 code?

17 MR. MCLEOD: Correct, Your Honor. She's going
18 to say -- she's here today. She's going to say she
19 could not perceive that small elevation. And if you
20 look at the contract between -- Fred's and WILDEVCO
21 have a set of conceptual plans attached to that
22 lease agreement, the contract, and in there, Fred's
23 has these conceptual plans that show a curb with
24 ramp cuts.

25 Then they hire an architect who produces a set

1 of architectural plans based on those conceptual
2 plans which has a curb and a ramp. They talk about
3 it should have been flush. The engineer, he drew it
4 to where it's supposed to be flush. Well, if you
5 look at his plans, he refers to several curb cuts
6 and has a handicap ramp right on the front page.

7 So for them to sit up here and say it's
8 supposed to be flush, we believe there's some issue
9 as far as the design and the architectural plans.
10 They provided those. We believe they're liable for
11 providing those plans if they are defective in any
12 degree to Tippins-Polk.

13 THE COURT: So you're saying that your client
14 complied with the plans and specs given to them by
15 the owner of the building?

16 MR. MCLEOD: Substantially complied. Yes, Your
17 Honor.

18 THE COURT: Substantially complied. All right.
19 Anything else?

20 MR. MCLEOD: Yes, Your Honor. And we believe
21 the engineer is responsible. If he's saying it's
22 supposed to be flush -- the engineer typically comes
23 out and reviews the site at the end, ensures that
24 the project was built correctly before final payment
25 is made. So they had an opportunity to inspect.

1 WILDEVCO was there from time to time during
2 construction, Fred's visited the site from time to
3 time during construction, and it doesn't sound like
4 the architect went or the engineer. WILDEVCO could
5 have hired both of them to go out there and ensure
6 that the building was built to the engineer's plans.
7 If you walk up on the site the first day, you can
8 see clearly there's a curb running all the way
9 across the front.

10 Their expert, Steve Hunt, will testify that
11 anything less than four inches is a tripping hazard.
12 So any time you have a curb ramp -- a curb with a
13 ramp cut into it, you're going to have a transition
14 that drops from whatever the curb height is, four
15 inches, two inches, whatever, it's going to reduce
16 down from below four inches at some point. And
17 that's what she tripped on.

18 The front of the curb was painted yellow up to
19 the transition area which was not painted yellow.
20 It was like -- in that condition four and a half
21 years. She said she could not perceive that edge of
22 the ramp; had it been painted, she would have
23 perceived it.

24 Now, the paint was not called for in the
25 architectural plans or the engineer's plans. They

1 don't talk about painting the curb, but they don't
2 talk about actually painting the actual transition
3 area. Plus, again, it remained like that for four
4 and a half years prior to the plaintiff tripping.
5 So we believe over four and a half years they were
6 certainly on constructive knowledge of this
7 condition.

8 And, again, there was a similar fall in the
9 Barnwell store where a lady walked up and tripped
10 over the edge. It happened in December of 2009.
11 This case, Ms. Fountain tripped March of 2010. We
12 believe that Fred was on knowledge and they should
13 have shared that information with all their stores,
14 including WILDEVCO.

15 THE COURT: Thank you.

16 MR. MCLEOD: Yes, sir.

17 THE COURT: You may call your first witness.

18 MR. LAFAVE: Can we take up a matter of
19 evidence real quick since Mr. McLeod brought it up
20 in his opening?

21 THE COURT: Like a motion in limine, perhaps?

22 MR. LAFAVE: Yes, sir. I apologize for not
23 bringing it to light.

24 MS. LEWIS: And Ms. Fountain is en route here,
25 and we had an issue regarding her testimony that we

1 need to address with the Court too before --

2 THE COURT: She's not here yet, is she?

3 MS. LEWIS: No, sir. She's on the way.

4 THE COURT: We'll wait until she gets here.

5 MS. LEWIS: Okay.

6 THE COURT: Unless you want to do it now.

7 MR. LAFAVE: My issue doesn't pertain to
8 Ms. Fountain directly. It actually pertains to
9 the -- any inferences or references to the other
10 incidents at other locations. As Your Honor well
11 knows --

12 THE COURT: Just when you get to that point,
13 object, and I'll listen to you.

14 MR. LAFAVE: Okay.

15 THE COURT: He may not bring it up. Opening
16 statements are not evidence.

17 Call your first witness. Who's going first?

18 MS. LEWIS: That would be Ms. Fountain, Your
19 Honor, and she's en route.

20 THE COURT: All right.

21 THE BAILIFF: Ms. Fountain is here.

22 MS. LEWIS: Thank you.

23 THE COURT: Is there any question about the
24 sufficient sale of the settlement or it being
25 excessive or anything of that nature?

1 MR. MCLEOD: They hired Mitch Griffith to
2 testify as to reasonableness of it, but that was the
3 only aspect. He didn't address any of the other
4 elements.

5 THE COURT: Other elements of what?

6 MR. MCLEOD: As far as being bona fide, as far
7 as being reasonable in the protection of your
8 interest. So I don't know how they'll provide that
9 evidence. But other than that --

10 THE COURT: All right.

11 Yes, ma'am. Be sworn in, please.

12 MARTHA FOUNTAIN

13 being first duly sworn, testified as follows:

14 THE CLERK: Be seated and state your full name
15 for the record.

16 THE COURT: Ms. Fountain, good morning. Please
17 speak up so everyone can hear you.

18 Your witness.

19 MS. LEWIS: Thank you, Your Honor.

20 DIRECT EXAMINATION

21 BY MS. LEWIS:

22 Q. Good morning, Ms. Fountain.

23 A. Good morning.

24 Q. Would you please -- you stated your name and
25 address. How long have you lived at your current

1 address?

2 THE COURT: Where do you live, ma'am?

3 THE WITNESS: I live at 100 Farrow Street,
4 Williston, South Carolina, 29853, and I've been
5 there for 11 years.

6 BY MS. LEWIS:

7 Q. All right. And are you married?

8 A. Yes, I am.

9 Q. To whom are you married?

10 A. Curtis Fountain.

11 Q. All right. And, Ms. Fountain, would you just
12 very briefly give the Court an overview of your work
13 history?

14 A. I've -- I was a manager for Dollar Tree back in
15 2005. I was -- I worked for them for seven years.
16 I went to truck driving -- was a truck driver with
17 my husband for five years til I had to come off the
18 road to my -- due to my parents. Then I went to
19 Walmart, started working at Walmart, and in a matter
20 of two years worked myself up to a zone manager
21 which is part of the management program. Then I had
22 my accident in March the 10th of 2010.

23 Q. Thank you, Ms. Fountain. You can stop there.
24 Are you currently employed?

25 A. Yes, ma'am, I am.

1 Q. Where do you work at?

2 A. McCain Atkinson Insurance.

3 THE COURT: What do you do for them?

4 THE WITNESS: I'm an agent.

5 BY MS. LEWIS:

6 Q. All right. Now, Ms. Fountain, did you visit
7 the Fred's store in Williston on March 10th of 2010?

8 A. Yes, ma'am, I did.

9 Q. All right. And had you shopped at that
10 location before?

11 A. On occasion, yes, ma'am.

12 Q. All right. And had you ever had any problem
13 prior to that day getting in or out of the Fred's?

14 A. Problem knowing which door to go in, yes.

15 Q. All right. Why do you say that?

16 A. Because there were times that different doors
17 were locked.

18 Q. All right. And how did you get to Fred's on
19 March 10th of --

20 A. I drove myself.

21 Q. All right. And do you recall what time you
22 arrived there?

23 A. Approximately between five 'til 12:00 and
24 12:00.

25 Q. What were the weather conditions like that day?

1 A. It was a sunny day, that I remember.

2 Q. Why were you going there?

3 A. I was going to get light bulbs for my ceiling
4 fan in my kitchen.

5 Q. Would you briefly tell the Court what happened
6 on that day when you went to Fred's?

7 A. I got out of my car. The door had been locked
8 on my previous visit, the main entrance to the left,
9 so I was headed towards the other entrance and
10 noticed that the door was open. So I saw a lady
11 going, so I went to the entrance. And as I was
12 going to the entrance, caught my toe, and it was an
13 accident after that.

14 Q. Did you fall?

15 A. Yes, ma'am, I did.

16 Q. Can you describe for the Court how you fell?

17 A. Yes, ma'am. I caught my toe and I tried to
18 catch myself and gain momentum. And when I hit the
19 door, the door didn't go anywhere. I hit my head on
20 the door, hit my hand on the door, and fell to my
21 knees.

22 Q. All right.

23 MS. LEWIS: Your Honor, I'd like to have this
24 photograph marked as Third-Party Plaintiff's Exhibit
25 1 for identification, please.

1 THE COURT: Yes, ma'am.

2 (Plaintiff's Exhibit No. 1 marked for
3 identification.)

4 BY MS. LEWIS:

5 Q. I'm going to show you, Ms. Fountain, what has
6 been marked as -- do you need a minute?

7 A. I begged you guys not to do this to me.

8 Q. It's just a picture. It's just the picture we
9 talked about.

10 A. It's the door. I can't go there. I have
11 begged you people. Please.

12 Q. Why don't you take a minute?

13 THE COURT: Do you need a break?

14 THE WITNESS: I've -- sir, I have not been back
15 to this store.

16 THE COURT: It's okay. We'll be through with
17 this in just a few minutes. You want to take a
18 little break?

19 THE WITNESS: I told you I cannot go there.

20 THE COURT: You need to step down and get
21 yourself composed?

22 THE WITNESS: I'll be all right.

23 THE COURT: You okay?

24 THE WITNESS: Yeah.

25 THE COURT: Listen to me a second. This thing

1 today has got just something to do between the
2 people who built it, the storeowner, and lessee; it
3 hasn't got anything to do with you. You've already
4 settled your case.

5 THE WITNESS: I understand.

6 THE COURT: So this won't take but a second.
7 It is nothing personally about you.

8 THE WITNESS: Oh, I understand that, sir. I
9 have not been back to that site or to the pictures.
10 I've begged everybody because I -- it is traumatic
11 to me. It is emotionally traumatic. I lost a lot
12 that day and it changed my life tremendously, and I
13 don't even want to go back to that place. I cannot.

14 We did this when we did my deposition and they
15 threw pictures out there and I'm like, please don't
16 do this to me. I -- my husband has tried to take me
17 back there because it is so emotionally traumatic to
18 me.

19 THE COURT: Let me ask you a question. If you
20 look at -- how many pictures are you showing?

21 MS. LEWIS: It's just one, Your Honor.

22 THE COURT: One picture.

23 THE WITNESS: Okay.

24 THE COURT: Take a deep breath. She's only
25 going to show you one picture.

1 THE WITNESS: Okay.

2 THE COURT: And she'll hand it up to you very
3 nicely. I promise they won't be thrown at you.

4 THE WITNESS: All right.

5 THE COURT: Take a deep breath.

6 This is number 1; right?

7 MS. LEWIS: Yes, Your Honor, Plaintiff's 1.

8 BY MS. LEWIS:

9 Q. Can you take a deep breath and describe for the
10 Court what's shown in that picture?

11 A. There's a concrete step and the -- not a step,
12 but a curb. And then you can see the blacktop or
13 whatever the gray is.

14 Q. All right. Is this -- can you show us on this
15 photograph -- well, there's a mark on here. Let's
16 short-circuit it.

17 A. Yeah.

18 Q. Is that the mark you put on this picture at
19 your deposition?

20 A. Yes.

21 Q. Is that the area where you fell?

22 A. Yes.

23 Q. And is this photograph a fair and accurate
24 depiction of the area where you fell?

25 A. Yes.

1 Q. Okay. That's all the questions I have on the
2 picture.

3 THE COURT: Any objection to the picture?

4 MR. MCLEOD: No, Your Honor.

5 THE COURT: All right. Exhibit 1.

6 There will be no more pictures. Okay?

7 THE WITNESS: Thank you.

8 (Plaintiff's Exhibit No. 1 admitted into
9 evidence.)

10 MS. LEWIS: Your Honor, may we approach for
11 just a second?

12 THE COURT: Yes, ma'am.

13 (Sidebar conference.)

14 THE COURT: All right. There's been a sidebar.
15 Let the record reflect there's also a
16 video surveillance -- or surveillance video. I
17 assume that's the correct terminology. Take a deep
18 breath, ma'am. We're not going to show it. And the
19 parties have stipulated that that is in fact the
20 video of her fall. That's the only stipulation.
21 And that would preclude Ms. Fountain from having to
22 identify it and go through that. I'm just not going
23 to make her go through that.

24 MS. LEWIS: Thank you, Your Honor.

25 THE WITNESS: Thank you so much.

1 BY MS. LEWIS:

2 Q. Ms. Fountain, can you just briefly give the
3 Court an overview of what your injuries were?

4 A. Yes, ma'am. When I fell, my hand, when I got
5 done, this portion of my hand was over here
6 (indicating). I had to have reconstructive cadaver
7 bones put into my hand. They had to wait for the
8 swelling. I had that done on --

9 Q. Was it March 17th?

10 A. -- March 17th. Yes, ma'am. And then I also
11 have nerve damage -- I've had many nerve tests done.
12 I have nerve damage in my shoulder and my neck where
13 I hit my head. And this compressed together has
14 damaged the nerves in my neck and my shoulder.

15 Q. And you've had a total of how many surgeries as
16 a result of the injuries?

17 A. Four total, because I had -- I had twice here,
18 once here -- no. Twice here, once here. So about
19 five -- I think it was four or five because I know
20 one they did two surgeries at one time. (Indicating)

21 Q. All right. So, just briefly, you had initial
22 surgery March 17th of 2010?

23 A. Yes, ma'am.

24 Q. And then you had a second surgery August --

25 A. In August.

1 Q. -- of 2010?

2 A. Right.

3 Q. And then you had a third surgery in September
4 of 2012?

5 A. Yes, ma'am.

6 Q. And that was a compression type of surgery?

7 A. Right. And then they also took out -- I had
8 one -- I want to say it was around November or
9 somewhere that I had one where they took out plates
10 because my body was rejecting them, and that was
11 when they did this one. But I'm not sure of the
12 dates.

13 Q. And just to short-circuit it, the last two
14 surgeries were in December of 2012?

15 A. Yeah.

16 Q. One was on your wrist again and then on your
17 elbow where they discovered a fracture; is that
18 right?

19 A. Yes, ma'am.

20 Q. And that was all from the accident?

21 A. Yes, ma'am.

22 Q. Prior to the accident, had you had issues with
23 your wrist or arm?

24 A. No, ma'am.

25 Q. Okay. And as a result of the last surgery, do

1 you have any numbness -- or how is -- what is the
2 condition of your hand right now?

3 A. I have numbness in my hand. It has a mind of
4 its own. It lets go at any given time. I can only
5 lift so much with my right hand. I don't -- I used
6 to play a piano, now I don't play that anymore; I
7 used to sew, don't sew anymore because I can't do --
8 I used to do inlays in clothing in a lot of fine
9 detail, I don't do that anywhere.

10 My limited -- I was a very independent woman
11 until this came about. I was a truck driver, hung
12 drywall, I was a jack of all, ran electricity. If
13 it needed to be done, I did it. Not anymore. Now I
14 have to depend on people to help me.

15 Q. Do you have problems lifting and gripping
16 things?

17 A. Yes, ma'am, I do. It -- you never know whether
18 it's going to hold on. I can't lift a lot of
19 heavy -- like if you have a pan that, like, you
20 cook, you know, boil food in, you know, I can't -- I
21 can't manipulate it with my hands. I have to have
22 somebody help me, like, to pour the water off to do
23 macaroni and cheese or anything if you're making any
24 quantity.

25 Q. And which hand is it?

1 A. My right hand.

2 Q. Are you right-handed?

3 A. Yes, ma'am, predominantly right-handed.

4 Q. All right. Ms. Fountain, you said you were
5 working at Walmart as a zone manager at the time of
6 the accident.

7 A. Uh-huh.

8 Q. Did your job as a zone manager require you to
9 do any lifting?

10 A. Oh, yes, ma'am. I was known to lift big beams
11 to put in shelving in the back.

12 Q. And did you miss time from work as a result of
13 the accident?

14 A. Yes, ma'am. From the time of the accident, it
15 was approximately four months. I was out from March
16 to June.

17 Q. And were you able to return to your duties as a
18 zone manager?

19 A. No, ma'am, I was not. I had -- they had taken
20 my position away from me, demoted me. I --

21 Q. Would -- I'm sorry. Go ahead.

22 A. I would have gone from making between \$13 and
23 \$14 an hour down to \$9 an hour and they had taken
24 away all of my promotions and stuff. So they wanted
25 me to work in a department that I couldn't work.

1 They said they were going to give me help. And I
2 knew, being a zone manager, it was not going to
3 happen, so I got offered a job at Price Wise because
4 of my background in management. Basically they gave
5 me what was called the deli position, but I oversaw
6 shipping and receiving -- you know, shipping and
7 receiving in of goods, and it didn't require any
8 lifting.

9 Q. And would you have been able to continue to do
10 your job at Walmart --

11 A. Oh, no.

12 Q. -- as a zone manager in light of your injuries?

13 A. No, ma'am.

14 Q. And that's because why?

15 A. Because I can't do any heavy lifting and heavy
16 things that I used to do.

17 Q. All right. And how long did you stay at Price
18 Wise?

19 A. Until it burned down. I was there almost three
20 years until it burned to the ground.

21 Q. All right. And then you went to your current
22 position?

23 A. Yes, ma'am.

24 Q. You were explaining some of the limitations
25 that you have. Did you incur -- well, before I get

1 to that -- strike that.

2 Did you make a claim for lost wages in your
3 case --

4 A. Yes, ma'am.

5 Q. -- against WILDEVCO?

6 A. About \$21,000.

7 Q. All right. And did you also incur medical
8 expenses as a result of this?

9 A. Yes, around \$70,000.

10 Q. Okay. You've told us a little bit about the
11 physical limitations that you had. What, if any,
12 impact that you haven't already told us has the
13 accident had on you? I know it's been --

14 A. Yeah. It's an emotional thing because in the
15 process of all of this, you know, I -- it's
16 emotional for me every day because I was very
17 independent. I'm no longer independent. And then,
18 you know, the losses during the time of all of this.

19 You know, I lost my father. The day of my
20 surgery -- the day before my surgery we had to take
21 him off life support. I never got to say goodbye.
22 I didn't get to go. And then, you know, the day of
23 his funeral, I have no recollection because I was on
24 medication for the pain, so I don't remember any of
25 it. Those are gone.

1 MS. LEWIS: Thank you, Ms. Fountain. I
2 appreciate it. I know it was difficult and I
3 appreciate your testimony. Nothing further.

4 THE COURT: Mr. McLeod, any questions?

5 MR. MCLEOD: Yes, Your Honor.

6 CROSS-EXAMINATION

7 BY MR. MCLEOD:

8 Q. Ms. Fountain, I'm sorry you got to be here
9 today, but I appreciate you being here with us. You
10 did not sue Tippins-Polk, the contractor, for this,
11 did you?

12 A. No, we did not. Not to my knowledge, no. That
13 was part of the attorney -- I'm really
14 not understanding who all got -- I left that in my
15 attorney's hands.

16 Q. Okay. Now, you were a shopper at the Fred's
17 that day when the incident occurred?

18 A. I was headed there to buy light bulbs, yes.

19 Q. And you said you were heading in which door?

20 A. Well, I was at the parking lot --

21 Q. Okay.

22 A. Okay. So I'm heading -- as I'm getting out of
23 my car, I was going to go towards the door to the
24 right where the registers were. But I wasn't even
25 very far in when I saw the girl coming out and she

1 went in the door and I was like, well, dang, they
2 opened that door back up. So I was headed back that
3 way. But I was parked -- like, if the door was
4 here, I was parked over here kind of away from the
5 door to the left of the door if you're standing
6 looking at it. (Demonstrating)

7 Q. Okay. So did you walk up to the
8 right-hand-side door and then come over to the left
9 side? Is that what your testimony is?

10 A. Well, it's been many years since we did this.
11 But, yeah, I was walking in. And to tell you -- I
12 can't even tell you what I was doing. I just know
13 that when I went in that day, I was walking in, I
14 saw the girl get out of her car and go in the door
15 ahead of me, because I was going to head to the
16 other door, and I was like, wow, they opened the
17 other door, and I started in.

18 Q. All right. So I can be clear, you went to the
19 right door and then you turned and --

20 A. I did not go to the right door.

21 Q. All right. Okay. So when you -- you've been
22 to the Fred's store before; correct?

23 A. I'd been there on occasion, yeah. I worked at
24 Walmart, so I didn't have need much to go there.
25 But, yeah, if I was not working and I needed

1 something, I would go there.

2 Q. And when you would go to the Fred's store, you
3 expected Fred's and the owner of the building to
4 provide you with a safe walking walkway; is that
5 correct?

6 A. Oh, yeah.

7 Q. Now, I don't want to show you the picture
8 again --

9 A. Please don't.

10 Q. -- because I know how troublesome it is for
11 you, and I can appreciate that. When you came up to
12 that door at that area where you tripped, you could
13 not perceive that little raised area; correct?

14 A. No. I mean, it -- no. I didn't notice that
15 there was any raising or any change. Just -- I
16 mean, as I'm walking, I'm looking ahead trying to --
17 you know, it's kind of like driving down the road;
18 you're driving down the road, you're paying
19 attention to what's going on, but you're trying to
20 take it all in.

21 Same thing with I'm walking and walking and
22 taking in what's going on around me, not steady
23 watching my feet, you know. So yeah.

24 Q. And it's true then that had that little raised
25 area been painted, you'd have perceived it then?

1 A. Well, yeah, because you notice the yellow
2 sticking up. I mean, kind of learned -- I guess
3 learned behavior because...

4 Q. Now, the parking lot is asphalt; correct? And
5 then that curb --

6 A. To my recollection, yes.

7 Q. And then that curb area, including the little
8 raised portion that you caught your foot on, is
9 concrete; correct?

10 A. Yes.

11 Q. And when did you first -- do you recall -- did
12 you go to -- the store opened in 2005; is that your
13 recollection?

14 A. I don't remember, to be honest. No.

15 Q. There's a slight contrast between the concrete
16 and the asphalt; correct?

17 A. Contrast in -- what do you mean?

18 Q. Different colors.

19 A. Yes. Yes.

20 Q. And over time that contrast reduced as the
21 asphalt turned grayer and the concrete turned
22 grayer; correct?

23 A. I imagine it would, yeah.

24 Q. Now, when you -- Fred's -- and, again, I don't
25 want to show you the picture. But you go into

1 Fred's, like a lot of these stores, and they got
2 signs here, signs there, signs that say there's
3 bananas on sale over here. And so were you -- you
4 were distracted, maybe, when you went in?

5 A. No. I don't remember any signs going in the
6 door, huh-uh, because that -- I just -- I guess I'm
7 not much of the sign-watcher because to this day I
8 don't go in looking at window signs. I'm an
9 ad-keeper. I'm -- I kind of look and see what you
10 got going before I go because I got a game plan.
11 So...

12 Q. Well, that's a good way to be.

13 A. I'm not much of a shopper. I want to get it
14 and get out.

15 Q. You said you expected Fred's and the owner of
16 the store to provide you with a safe walkway. Did
17 they?

18 A. I mean, I don't know who did what. So to
19 say -- to say who was responsible, I can't answer
20 that because I don't know who did what. That's not
21 a fair decision for me to make. As far as saying do
22 I feel like I should have been able to get into the
23 store safely, yes. Do I know who did all the work?
24 No. Do I think it probably should have been
25 painted? Yes. I think, you know --

1 Q. But you'd expect Fred's and the owner to go
2 around and make sure it was safe for you to walk in
3 there and buy some light bulbs, wouldn't you?

4 A. I would expect any store to, yes, sir.

5 MR. MCLEOD: No more questions.

6 MR. LAFAVE: Thank you, Your Honor.

7 CROSS-EXAMINATION

8 BY MR. LAFAVE:

9 Q. Ms. Fountain, good morning. My name is Matt
10 LaFave. I'm the attorney for Fred's. You had
11 indicated that you were actually heading to the
12 Fred's store; correct?

13 A. Yes, sir.

14 Q. And would you agree that you didn't actually
15 make it to the Fred's store?

16 A. I made it at the door.

17 Q. You made it to the door --

18 A. That's right.

19 Q. -- but not into the actual store?

20 A. No.

21 Q. Do you have any idea as to who's in control of
22 that parking lot?

23 A. No.

24 Q. Do you have any idea who is in control of the
25 sidewalks and curbs and ramps?

1 A. No.

2 Q. Okay. And counsel just asked you about whether
3 or not you would expect Fred's and WILDEVCO to give
4 you a safe walking path into the store --

5 A. Right.

6 Q. -- you recall that?

7 Would you also expect then that the party who
8 built it --

9 A. Exactly.

10 Q. -- to build it in a safe manner?

11 A. Exactly. That's what I'm stating. I don't
12 know who did what as far as building that. But,
13 yes, I mean, to me -- and again you're asking me --
14 I'm also on the insurance. So, yes, you know, we're
15 going to expect them to do the job right.

16 Q. And you were also asked some questions about
17 paint. Do you recall those questions, whether or
18 not the curb should have been painted?

19 A. Yeah.

20 Q. Are you aware of any standard that requires
21 that curb to be painted?

22 A. No, I'm not aware of any standard. It's just
23 courtesy to the people going in and out of the door
24 that I would expect.

25 Q. And I'm not going to show you the picture

1 either.

2 A. Thank you so much.

3 Q. I know you've seen it and I know you haven't
4 gone back to the store. Do you recall any
5 noticeable damage to the curb? Was there any
6 cracks?

7 A. No.

8 Q. Were there any pieces of the concrete that were
9 missing?

10 A. No.

11 MR. LAFAVE: No further questions.

12 THE COURT: Anything on redirect?

13 MS. LEWIS: Nothing on redirect.

14 THE COURT: Okay. Ma'am, you may step down
15 carefully.

16 Next witness, please.

17 MS. LEWIS: Your Honor, may we go ahead and
18 mark the video?

19 THE COURT: That would be fine. It's been
20 agreed upon and stipulated that that's the video of
21 her fall.

22 (Plaintiff's Exhibit No. 2 marked for
23 identification.)

24 THE COURT: All right. Next witness, please.

25 MS. LEWIS: We call Curtis Fountain.

1 CURTIS FOUNTAIN

2 being first duly sworn, testified as follows:

3 THE WITNESS: Yes, ma'am.

4 THE CLERK: Be seated and state your full name
5 for the record, please.

6 THE WITNESS: Curtis Edward Fountain.

7 DIRECT EXAMINATION

8 BY MS. LEWIS:

9 Q. Good morning, Mr. Fountain. Would you please
10 tell the Court your current address?

11 A. 100 Farrow Street, Williston, South Carolina.

12 Q. All right. And to whom are you married?

13 A. Martha Fountain.

14 Q. And how long have you been married to
15 Ms. Fountain?

16 A. Why would you ask me that? Let's see. I think
17 it's about 12 years.

18 Q. All right. And are you currently employed?

19 A. No.

20 Q. Were you previously employed as an
21 owner-operator truck driver?

22 A. Yes, I was.

23 Q. And do you recall your wife's accident at
24 Fred's?

25 A. Yes.

1 Q. Where were you when it occurred?

2 A. I was driving my truck down the road over by
3 Atlanta.

4 Q. All right. And how did you learn about the
5 accident?

6 A. One of the paramedics, I believe it was, called
7 because I'd been trying to call my wife for, what, a
8 couple hours.

9 Q. And what if anything did you do when you got
10 that call?

11 A. I went and called my dispatcher and I told them
12 I needed to go home immediately because my wife had
13 been in an accident. And I didn't know what kind of
14 accident, they just said accident.

15 Q. All right. And did you take any time off from
16 work as a result of this?

17 A. Yes, I did.

18 Q. And did you assist in your wife's care in any
19 way?

20 A. Yes, I did.

21 Q. Can you briefly give the Court an overview of
22 kind of what it was like after the accident and the
23 care that you provided for Ms. Fountain.

24 A. Well, she couldn't do anything because her hand
25 was immobile. I had to wipe for her -- pardon my

1 expression -- you know, after she had to use the
2 facilities and stuff like that. It was rather
3 embarrassing for her. And when you're doing
4 something like that, it's kind of embarrassing for
5 yourself because you feel sorry for them.

6 She couldn't do anything, still can't do
7 anything -- I mean, not anything. She can't start
8 the lawnmower, she's burned her arm up and down with
9 where she worked before and --

10 THE COURT: You said she can't start the
11 lawnmower?

12 THE WITNESS: No.

13 THE COURT: She's my kind of woman. My wife
14 can't start ours either, but it's not because of her
15 hand.

16 THE WITNESS: Well, she used to -- she was a
17 very independent woman. And now she's -- there's a
18 lot of things she can't do.

19 BY MS. LEWIS:

20 Q. You, Mr. Fountain, filed a lawsuit against
21 WILDEVCO and Fred's, along with your wife. And in
22 that lawsuit you claimed a loss of companionship of
23 your wife, and you talked to us a little bit about
24 that. But could you please tell the Court how your
25 marriage was impacted or what companionship you lost

1 as a result of the accident?

2 A. Well, most of the time I had to stay out longer
3 because our income had been shrunk, you know, in
4 half, basically.

5 Q. Now, when you say stay out, what does that
6 mean?

7 A. Stay out driving the truck longer at a time.
8 Instead of two weeks, I had to stay out anywhere
9 from three to six weeks or whatever. And then when
10 I got to go home, it was usually to help while she
11 was having a surgery or if we had to do a court
12 appearance or something like that. I wasn't able to
13 come home and enjoy and have good quality family
14 time. She was usually in a lot of pain most of the
15 time because she was going through surgeries all the
16 way through over the last six years.

17 Q. All right. And did you have to obtain any
18 assistance from other people as far as helping with
19 her care?

20 A. Yes, ma'am. Her friend around the corner
21 helped her quite often, her daughter came out and
22 helped her quite often, and one time her sister from
23 Ohio came down and helped when she had one of the
24 surgeries because it just became a financial
25 can't-be-there thing. You know what I'm saying?

1 Q. Yes, I do. All right. And so you indicated
2 that Ms. Fountain was pretty independent before the
3 fall.

4 A. Yes, ma'am.

5 Q. Other than the physical limitations that she
6 has as a result of the fall, were there any other --
7 any other impact on her emotionally or anything else
8 that you observed as a result of the fall?

9 A. Oh, yeah. She never went back to the scene
10 that I know of, you know. She just couldn't go in
11 that store anymore.

12 And if you saw her testimony, she probably
13 cried somewhere in the thing maybe. It's been an
14 emotional roller coaster for her really bad and it's
15 affected both of us. I'd come home and she'd start
16 talking about it or something and she'd just break
17 down and start crying. It was a pretty tough time.

18 MS. LEWIS: Nothing further.

19 THE COURT: Any questions by anyone?

20 MR. MCLEOD: I have just one quick one.

21 THE COURT: Yes, sir.

22 CROSS-EXAMINATION

23 BY MR. MCLEOD:

24 Q. You did file claims in that lawsuit, but you
25 didn't sue Tippins-Polk; correct?

1 A. I don't know who we sued. I'm not even going
2 to lie to you. I thought we -- I thought -- my
3 attorney told me that we weren't -- I wasn't
4 basically involved anymore at all.

5 Q. Okay. A couple more then. Did your wife ever
6 say why she fell?

7 A. She tripped over the thing right there in front
8 of the store door and plowed into the door.

9 Q. Because she couldn't see the elevation change
10 of the ramp; correct?

11 A. I don't know if it was because you can't see it
12 or your eyes don't -- you don't see it because
13 you're looking ahead and the yellow stops, is
14 basically what she told me.

15 MR. MCLEOD: That's all I have. Thank you,
16 Your Honor.

17 MR. LAFAVE: Just briefly, Your Honor.

18 CROSS-EXAMINATION

19 BY MR. LAFAVE:

20 Q. Mr. Fountain, did you dictate to your attorneys
21 who to file a lawsuit against?

22 A. I don't remember that either.

23 Q. Okay. Do you recall whether or not you said I
24 want to sue Fred's and WILDEVCO?

25 MR. MCLEOD: Objection; asked and answered.

1 THE COURT: Overruled.

2 A. We wanted -- we were going to sue Fred's
3 because they didn't even want to pay the medical
4 bills.

5 Q. Do you know if your wife actually on that day
6 made it into the Fred's store?

7 A. I know she did not. She fell right in front of
8 that door.

9 Q. Right. You had said you were no longer
10 driving; is that right?

11 A. That's correct.

12 Q. When did you stop driving?

13 A. About three months ago.

14 Q. And why did you stop driving?

15 A. Because of health issues.

16 Q. For you or for her?

17 A. For me.

18 Q. Okay. You said also you had to take some time
19 off of the road. How much time -- when the accident
20 occurred, how much time did you have to take off?

21 A. I don't remember exactly. I'm not going to lie
22 to nobody.

23 Q. How were you paid when you were driving?

24 A. By the mile.

25 Q. How much were you making per mile?

1 A. A dollar a mile, I believe, at the time, if I
2 was leasing. I don't remember if I was leasing or
3 driving a company truck at the time.

4 Q. Do you have any idea how much money you
5 personally lost from having to take time off the
6 road?

7 A. No. I haven't sat down and figured it out. I
8 know it adds up because you drive about 500 miles a
9 day. So it's about \$500 a day.

10 Q. Had you, prior to this accident with your wife,
11 intended to stop driving sooner than three months
12 ago?

13 A. Yes.

14 Q. And when were you planning on stopping?

15 A. She had just gotten her promotion at Walmart
16 and we were talking about doing it very soon. I
17 mean, it was like right there, that was our whole
18 goal, to get both of us off the road because we both
19 used to drive. And we've lost cars and everything
20 else due to the financial difficulty.

21 Q. The financial difficulty from what?

22 A. Not having two incomes. Can't pay all the
23 bills. It's either you pay the house payment or you
24 pay the car payment. The car payment goes.

25 Q. So you've actually had cars repossessed as a

1 result of --

2 A. No, not repossessed. We turned them back in to
3 the buy-here-pay-here places.

4 Q. Thank you.

5 MR. LAFAVE: No further questions, Your Honor.

6 MS. LEWIS: Nothing further, Your Honor.

7 THE COURT: All right. Thank you,
8 Mr. Fountain. You and your wife are free to go.
9 Thank you for coming.

10 Next witness, please.

11 MS. LEWIS: Your Honor, our next witness is the
12 engineer, and he's about ten minutes out.

13 THE COURT: Anything else we can do while we
14 wait?

15 MS. LEWIS: No, sir.

16 THE COURT: All right. Let's take a ten-minute
17 break.

18 (Short break 10:51 AM - 11:10 AM.)

19 THE COURT: You may call your next witness.

20 MS. BAGLEY: WILDEVCO would call Tilden
21 Hilderbrand, Your Honor.

22 TILDEN HILDERBRAND

23 being first duly sworn, testified as follows:

24 THE WITNESS: I do.

25 THE CLERK: Please be seated and state your

1 full name for the record.

2 THE WITNESS: Horace Tilden Hilderbrand, Jr.

3 DIRECT EXAMINATION

4 BY MS. BAGLEY:

5 Q. Thank you. Mr. Hilderbrand, what is your
6 occupation?

7 A. Civil engineer.

8 Q. And with whom are you employed?

9 A. Hass & Hilderbrand Incorporated in Aiken.

10 Q. What is your position there?

11 A. Vice president.

12 Q. Are you being compensated by any party for your
13 testimony today?

14 A. No.

15 Q. Mr. Hilderbrand, are you familiar with the
16 Fred's store located in Williston, South Carolina?

17 A. Yes, I am.

18 Q. What services, if any, did you perform related
19 to the Fred's store?

20 A. Our company prepared a survey and a site plan
21 for the Fred's store.

22 Q. And who hired you to prepare those site plans
23 for the Fred's in Williston?

24 A. I'm not sure of the specific name. WILDEVCO, I
25 think, is the name of it.

1 Q. Can you explain, Mr. Hilderbrand, what are site
2 plans?

3 A. Site plans are a set of documents that show how
4 a site will be graded, how the utilities are
5 installed; basically everything on a property that's
6 developed from the ground down, including pavement.

7 Q. And what was the function of the site plans
8 that you prepared for the Fred's project at issue?

9 A. To provide the owner with a plan so that the
10 site could be developed.

11 MS. BAGLEY: May I approach the witness, Your
12 Honor?

13 THE COURT: Yes, ma'am.

14 (Plaintiff's Exhibit No. 3 marked for
15 identification.)

16 BY MS. BAGLEY:

17 Q. Mr. Hilderbrand, I'm going to show you what's
18 been premarked for identification as Plaintiff's
19 Exhibit 3. Do you recognize that document?

20 A. I do. These are the plans that we prepared.

21 Q. And are they a true, accurate, and authentic
22 copy of the site plans that Hass & Hilderbrand
23 prepared for Fred's -- for the Fred's project,
24 rather?

25 A. Yes.

1 Q. Is that your stamp in the bottom right-hand
2 corner?

3 A. It is.

4 Q. And what do those stamps signify?

5 A. It means that I have reviewed the plans and
6 they are adequate to meet all requirements.

7 MS. BAGLEY: Your Honor, at this time we'd move
8 to enter the site plans as Plaintiff's Exhibit 3.

9 THE COURT: Any objection?

10 MR. MCLEOD: No, Your Honor.

11 MR. LAFAVE: No, Your Honor.

12 (Plaintiff's Exhibit No. 3 admitted into
13 evidence.)

14 BY MS. BAGLEY:

15 Q. Mr. Hilderbrand, who uses those site plans?

16 A. The developer and the site work contractor use
17 these plans.

18 Q. Do you know who the general contractor was for
19 the Fred's project?

20 A. Tippins-Polk, I believe, is the correct name.

21 Q. Can you please turn to page 2 of the site
22 plans. And, Mr. Hilderbrand, can you just explain
23 for the Court what page 2 shows?

24 A. Page 2 shows the grading, drainage, and
25 utilities on the site; it shows existing contours,

1 which are typically dashed, and it shows finished
2 contours which are finished grades for the completed
3 site.

4 Q. What's the significance of the grades?

5 A. It represents how the site will slope and where
6 the site will drain after the project is completed.

7 Q. And if we look at the Fred's building and the
8 parking lot, we see there are numbers, different
9 numbers throughout -- delineated throughout that
10 drawing. What do those signify?

11 A. There are numbers that -- some of the numbers
12 signify building dimension, some of them state the
13 square footage of some of the buildings, some of the
14 numbers represent finished grades.

15 Q. Are there grades on page 2, Mr. Hilderbrand,
16 that are significant with regard to the sidewalk in
17 front of the Fred's store?

18 A. Yes, there are elevations shown at the edge of
19 that sidewalk.

20 Q. Are there elevations shown anywhere else on the
21 sidewalk?

22 A. There's some that represent elevations off the
23 edge and some on the edge.

24 Q. And based on those grades as prepared on the
25 site plans, Mr. Hilderbrand, what does the site plan

1 call for with regard to the front sidewalk?

2 A. It shows that the front edge of the sidewalk is
3 one-tenth of a foot lower than the finished floor of
4 the building.

5 Q. And what, if anything, does that indicate to
6 you with regard to how the sidewalk should have been
7 constructed?

8 A. Well, it shows the slope that is across the
9 front sidewalk, and also that there's no step-down,
10 that the elevation is flush at the front.

11 THE COURT: Flush with what?

12 THE WITNESS: The pavement, Your Honor.

13 THE COURT: The sidewalk is flush with the
14 pavement?

15 THE WITNESS: Yes, sir.

16 THE COURT: Thank you.

17 BY MS. BAGLEY:

18 Q. And when you say that, Mr. Hilderbrand, you
19 mean the sidewalk edge -- front edge of the sidewalk
20 should have been flush with the parking lot
21 pavement?

22 A. That's what the plans show.

23 THE COURT: In fact, it shows 107 -- is that
24 .5? I can't see it.

25 THE WITNESS: 107.9.

1 THE COURT: All the way across from left to
2 right, including in front of the doors?

3 THE WITNESS: In front of the doors, yes, sir.
4 And 107.8 on the left and 107.5 on the right.

5 BY MS. BAGLEY:

6 Q. And why, Mr. Hilderbrand, would there have not
7 been an elevated sidewalk edge?

8 A. With the slope on the front sidewalk of the
9 building and the elevation of the finished floor, no
10 elevated edge was required since ADA access was
11 required there.

12 Q. As drawn, Mr. Hilderbrand, was there room in
13 the sidewalk for a handicap curb ramp?

14 A. The width of the sidewalk up front appeared to
15 be nine feet, the handicap ramp itself is six feet
16 deep, so there's only three feet between the
17 building and the ramp -- or a ramp, if the ramp had
18 been there, and that's not enough room for ADA
19 access between the building and the end of the ramp.

20 Q. So did these site plans as prepared by Hass &
21 Hilderbrand call for a handicap ramp?

22 A. No, they don't.

23 Q. If it did call for a handicap ramp, how would
24 that be indicated on the site plans?

25 A. It would be labeled ramp.

1 Q. Would the drawings be different in any manner
2 if there was a ramp called for?

3 A. Well, there would be, first of all, a label
4 that said ramp, and then second, there would be at
5 least a six-inch change in grade between the floor
6 and the spot elevation at the edge of the parking
7 lot.

8 Q. And is there -- you testified that it requires
9 a six-inch step-up; is that correct?

10 A. That's correct.

11 Q. For a handicap ramp?

12 A. That's correct.

13 Q. Why is that?

14 A. That's an ADA requirement.

15 Q. Now, Mr. Hilderbrand, do these plans reference
16 a handicap ramp in any manner?

17 A. There is a detail for a handicap ramp on sheet
18 one, but it's not labeled on the plan. So in this
19 case, it was not used.

20 Q. What is the purpose of having the handicap ramp
21 detail on the plans?

22 A. That's one of the standard details that we put
23 on plans. And sometimes they're used and sometimes
24 they're not.

25 Q. And am I correct that the -- or, rather, where

1 would the contractor look to determine if a handicap
2 ramp was required for the site plans?

3 A. He would look on either sheet one or sheet two
4 and it would point to a location where the ramp was
5 required.

6 Q. Does the inclusion of the handicap ramp detail
7 in the margin dictate that a handicap ramp is
8 actually called for in the drawings themselves?

9 A. No.

10 Q. What, if any, relation do these site plans have
11 to the architectural drawings?

12 A. We use architectural plans as a base,
13 typically, to give us the size of the building and
14 the location of the exit points or the utilities.

15 Q. Between the site plans and the architectural
16 drawings, which would govern the height of the
17 sidewalk curb, if any?

18 A. The site plans.

19 Q. Mr. Hilderbrand, on page 2 of the site plans
20 there are two perpendicular lines in front of the
21 door -- in these two sets of doors; is that right?

22 A. That's correct.

23 Q. What do those lines indicate?

24 A. I'm not real sure. There are no -- typically
25 handicap ramp plan view would have wings on the

1 sides to indicate a transition in grade. And I'm
2 not sure what these parallel lines indicate.

3 Q. If you intended for there to be a handicap ramp
4 there, would there be wings in the drawing?

5 A. Yes.

6 Q. Mr. Hilderbrand, I'm going to show you what's
7 been premarked as Plaintiff's Exhibit No. 1. And
8 I'll represent to you that that is a photo of the
9 front of the Fred's store at issue. The box on that
10 photo is where Ms. Fountain alleges she tripped and
11 fell. Based on the photograph, can you tell whether
12 the front sidewalk complies with the site plans
13 provided by you?

14 A. It appears that there's an elevation change at
15 the location you have marked.

16 Q. Does that comply with the site plans that you
17 prepared?

18 A. No.

19 Q. In what way does the sidewalk, as constructed,
20 differ from the site plans?

21 A. Our plan showed a pavement that would be flush
22 with the top of the sidewalk and actually did not
23 show a recessed ramp like the one that appears to be
24 here.

25 Q. If the front edge of that sidewalk,

1 Mr. Hilderbrand, exclusive of the handicap ramp, is
2 approximately two inches in height across the front
3 edge, would that be proper?

4 A. That is not typical. A typical step-up is six
5 inches.

6 Q. Mr. Hilderbrand, will you turn to page 1 on
7 Plaintiff's Exhibit 3, the site plans. In the lower
8 left-hand corner is an area entitled general notes
9 site work. What is the purpose of those notes?

10 A. Those are notes that typically apply to site
11 plans in regard to standard procedures or standard
12 installation.

13 Q. Who should read those notes?

14 A. I'm sorry. Who should read those notes?

15 Q. Yes, sir.

16 A. I would assume the owner should read those and
17 the contractor should read those.

18 Q. Is it large enough for you to read?

19 A. I think so.

20 Q. Can you read number 3, please.

21 A. The contractor should notify the engineer for a
22 review should discrepancies be discovered at the
23 site or on the drawings.

24 Q. Were you ever contacted by Tippins-Polk
25 regarding any discrepancies discovered at the site?

1 A. Not that I recall.

2 Q. Were you ever contacted by Tippins-Polk
3 regarding any discrepancies discovered on the
4 drawings?

5 A. Not that I recall.

6 Q. Were you ever contacted by Tippins-Polk with a
7 request to deviate in any way from the site plans?

8 A. Not that I recall.

9 Q. Are you required in any way, Mr. Hilderbrand,
10 to go to the site to ensure that the construction by
11 the general contractor complies with the site plans?

12 A. Only in relation to the waterline and the sewer
13 line.

14 Q. Other than these site plans, Mr. Hilderbrand,
15 did you provide any additional instruction or
16 clarification to Tippins-Polk regarding the
17 construction of the front sidewalk?

18 A. No.

19 Q. Do you believe any additional instruction was
20 necessary?

21 A. No.

22 Q. Why not?

23 A. I thought the plans were clear.

24 Q. As you see them today, do you still believe
25 they are clear?

1 A. I do.

2 Q. In summary, Mr. Hilderbrand, was the Fred's
3 sidewalk and curb as shown in the picture
4 constructed in accordance with the site plans that
5 you prepared?

6 A. No.

7 Q. And in what way were they not compliant?

8 A. The pavement and the sidewalk are not flush
9 with each other.

10 Q. Thank you, Mr. Hilderbrand.

11 THE COURT: Mr. McLeod.

12 CROSS-EXAMINATION

13 BY MR. MCLEOD:

14 Q. Mr. Hilderbrand, Brown McLeod on behalf of
15 Tippins-Polk. You just said you believe the plans
16 are real clear; correct?

17 A. Correct.

18 Q. But just a little while ago you told us you
19 couldn't tell us what those two little lines on
20 there in front of each door was; correct?

21 A. Correct.

22 Q. Okay. Does that seem clear then?

23 A. Well --

24 Q. It's confusing; correct?

25 A. Could be, yes, sir.

1 Q. Okay. Now, where does the plans -- where do
2 your -- do your designs go up onto the sidewalk of
3 the Fred's store?

4 A. No.

5 Q. Okay. So how do you reconcile -- and you saw
6 the architectural plans; correct?

7 A. I did.

8 Q. And they had a ramp in them; correct?

9 A. That's correct.

10 Q. How do you reconcile the two together? How do
11 you bring -- well, how do you reconcile the two
12 together then?

13 A. When we reviewed the width of the front
14 sidewalk, we saw that a ramp would not work due to
15 the width of the front sidewalk, so we showed a
16 flush pavement across the front.

17 Q. So is it your responsibility to design the
18 sidewalk?

19 A. It's our responsibility to tie into the
20 sidewalk, yes.

21 Q. Okay. So if an architect dictates a ramp, then
22 shouldn't you tie into that ramp?

23 A. Not if it doesn't make it meet ADA
24 requirements.

25 Q. How wide was the sidewalk?

1 A. We scaled nine feet.

2 Q. Okay. Would ten feet be sufficient?

3 A. Ten feet would be.

4 Q. Can I give you the architectural plans and have
5 you look at those? You may need to lay these out
6 somewhere, and I'll help you.

7 A. You want me to just --

8 Q. Yes, because you're more familiar with it than
9 I am.

10 THE COURT: All right. Let's lay a little
11 foundation. Who did the architectural plan? I
12 assume the architects who is who?

13 MR. MCLEOD: Yes, Your Honor, the architect --

14 THE WITNESS: Alan J. Venable.

15 THE COURT: Do you have any connection with
16 Mr. Venable, any business connection?

17 THE WITNESS: I do not.

18 THE COURT: So these are the architect's plan
19 that you -- I assume were done after the site plan
20 or done in conjunction with the site plan and --
21 obviously sometime before construction?

22 THE WITNESS: Yes, sir.

23 THE COURT: All right. Go ahead. The question
24 is what?

25

1 BY MR. MCLEOD:

2 Q. How wide is the sidewalk, according to the
3 architectural plans?

4 A. According to these plans, it shows ten feet
5 four inches.

6 Q. Okay. And, again, we touched on this earlier,
7 it's got a drawing that says -- that includes a
8 ramp?

9 A. Correct.

10 Q. Okay.

11 THE COURT: So we got a site plan that doesn't
12 include a ramp that calls for a nine-foot sidewalk
13 and we got an architectural plan that includes a
14 ramp ten feet plus; is that where we're at?

15 MR. MCLEOD: Yes, Your Honor. But we'd also
16 point out to the Court, on the first page of
17 Mr. Hilderbrand's site plans there is a --

18 BY MR. MCLEOD:

19 Q. You'll agree with me there's a ramp on the
20 plans; correct?

21 A. There is a ramp detail, yes.

22 Q. And on this detail, how wide is the ramp
23 itself?

24 A. I'm sorry. How wide or deep?

25 Q. How wide. And I may not be describing it

1 right, but I want to talk about the width of the
2 flush area.

3 A. The center aisle, I'd say, is four feet wide.

4 Q. Okay. Four feet. And how wide are the flares,
5 you know, to either side, the transition area?

6 A. From six feet to zero.

7 Q. And is that a typically drawn handicap ramp?

8 A. It is.

9 Q. And so when you have six -- is it not typical
10 to do a transition or flare that's half of the width
11 of the ramp?

12 A. No.

13 Q. Okay. And so if you've got six feet of flare
14 to one or either side of the ramp, you've got a long
15 six-foot area that gradually raises up from flush,
16 gradually raises up slowly incrementally until it
17 gets to the size of the curb; correct?

18 A. That's correct.

19 Q. So there's a large portion in there under four
20 inches; correct?

21 MS. LEWIS: I'm going to object, Your Honor.

22 There's been no testimony about four inches.

23 THE COURT: Overruled.

24 Go ahead.

25 A. Geometrically, two-thirds of it.

1 Q. Okay. And so when you -- did you go to the
2 site and look at the waterline and the sewer line?

3 A. Uh-huh, I did.

4 Q. Okay. And at what part of the construction
5 would that have been?

6 A. I can't recall.

7 Q. Okay. Would the sidewalk -- or would the
8 parking lot have been completed at that point?

9 A. Not necessarily.

10 Q. Okay. So the owner, WILDEVCO, hired you to
11 produce these plans; correct?

12 A. Correct.

13 Q. And at the end of the project, you have an
14 opportunity to go inspect and make sure that the
15 site is prepared in accordance to the site plan;
16 correct?

17 A. I have the opportunity if I were to do that.

18 Q. Okay. So WILDEVCO didn't ask you to go do
19 that?

20 A. No.

21 Q. So they sort of accept the responsibility as to
22 the resulting construction site as compared to the
23 site plans?

24 A. I can't -- I don't know that I can answer that.

25 Q. Okay. Is there a -- do you typically go out --

1 when you do a project like this, are you typically
2 hired to go out and do a final inspection?

3 A. In some cases; in some cases not.

4 THE COURT: How about in this case?

5 THE WITNESS: In this case, no.

6 BY MR. MCLEOD:

7 Q. Let me ask you this: Some cases and some cases
8 not. Would a majority of the time you'd be asked to
9 go out there?

10 A. Probably 50 percent of the time.

11 Q. Okay. Who was the developer?

12 A. WILDEVCO.

13 Q. Okay. Are you familiar with TD Barber?

14 A. I am.

15 Q. Who are they? And I'm not talking about
16 Mr. Barber. I understand there's -- TD Barber
17 Properties, are you familiar with that entity?

18 A. I've heard the name.

19 Q. Okay.

20 MS. BAGLEY: Your Honor, I'd object. It's
21 beyond the scope of direct.

22 MR. MCLEOD: That's fine.

23 THE COURT: Sustained.

24 BY MR. MCLEOD:

25 Q. And if you could look back --

1 THE COURT: But, ma'am, he can cross-examine on
2 any relevant subjects in response to direct.

3 MS. BAGLEY: Thank you.

4 THE COURT: Go ahead.

5 BY MR. MCLEOD:

6 Q. On page number 2 we were talking about the
7 elevations. Now, this site was -- the building --
8 and, again, I know you didn't design the building.
9 But the building, from your understanding, is that
10 the Fred's floor is the same elevation as the
11 neighboring units to the left; correct?

12 A. Correct.

13 Q. Okay. So let's talk about some of the
14 elevation changes in front of those units to the
15 left, specifically this one right here. So these
16 units to the left are all at 108; correct?

17 A. Correct.

18 Q. And then that far left unit, there's a number
19 in there, 107.5. What is the distance -- and what
20 is that marking? Is it marking the curb or is it
21 marking the asphalt?

22 A. It's -- is this far left beside the building
23 over here or --

24 Q. The 107.5, right in front of the entrance to
25 the far left unit.

- 1 A. That indicates the elevation of the asphalt.
- 2 Q. Okay. And what is the elevation difference
- 3 between 108 and 107.5?
- 4 A. 0.7 feet.
- 5 Q. How many inches?
- 6 A. 8.4 inches.
- 7 Q. Okay. So what about the sidewalk? What's the
- 8 sidewalk elevation in that?
- 9 A. 107.8.
- 10 Q. So there's a difference of how many inches
- 11 between the sidewalk in front of that unit and the
- 12 asphalt?
- 13 A. Six.
- 14 Q. Six inches. Okay. Now let's look at this.
- 15 The far right corner of the Fred's store, there's a
- 16 107.5 again.
- 17 A. Uh-huh.
- 18 Q. And what is that marking?
- 19 A. That is elevation of the asphalt.
- 20 Q. Okay. And how high is the sidewalk at that
- 21 point?
- 22 A. 107.9.
- 23 Q. And what is the difference there?
- 24 A. Five inches.
- 25 Q. Okay. And there's a 107.9 and 107.9 right in

1 between those two lines we don't know what they're
2 about; correct?

3 A. Correct.

4 Q. And what are those marking?

5 A. They're marking the top of the sidewalk and the
6 asphalt.

7 Q. Okay. And so you've got an elevation change.
8 So to the right side of that, it's going from five
9 inches down to zero, is that correct, from right
10 side to that first ramp? Is that correct?

11 A. That's correct.

12 Q. So how can it be flush if you've got five
13 inches on the right and then you've got zero on
14 the -- on the --

15 A. This indicates flush at the doors.

16 Q. At the doors. Okay. So it's not flush all the
17 way across?

18 A. Correct.

19 THE WITNESS: Can I make an observation here?

20 THE COURT: You may.

21 THE WITNESS: Our plans -- which if I recall
22 correctly, the plans for the Fred's store was sent
23 to us from the architect as an electronic file. It
24 doesn't appear to match those architectural plans.
25 It looks like the width of our sidewalk is narrower

1 than the ones shown on those architectural plans
2 based on the fact that there's difference between
3 the columns and the edge of the sidewalk on his plan
4 but not on ours.

5 BY MR. MCLEOD:

6 Q. So you worked off a separate set of plans;
7 correct?

8 A. We worked off an electronic file that we
9 inserted in our drawing.

10 THE COURT: Electronic from whom?

11 THE WITNESS: From the architect.

12 THE COURT: And you're telling me that the
13 architect plans you're looking at here today are
14 different than the plans sent to you by the
15 architect?

16 THE WITNESS: It appears so.

17 BY MR. MCLEOD:

18 Q. I'm going to ask you to look at one more thing
19 on these architectural plans, if you would. Can you
20 tell me from these how wide those doors are at the
21 Fred's store?

22 A. Right here, they're labeled six feet, four
23 inches.

24 Q. So that's about two feet, four inches narrower
25 than your ramp depicted on your site plans; correct?

1 A. On the detail that we included on the site
2 plans.

3 Q. Now, is page 3 of 4 part of the site plans?

4 A. Yes.

5 Q. Right there in the center, sort of center left,
6 there's a drawing. And if you'll agree with me,
7 that depicts a curb edge; correct?

8 A. Correct.

9 Q. Bear with me. I kind of jumped around. So
10 going back to the depiction of the curb ramp on page
11 1, that design creates a small elevation change all
12 along until it gets to the curb, correct, regardless
13 of the height of the curb?

14 A. The ramp itself?

15 Q. The edge. No, sir. The flare edge, what I've
16 been calling sort of the transition from zero flush
17 all the way up to the curb. Irregardless of the
18 height of the curb, there's elevation change in that
19 flare area; correct?

20 A. That is correct.

21 Q. Are you familiar with the building code? Do
22 you deal with the building code in any form or
23 fashion?

24 A. Yes.

25 Q. Do you know if it's required to paint that

1 edge, that transition area, the flare edge of a ramp
2 in 2005?

3 A. I'm not familiar.

4 Q. Okay. So you testified that the architectural
5 plans and your plans don't really comply with one
6 another; correct?

7 A. They appear to be different. Yes.

8 Q. Okay. And if you had a flush, if you had a
9 flush result, the construction ended and the asphalt
10 was flush with the sidewalk, that would be open and
11 obvious; correct?

12 MS. LEWIS: Objection, Your Honor.

13 THE COURT: Sustained.

14 BY MR. MCLEOD:

15 Q. I mean, as soon as you walk up on the site, you
16 can see if it's flush or not flush; correct?

17 A. That's correct.

18 MR. MCLEOD: That's all I have, Your Honor.

19 Thank you.

20 THE COURT: Mr. LaFave.

21 MR. LAFAVE: Thank you, Your Honor.

22 CROSS-EXAMINATION

23 BY MR. LAFAVE:

24 Q. Mr. Hilderbrand, my name is Matt LaFave. I
25 represent Fred's. Did you have any contact with

1 anyone from Fred's relative to your drawings?

2 A. We had contact with the architect, I assume.

3 But it's been a while.

4 Q. All right. Do you recall having any direct
5 interaction with an employee of Fred's Stores of
6 Tennessee during your involvement in this process?

7 A. Not that I recall.

8 Q. Okay. You've been asked, obviously, a lot of
9 questions about these particular drawings and about
10 any contact. And counsel had asked you if you had
11 any contact relative to deviations from your site
12 plans. Do you recall those questions?

13 A. I do.

14 Q. And in your experience, if you have contact, if
15 someone reaches out to you with an issue about your
16 drawings, is that typically done in writing? What's
17 the usual standard of operation?

18 A. 2005 probably would have been telephone.

19 Q. Okay.

20 A. Or fax.

21 Q. Okay. On page 1 of what we've been referring
22 to as your site plans, just as a point of
23 clarification, your testimony is if your site plans
24 had delineated a curbed ramp, there would have been
25 what you called wings; is that right?

1 A. That's correct.

2 Q. Okay. So there's no mistaking that this plan,
3 as it's drawn here, does not intend or call for a
4 curb ramp; is that accurate?

5 A. That's correct. And if I may expand --

6 Q. Yes, sir.

7 A. -- the Fred's store footprint, again, and the
8 sidewalk, was sent to us by the architect, so we did
9 not draw the lines perpendicular to the building at
10 the front doors.

11 Q. So the lines that you see here were not placed
12 there by you; is that what your testimony is?

13 A. No, they were not.

14 Q. Okay. But if you, as the engineer, intended
15 for there to be a ramp, you would have delineated
16 that with what you've referred to as wings on the
17 drawing; correct?

18 A. That's correct.

19 Q. All right. There have also been asked a lot of
20 questions about the handicap ramp that's detailed
21 and depicted at the top.

22 A. Yes, sir.

23 Q. Is that something that you, in diagraming this,
24 establishing your site plans, is that something that
25 you actually placed there?

1 A. It is.

2 Q. Okay. And is that a common practice to place
3 something that may or may not be needed in your
4 plans?

5 A. We do.

6 Q. And who, at the end of the day, has the
7 ultimate job of determining whether or not that is
8 necessary during the building process?

9 A. The person who builds it.

10 Q. Okay. And in that situation, would they have
11 contacted you to dictate whether or not they were
12 going to utilize that curb ramp?

13 A. I would assume, yes.

14 Q. Okay. And do you recall, sitting here today,
15 having any communication with Tippins-Polk about
16 adding a curb ramp that you didn't intend to be in
17 your site plans?

18 A. I do not recall.

19 Q. Okay. The architect's drawings, do they have
20 the benefit of the elevations when they do their
21 drawings?

22 A. Typically the architectural plans are finished
23 when we get those.

24 Q. Okay. When you get the elevation?

25 A. When we get the building footprint from the

1 architect, we typically provide our service after
2 they are complete.

3 Q. So, chronologically, the architect's plans come
4 out first; correct?

5 A. Correct.

6 Q. Then the elevations are shot?

7 A. That's correct.

8 Q. And then you take the architect's plans in
9 correlation with the elevation and you develop your
10 site plans; correct?

11 A. Correct.

12 Q. Are the site plans then provided to the
13 contractor or are they provided to the entity that
14 engages your services?

15 A. We provide them to the owner. And if they say
16 send plans to the contractor, then we do that.

17 Q. Do you recall that being the case here?

18 A. I don't recall the specifics, but I would
19 assume that that was the case.

20 Q. Okay. And would the site plans be the basis
21 for the construction; meaning, would they supersede
22 the architect's plans as far as how to actually
23 build the property?

24 A. Outside the limits of the building, yes.

25 Q. Okay. You've been asked by counsel about the

1 flared sides that cut into the curb and actually
2 form the curb ramp; correct?

3 A. Correct.

4 Q. If I'm looking at page 1 correctly, this calls
5 for -- I've heard it 12 to 1 or 1 to 12. But it
6 calls for a slope not to exceed 1 and 12; is that
7 right?

8 A. That's correct.

9 Q. Okay. And in this particular building, if you
10 have a two-inch curb and you have a 1-and-12 slope,
11 what should the distance of that flare be starting
12 from the two-inch down to flush with the asphalt?

13 A. Two feet.

14 Q. Okay. So if the curb ramp was called for and
15 was built, is it your understanding that that flared
16 side should have been no longer than two feet?

17 A. If the difference in grade was two inches, yes.

18 Q. If the starting point on the curb is two inches
19 down to flush with the parking lot, that flare
20 should have been two inches?

21 A. That's correct.

22 Q. Or two feet. Excuse me.

23 A. Two feet.

24 Q. So if it was longer than two feet -- setting
25 aside that your site plans don't even call for it,

1 if it was longer than two feet, would that have also
2 been a deviation from your site plans?

3 A. Yes.

4 Q. I don't have any further questions.

5 THE COURT: Ms. Bagley?

6 MS. BAGLEY: Briefly, Your Honor.

7 REDIRECT EXAMINATION

8 BY MS. BAGLEY:

9 Q. Mr. Hilderbrand, you were asked about the
10 architectural plans. If you want to step down here.
11 Page 2 of the architectural plans, that's A 2.0.

12 A. Yes.

13 Q. Do these architectural plans call for a
14 handicap curb ramp?

15 A. They do.

16 Q. And how can you tell that?

17 THE COURT: I'm sorry. Do they or do they not?

18 THE WITNESS: They do.

19 THE COURT: How can you tell that?

20 THE WITNESS: The word ramp is written on here
21 and it's depicted at the door.

22 BY MS. BAGLEY:

23 Q. Any other way?

24 A. No.

25 Q. Are there wings on these ramps?

1. A. Yes.
- 2 Q. The site plans as prepared by you say ramp?
- 3 A. No.
- 4 Q. Do they have wings?
- 5 A. No.
- 6 Q. Whose plans should the contractor follow with
7 regard to the elevation of the store sidewalk
8 with -- as compared between the architectural plans
9 and the engineering site plans?
- 10 A. Well, there are potentially two different
11 contractors here; one is the general contractor and
12 one is the site contractor. I would assume the
13 general contractor would have responsibility for the
14 building. So if the architect shows the sidewalk on
15 his plan, then he should build per the architect's
16 plan. The site guy takes over when he reaches the
17 exterior extents of the building.
- 18 Q. And whose plans should he follow?
- 19 A. The site plans.
- 20 Q. You were asked about the building code. Does
21 the building code dictate a minimum step-up for a
22 minimum step-up height?
- 23 A. I can't answer that.
- 24 Q. Is there a maximum step-up height?
- 25 A. Six inches.

1 Q. Thank you. Nothing further.

2 THE COURT: All right. You may step down.

3 MR. MCLEOD: I --

4 THE COURT: I don't allow re-cross. It's
5 discretionary with the Court.

6 Next witness.

7 MS. LEWIS: Your Honor, at this time we call
8 Tad Barber.

9 THE COURT: Mr. Barber, come around, please.
10 Any objection to Mr. Hilderbrand being released?

11 MR. MCLEOD: No, Your Honor.

12 MS. BAGLEY: Not from us, Your Honor.

13 MR. LAFAVE: No, Your Honor.

14 THE COURT: You may go, sir.

15 THADDEUS BARBER

16 being first duly sworn, testified as follows:

17 THE WITNESS: Thaddeus Dill Barber.

18 DIRECT EXAMINATION

19 BY MS. LEWIS:

20 Q. Good morning, Mr. Barber. What is your
21 occupation?

22 A. I'm a real estate broker.

23 Q. And how long -- is that commercial real estate?
24 Residential? Both?

25 A. I specialize in commercial, but I own a company

1 that does both.

2 Q. Okay. How long have you been in the commercial
3 real estate business?

4 A. Since 1998.

5 Q. Okay. Would you briefly please give the Court
6 an overview of just your educational and work
7 history?

8 A. I graduated from Aiken High School, attended
9 Clemson University with a degree in financial
10 management, and received a master's in business from
11 University of South Carolina.

12 Q. Do you have any education or work experience
13 involving construction?

14 A. No.

15 Q. Do you have any education or work experience
16 involving architecture?

17 A. No.

18 Q. Do you have any education or work experience
19 involving engineering?

20 A. No.

21 Q. And are you -- can you tell the Court what your
22 affiliation was with WILDEVCO and what WILDEVCO is.

23 A. I'm one of the partners of the LLC and I was
24 responsible for managing the construction of the
25 Fred's center in Williston.

1 Q. And did WILDEVCO have a lease agreement or a
2 lessor-lessee relationship with Fred's at one time?
3 A. Yes.
4 Q. For the Fred's in Williston; is that correct?
5 A. Yes.
6 Q. And there was a ten-year lease?
7 A. Yes.
8 Q. And that lease ran from 2005 to 2015?
9 A. Yes.
10 Q. And the lease was not renewed, so there's no
11 current relationship between WILDEVCO and Fred's; is
12 that correct?
13 A. Correct.
14 Q. What involvement, if any, did WILDEVCO have
15 with the construction of the Fred's in Williston?
16 A. We were the owner and we managed, I guess, the
17 construction process.
18 Q. Okay. And when you say you managed the
19 construction process, can you give the Court an
20 overview of what that entailed?
21 A. Well, from the very beginning it would have
22 been engaging engineers and architects and general
23 contractors to do the construction on the property.
24 Q. All right. Why do you hire both an architect
25 and an engineer?

1 A. We need an architect to provide architectural
2 plans for the building itself; we need a civil
3 engineer to provide the surveys, the plans for the
4 property that the building is going to sit on.

5 Q. All right. And did WILDEVCO enter into an
6 agreement with Tippins-Polk to construct the Fred's
7 in Williston?

8 A. Yes, we did.

9 Q. And when was that?

10 A. It was somewhere in early 2005, probably March.

11 Q. Okay.

12 MS. BAGLEY: Your Honor, may I approach?

13 THE COURT: Yes, ma'am.

14 MS. LEWIS: We'll have this marked as
15 Plaintiff's Exhibit 4 for identification.

16 (Plaintiff's Exhibit No. 4 marked for
17 identification.)

18 BY MS. LEWIS:

19 Q. Mr. Barber, I'm going to show you what's been
20 marked as Plaintiff's Exhibit 4 and ask you if you
21 can identify that document, please.

22 A. It's the construction agreement between
23 WILDEVCO and Tippins-Polk Construction.

24 Q. All right. And it looks like it indicates that
25 the agreement was entered into on April 28th, 2005.

1 A. Yes.

2 Q. Is that right?

3 A. Yes.

4 Q. And what was your general understanding of
5 WILDEVCO's agreement with Tippins-Polk regarding the
6 construction of the Fred's?

7 A. That Tippins-Polk would construct the Fred's
8 shopping center in Williston and do that in
9 accordance to the building plans and the site plans
10 and according to the specifications and the building
11 code.

12 Q. All right. And under the article two of the
13 contract -- article two is entitled work for this
14 contract. Do you see that?

15 A. Yes.

16 MS. LEWIS: I'm going to go ahead and enter
17 this into evidence so I can show it to the Court.
18 There's no objection.

19 THE COURT: All right.

20 (Plaintiff's Exhibit No. 4 admitted into
21 evidence.)

22 BY MS. LEWIS:

23 Q. Under article two, the work for this contract,
24 there's a paragraph there that begins with building
25 foundation. Do you see that?

1 A. Yes, ma'am.

2 Q. All right. And if you go down to the last line
3 of that -- the third to last line of that paragraph,
4 it says: All site work (clearing, grubbing, asphalt
5 paving, site utilities, water, and sewer). And then
6 it says: Per site plans. Is that correct?

7 A. Yes.

8 Q. All right. And so did WILDEVCO have any input
9 into how the premises would be constructed?

10 A. No.

11 Q. All right. Did WILDEVCO take part at all in
12 the drawing of any plans, site plans, or designs?

13 A. No.

14 Q. You hired the architect and the engineer.

15 A. We hired -- an architect drew the plans based
16 off some prototype plans that are provided by
17 Fred's.

18 Q. And why did you specifically select
19 Tippins-Polk as the contractor?

20 A. To the best of my recollection, they provided a
21 good price, number one, and we understood them to
22 have built some Freds' in the past and had some
23 experience with building Freds'.

24 THE COURT: Was this your first Fred's venture?

25 THE WITNESS: Yes.

1 BY MS. LEWIS:

2 Q. Did the construction of the Fred's -- did you
3 conduct any inspections of the property or go to the
4 property periodically?

5 A. I would go to the property periodically and do
6 general observations of whether people were working
7 and what was going on at the particular time, if
8 site work was being done or walls were being put up,
9 things like that.

10 Q. Right. Did you conduct any inspections to
11 determine whether or not the building met building
12 codes or building standards?

13 A. No. I'm not qualified to --

14 THE COURT: Would you know how to do that?

15 THE WITNESS: I wouldn't know how to do that.
16 I'm not qualified.

17 BY MS. LEWIS:

18 Q. That was my question: Are you qualified to
19 conduct such inspections?

20 Okay. So when the project is completed, what
21 steps, if any, had to be taken before you could turn
22 this store over to Fred's to open it for business?

23 A. The general contractor notifies us that the
24 building reaches a point where it's substantially
25 complete, and we then obtain a certificate of

1 occupancy which requires an inspection by the
2 County. Once we have the certificate of occupancy,
3 we then notify Fred's that the building is ready for
4 them to take possession of it.

5 Q. All right. If along the way the contractor
6 determines that there's a question about the site
7 plans or the manner in which the property is being
8 constructed, how is that handled?

9 A. If there are questions?

10 Q. Right.

11 A. Questions would either be directed, I would
12 think, to the owner or the preparer of the document,
13 whether it's an architect or an engineer who they
14 have questions about the document.

15 Q. Okay. And did you hire anyone -- you mentioned
16 that there was a building inspection and a
17 certificate of occupancy. Who initiates the process
18 for the certificate of occupancy? Is that something
19 WILDEVCO does?

20 A. My understanding is the contractor will request
21 final inspection --

22 Q. All right. So you didn't --

23 A. -- and for the certificate of occupancy. So
24 that would be, in this case, Tippins-Polk.

25 Q. Okay. And was WILDEVCO involved at all in

1 obtaining their certificate of occupancy or with the
2 inspection?

3 A. No.

4 Q. Did you hire anyone else, another third party,
5 other than the building inspector? Did you hire
6 anyone else to come to the site to look at the site
7 plans and determine whether or not the property was
8 constructed in accordance with the site plans?

9 A. No. We had hired a contractor and engineer and
10 felt like they were experts in being able to come up
11 with the final product.

12 Q. All right. Did the county building inspector
13 ever contact you concerning any defects related to
14 the sidewalk or the curbing at the Fred's store?

15 A. No.

16 Q. And the certificate of occupancy was issued?

17 A. Yes.

18 Q. And then did the store subsequently open in or
19 about September of 2005?

20 A. Yes, it did.

21 Q. All right. Now, according to your lease
22 agreement with Fred's, is WILDEVCO responsible for
23 maintaining the curbs and the sidewalks?

24 A. Yes.

25 Q. And once the store opened, did WILDEVCO

1 maintain the curbs and sidewalks?

2 A. Yes, we did.

3 Q. And can you tell the Court a little bit about
4 what that entails?

5 A. Primarily keeping it free of leaves and debris
6 and trash. If there are obstructions, we'd be
7 responsible for removing the obstructions or, I
8 suppose, if something broke, we would be responsible
9 for fixing those.

10 Q. And before the accident in March of 2010, were
11 you made aware at all that the parking lot had not
12 been constructed in accordance with the site plan?

13 A. No.

14 Q. At any time before Ms. Fountain's accident,
15 were you made aware that the site plans called for
16 the sidewalk to -- at the door entrance, to be flush
17 or even with the parking lot?

18 A. No.

19 Q. Is that something that you would have the
20 qualifications or ability to discern if you had
21 reviewed the site plans?

22 A. I don't think I've got the ability to make that
23 determination, no.

24 Q. At any time before Ms. Fountain's accident were
25 you made aware that the curb that was ultimately

1 built by Tippins-Polk was shorter than it should
2 have been?

3 A. Could you repeat that?

4 Q. Sure. At any time prior Ms. Fountain's fall,
5 prior to the accident, were you made aware or have
6 any knowledge that the curb that was there was
7 shorter than it should have been?

8 A. No.

9 Q. Did you know the standards for curb heights in
10 2005?

11 A. No. I just found out this morning.

12 Q. Thank you, Mr. Barber. I don't have anything
13 further.

14 CROSS-EXAMINATION

15 BY MR. MCLEOD:

16 Q. Good morning, Mr. Barber. Brown McLeod for
17 Tippins-Polk.

18 A. Good morning.

19 Q. You just sat in here and you listened to
20 Mr. Hilderbrand; correct?

21 A. Yes.

22 Q. You heard his testimony?

23 A. Yes.

24 Q. And you'd agree with me there's some confusion
25 between the architect's plans and the engineer's

1 plan; correct?

2 A. There were some differences apparently, yes.

3 Q. And those differences could cause some
4 confusion; correct?

5 A. I suppose.

6 Q. And you hired the architect, you hired the
7 engineer; correct?

8 A. Correct.

9 Q. And then you took those plans and you gave them
10 to Tippins-Polk; correct?

11 A. Correct.

12 Q. Okay. And then that confusion -- or the
13 discrepancies between the two were related to the
14 issue that tripped Ms. Fountain; correct?

15 A. I'm not sure I can answer that.

16 Q. Okay. Who was the developer for this project?

17 A. The owner, which was WILDEVCO.

18 Q. Okay. And who is TD Barber Properties?

19 A. That is a company that had a -- was known as
20 Palmetto Properties. It's a real estate firm that I
21 owned back in 2005. And, actually, TD Barber
22 Properties still exists.

23 Q. And why was TD -- if WILDEVCO is the developer,
24 why was TD Barber Properties paid \$40,000 for
25 development fees?

1 A. Because TD -- well, it was actually Palmetto
2 Properties was paid that as a fee to identify the
3 site and negotiate the lease with Fred's.

4 Q. Okay. And so are those developer
5 responsibilities?

6 A. Not necessarily, no.

7 Q. I'm going to hand you an invoice. Can you tell
8 me what that invoice is or do you recognize that
9 document?

10 A. It's an invoice for development, commission for
11 the Fred's store in Williston from TD Barber
12 Properties to WILDEVCO.

13 Q. And what are they paying them for?

14 A. For -- it's development fee and, slash,
15 commission.

16 Q. Okay.

17 THE COURT: What's that got to do with the
18 fall?

19 MR. MCLEOD: It was a developer that actually
20 developed the property.

21 BY MR. MCLEOD:

22 Q. Now, you and Fred's had a lease agreement;
23 correct?

24 A. Yes. WILDEVCO, not me.

25 Q. Pardon me. WILDEVCO had a lease agreement.

1 I'm going to mark this.

2 (Defendant's Exhibit No. 1 marked for
3 identification.)

4 THE COURT: What are you showing him?

5 MR. MCLEOD: This --

6 BY MR. MCLEOD:

7 Q. Can you identify the document I just handed
8 you?

9 A. This is the lease agreement between WILDEVCO
10 and Fred's store.

11 Q. And inside that -- or part of that lease
12 agreement were Fred's conceptual plans which
13 included a curb running across the front of the
14 Fred's store; correct?

15 A. There are plans. I'm not sure if it has the
16 curb or not.

17 Q. Okay. Let's take a look.

18 THE COURT: Are you offering these or what are
19 we doing with them? What exhibit number?

20 MR. MCLEOD: It's Exhibit No. 1.

21 THE COURT: All right. I'm going to call you
22 Defendant.

23 MR. MCLEOD: Okay.

24 BY MR. MCLEOD:

25 Q. Now, according to these -- while I'm looking

1 for it, according to these -- according to the lease
2 agreement, Fred's is requiring you to build a
3 building per these conceptual plans; correct?

4 A. That is an exhibit to the lease that states, I
5 think, if you read in there, that we will request
6 the prototype plans from Fred's -- or the architect
7 would request the actual prototypical plans that are
8 in effect at the time. So I'm not sure -- that's
9 more of an exhibit as opposed to any kind of working
10 drawing.

11 Q. Okay. Well, let me show you this portion of
12 the conceptual plans. You'll agree with me that it
13 includes a ramp or a curb cut; correct?

14 A. Yes.

15 Q. Okay. And according to the plans, it describes
16 what the premises are, correct, that you're
17 leasing -- or that WILDEVCO is leasing to Fred's;
18 correct?

19 A. Correct.

20 Q. And that portion includes the parking lot;
21 correct?

22 A. They are -- they have a right to use the
23 parking lot.

24 Q. All right.

25 A. They're not leasing the parking lot.

1 Q. They're leasing the use of the parking lot?
2 A. Correct.
3 Q. And they're leasing the sidewalk; correct?
4 A. Correct.
5 Q. Okay. So the lease agreement includes the ramp
6 in front of the entrances of the Fred's store;
7 correct?
8 A. You're specifically talking about this
9 particular store or in general?
10 Q. That particular store in Williston..
11 A. Yes.
12 Q. Okay. Now, in the lease agreement, Fred's has
13 an opportunity to prepare a punch list at the end of
14 construction; correct?
15 A. Yes.
16 Q. Do you know if one was ever prepared?
17 A. I don't.
18 Q. Okay. And the punch list allowed them to go
19 around with WILDEVCO and inspect the property;
20 correct?
21 A. Who is they?
22 Q. Fred's -- the lease provides for a punch list
23 to be created by Fred's. And the punch list would
24 include inspections by them as well as WILDEVCO as
25 to issues that needed to be addressed before they

1 moved in; correct?

2 A. I'd suppose so, yes.

3 Q. And the inspection would have included the

4 parking lot because you're using it and it would

5 have included the sidewalk; correct?

6 A. I don't know. I don't know that their

7 inspection was done, so I don't know what it would

8 have included.

9 Q. But it could have given them an opportunity to

10 inspect the parking lot, correct, before they moved

11 in?

12 A. I suppose they could inspect the parking lot,

13 yes.

14 Q. And it gave them an opportunity to inspect the

15 ramp; correct?

16 A. Yes.

17 Q. And it gave them an opportunity to inspect the

18 sidewalk; correct?

19 A. Correct.

20 Q. And had they found any issues, they would have

21 then put it on a punch list; correct?

22 A. Correct.

23 Q. And provided it to WILDEVCO; correct?

24 A. Correct.

25 Q. To have them corrected; correct?

1 A. Yes.

2 Q. And in there they describe what latent defects
3 are; is that correct?

4 A. I believe so, yes.

5 Q. Okay. And under that lease agreement it
6 provides that if Fred's finds some latent defects,
7 they look to WILDEVCO to correct them; correct?

8 A. I suppose so. I'm --

9 Q. Well, that's what the lease says; correct?

10 A. If you are asking me to interpret what the
11 lease says, I'd say yes.

12 Q. Okay. And then if WILDEVCO doesn't correct the
13 latent defects, Fred's has the right to then correct
14 it themselves?

15 A. Yes.

16 Q. And then as part of this lease agreement, after
17 the inspection and the creation of the punch list,
18 Fred's moves in, and at that point, under the terms
19 of the lease, they've then accepted the property;
20 correct?

21 A. Yes.

22 (Defendant's Exhibit No. 2 marked for
23 identification.)

24 Q. I'm going to hand you this document. Can you
25 identify that document for the record?

1 THE COURT: Are you going to introduce number
2 1?

3 MR. MCLEOD: Yes, Your Honor.

4 THE COURT: Any objection?

5 MS. LEWIS: No objection, Your Honor.

6 THE COURT: All right. Defendant's Exhibit 1
7 entered.

8 Now you're looking at what?

9 (Defendant's Exhibit No. 1 admitted into
10 evidence.)

11 THE WITNESS: This is an agreement for the
12 architectural services between WILDEVCO and
13 Christopher Booker Architects in Augusta.

14 BY MR. MCLEOD:

15 Q. And you saw Mr. Hilderbrand looking at the
16 plans we brought in. Those are the plans that
17 Mr. Brooker prepared; correct?

18 A. Yes.

19 Q. And you would expect Mr. Brooker to give
20 Mr. Hilderbrand the most updated architectural
21 plans; correct?

22 A. I would think -- I mean, it depends on what
23 stage in the process they're in, because I'm sure
24 there are changes made in the process.

25 Q. Sure. But to prepare for Mr. Hilderbrand to

1 prepare the site plans, you would expect the
2 architect to provide him with the most updated
3 architectural plans; correct?

4 A. I would suppose, yes.

5 Q. Okay. And then part of that contract, the
6 architect's contract, number 2, he provides he's
7 going to give a life safety code study.

8 THE COURT: Give a what?

9 MR. MCLEOD: Something identified as a life
10 safety code study.

11 THE COURT: Life safety code study.

12 MR. MCLEOD: And a life safety plan. And I
13 think it's on --

14 THE COURT: And Exhibit 2 calls for the life
15 safety code study to be given by whom to whom?

16 BY MR. MCLEOD:

17 Q. The architect in this contract agrees to
18 provide a life safety code study and a life safety
19 plan; correct?

20 THE COURT: To whom?

21 MR. MCLEOD: To WILDEVCO.

22 A. It says life safety code 2000 review.

23 Q. Okay.

24 A. And a life safety plan.

25 Q. Okay. So it does.

1 A. Yes.

2 Q. This contract -- you've contracted with the
3 architect to provide you with both those things;
4 correct?

5 A. That would be part of the documents that they
6 would provide.

7 Q. Okay. And you heard Mr. Hilderbrand's
8 testimony when he was reviewing the architectural
9 plans that they called for a ramp; correct?

10 A. I believe so, yes.

11 Q. Okay. So it calls for a curb all the way
12 across the front; correct?

13 A. Are you asking me that based on the plans --

14 Q. Architectural plans.

15 A. -- or on the testimony?

16 Q. Based on the architectural plans, it calls for
17 a curb; correct?

18 A. I'm not sure I can answer that question. I'm
19 not qualified.

20 Q. Okay. Article six of the architectural
21 contract between Mr. Brooker and WILDEVCO provides
22 for field inspections, correct, for \$100; correct?

23 A. I'm looking for that section.

24 Q. Okay. Sorry.

25 A. Right. It says that they'll be reimbursed for

1 field inspections or they'll charge \$100 per visit.

2 Q. Okay. And then below it it's got a certificate
3 of payment including site visit for \$165; correct?

4 A. Yes.

5 Q. Did you ever hire Mr. Brooker, the architect,
6 to do a field inspection?

7 A. No.

8 Q. Okay. You didn't want him to go take a look at
9 the life safety plan to see if it's been applied in
10 this project?

11 A. I felt like between the general contractor, the
12 architect, and the engineers, that they were the
13 ones that had the expertise to be able to determine
14 whether things were missing or done incorrectly.
15 They would -- between the three of them, somebody
16 would bring up an issue.

17 Q. But if you don't get them to go out to the
18 site, how are they going to bring up an issue?
19 Correct?

20 A. I'm sorry?

21 Q. If you don't ask them to go to the site and pay
22 them \$100, they're not going to pick up an issue;
23 correct?

24 A. Well, visually they wouldn't. But I think if
25 somebody else was reviewing the plans, it should

1 have been picked up by the contractor or the
2 building inspector when they applied for the
3 permits, you know, somewhere along the line that
4 somebody who had the expertise to be able to read
5 the plans would pick up on that.

6 Q. Would you agree with me that the purpose of a
7 field inspection is for the architect to go out
8 there and make sure the construction is per his
9 plans? Correct?

10 A. I would guess that's what they do. I don't
11 know for sure.

12 Q. And you just elected not to have them do that;
13 correct?

14 A. I didn't feel the need.

15 Q. Okay. You knew this was going to be open to
16 the public, correct, this store, Fred's store?

17 A. Yes.

18 Q. Okay. And you mentioned you had done some
19 inspections of the construction site yourself;
20 correct?

21 A. Yes.

22 Q. But you're not qualified as an architect or an
23 engineer to do those types of inspections; correct?

24 A. I wasn't inspecting for -- to match up with
25 plans. I was more inspecting as an owner to make

1 sure that people were working and work was getting
2 done so when the contractor would ask for draws that
3 we would know what progress was being made.

4 Q. You were asked questions about the construction
5 contract between WILDEVCO and Tippins-Polk. Who
6 prepared that?

7 A. Tippins-Polk, I believe.

8 Q. And the two parties on that contract were,
9 obviously, WILDEVCO and Tippins-Polk; correct?

10 A. Yes.

11 Q. No Fred's; correct?

12 A. I'm sorry?

13 Q. Fred's was not a part of that; correct?

14 A. No.

15 Q. Under the construction agreement and -- which I
16 think is Exhibit No. 4, it provides for a final
17 inspection by WILDEVCO; correct? It's the last page
18 under project schedule, if that will help you.

19 A. It says final inspection. It doesn't say by
20 whom.

21 Q. Okay. And it's got a punch-out. What's a
22 punch-out of building?

23 A. I'm not exactly sure. I think that's a term
24 that the contractor uses.

25 Q. Is this the first time you've built any

1 building like this to be occupied as a retail space
2 or a space open to the general public?

3 A. Second.

4 Q. Okay. So you're familiar with what a punch-out
5 process is; is that correct?

6 A. I'm familiar with what that could be, yes.

7 Q. And it allows the owner, such as in this case,
8 WILDEVCO, to come out and say we need to get this
9 changed, we need to get this changed, whatever;
10 correct?

11 A. Correct.

12 Q. Okay. So a punch-out essentially is a final
13 inspection by the owner or, in this case, WILDEVCO;
14 correct?

15 A. Could be, yes.

16 Q. It is though, isn't it?

17 A. Well, I mean, it could be some other parties as
18 well.

19 Q. Sure.

20 A. I mean, it wouldn't necessarily be the owner.

21 Q. That's a good point. Since you're not
22 qualified, it would probably be reasonable to hire
23 the architect to visit with you or the engineer;
24 correct?

25 A. Probably not. I would probably include maybe

1 the tenant or the lender.

2 Q. Okay. And do you recall doing the final
3 inspection or a punch-out?

4 A. I don't recall if I did or didn't. I just
5 don't remember.

6 Q. If you're the owner and you're going to open
7 this store to the public, don't you think it's
8 reasonable for you to make an inspection of the
9 property as well?

10 A. Yes.

11 Q. Okay. But you don't recall doing it?

12 A. It's been ten years. I would suspect that I
13 did, but I can't answer that.

14 Q. And the first time you walked onto the site,
15 you could tell it had a curb in the front; correct?

16 A. Yes.

17 Q. Okay. And you could tell that that curb that
18 runs across the front was painted yellow; correct?

19 A. I'm not -- I mean, it depends on when. I don't
20 know specifically when I would have looked at it,
21 whether it was painted or not painted. No, I don't
22 specifically recall it being painted or not painted.
23 I don't recall.

24 Q. Who would have painted it after Tippins-Polk
25 left?

1 A. I don't know.

2 Q. Okay. Now, part of -- we talked about a little
3 bit about maintenance previously, or you did. And
4 you're responsible -- WILDEVCO is responsible for it
5 at the Fred's store in Williston; correct?

6 A. Yes.

7 Q. And painting is part of maintenance; correct?

8 A. Could be, yes.

9 Q. You've painted the curb since the incident;
10 correct?

11 A. Yes.

12 Q. And that's because it was fading, chipping,
13 whatever. You've maintained that paint; correct?

14 A. We re-stripped the parking lot, and in the
15 process of re-stripping the parking lot, we requested
16 that they repaint anything that was already painted.

17 Q. Do you remember when that was done?

18 A. Around 2012 or '13.

19 Q. And the certificate of occupancy -- when was --
20 here, I'll give you a copy of it. That will help
21 you recall when it was completed.

22 A. October 25th, 2005.

23 Q. Okay. So 2012, 2013, that's when you first
24 re-stripped the parking lot and painted the curb;
25 correct?

1 A. Yes.

2 Q. Okay.

3 MR. MCLEOD: Let's mark this as Exhibit 3.

4 (Defendant's Exhibit No. 3 marked for
5 identification.)

6 BY MR. MCLEOD:

7 Q. So this is a certificate of occupancy that you
8 would have received from the County of Barnwell;
9 correct?

10 A. Yes.

11 Q. And it's them telling you that the building
12 complied with the building code; correct?

13 A. I suppose. It has some notes on here about
14 things verifying the next inspection. But I suppose
15 if they issued it, it complied with the building
16 code.

17 Q. Okay. Do you recall if WILDEVCO made a final
18 inspection before the last payment to Tippins-Polk?

19 A. I don't specifically recall an inspection, but
20 I don't recall not inspecting either.

21 Q. It would have been the reasonable thing to do
22 though; correct?

23 A. Yes.

24 Q. If you were to walk up right after
25 construction, you could have told that the curb was

1 painted or not; correct?

2 A. Yes.

3 Q. And in the same manner, you could have looked
4 at the transition of the ramp -- and to make sure
5 it's clear you know what I'm talking about, the curb
6 down to where it's flush, that little triangle.

7 A. Yes.

8 Q. Just like you could tell the curb was painted,
9 you could look at that transition area and you could
10 tell if it was painted or not; correct?

11 A. Yes.

12 Q. It's visual to the naked eye; correct?

13 A. Correct.

14 Q. If you're facing the store, there's propane --
15 I know they're closed now. But at the time of the
16 incident, before and after, there was a propane area
17 where they sold propane tanks.

18 A. Yes.

19 Q. And there were a couple bollards, those little
20 yellow columns in front of them.

21 A. Correct.

22 Q. That wasn't in the contract for Tippins-Polk to
23 install; correct?

24 A. Correct.

25 Q. Who installed those? Was it WILDEVCO who

1 installed them or was it Fred's?

2 A. I don't know. It wasn't WILDEVCO.

3 Q. And what are the purpose of those bollards?

4 MS. LEWIS: Objection, Your Honor.

5 THE COURT: How is that relevant?

6 MR. MCLEOD: It is, Your Honor.

7 THE COURT: I'm asking you.

8 MR. MCLEOD: Okay. It's to keep -- it's to
9 protect -- it's a protective device. Fred's has got
10 them set up at other stores. Sorry.

11 MS. LEWIS: He has testified that WILDEVCO did
12 not install those.

13 THE COURT: We don't have a jury. I'm going to
14 let you ask and answer it, but I don't see how it's
15 got anything to do with the lady falling. Go ahead.

16 MR. MCLEOD:

17 Q. Do you know what the purpose of those bollards
18 are?

19 A. It's supposed to keep a vehicle from driving
20 and crashing into them.

21 Q. Okay. It's a safeguard; correct?

22 A. Yes.

23 Q. Okay. And it's also a warning; correct?

24 A. I guess, yes.

25 Q. Okay. And those were installed after

1 construction; correct?

2 A. Yes.

3 Q. And after completion of the construction
4 project, you made periodic inspections of the
5 property; correct?

6 A. Yes.

7 Q. Okay. Were you conducting anything relating to
8 safety purposes during these inspections?

9 A. They weren't really inspections in the sense
10 that I have a checklist on the things. I mean, that
11 was -- they were -- I'd go there and -- you know,
12 observing the condition of the parking lot and
13 whether the lights were working, things like that.
14 I didn't specifically go in looking for safety
15 issues with the exception of the lighting. I would
16 make sure it was lit at night.

17 Q. And that's a safety issue?

18 A. Correct.

19 Q. And you'd make those inspections about once a
20 month?

21 A. That or as requested by a tenant. If a tenant
22 notified me that there was an issue, I'd go down and
23 look.

24 Q. So those inspections would have gone on for
25 about -- since completion all the way up to the time

1 of Ms. Fountain's trip-and-fall; correct?

2 A. Well, you know, in the early stages of the
3 construction, everything is new, so it's probably
4 not as much of a -- as many visits as it probably
5 would be now, just because things were newer. So I
6 don't know that I was going down there every month
7 for five years. No.

8 Q. Just a couple more questions. I'm going to
9 hand you this photo. Do you recognize that photo?

10 A. That's the shopping center in Williston.

11 Q. That's the one including the Fred's; right?

12 A. Yes.

13 Q. And is that a photograph that took place soon
14 after construction?

15 A. It was because the Subway is not open.

16 Q. And you can look at that asphalt right there.
17 That's a dark, dark asphalt; correct?

18 A. Yes.

19 Q. And at that same time, the white concrete of
20 that transition area would have been a whole lot
21 whiter than it was in 2010; correct?

22 A. I'm sorry. Say that again.

23 Q. Over time concrete gets darker in nature;
24 correct?

25 A. I'm not sure. I think it changes color, but

1 I'm not sure if it gets darker. But it does
2 discolor from the original, yes. Still looks black
3 to me.

4 Q. Well, no, the concrete on the transition area
5 is what I'm referring to.

6 A. I'm sorry.

7 Q. It's kind of hard to depict in that picture,
8 but --

9 A. It darkens over time?

10 Q. I'm asking you. Do you agree with me that
11 concrete will get darker over time?

12 A. I think it gets dirty, yes, so it gets dark.

13 Q. And over time the asphalt gets lighter;
14 correct?

15 A. I don't know. I don't know if I can answer
16 that.

17 Q. That's fine.

18 A. I know it changes color. I can't tell you if
19 it's lighter or darker.

20 Q. Okay. Have you ever conducted a -- has
21 WILDEVCO ever conducted an inspection around the
22 store looking for tripping hazards?

23 A. Not specifically, no.

24 Q. Have you hired anybody to go around the store
25 looking for tripping hazards?

1 A. No.

2 Q. Now, in March of 2010, Fred's first contacted
3 you about Ms. Fountain's fall; correct?

4 A. Yes.

5 Q. Okay. I think it was either March or April.
6 Correct?

7 A. I think the testimony was it was March or it
8 may have been -- it was after the fact, so I'm not
9 sure how much later.

10 Q. Did Fred's ever contact you prior to
11 Ms. Fountain's fall to make any changes to the front
12 of the store?

13 A. Not that I recall, no.

14 Q. If they had made a request, you would have
15 complied with it, correct, as long as it was within
16 reason?

17 A. If it was reasonable, yes.

18 Q. Have you ever visited the Fred's store in
19 Barnwell?

20 A. No.

21 MR. LAFAVE: Objection.

22 THE COURT: Sustained. That's not relevant.

23 BY MR. MCLEOD:

24 Q. Are you aware of a trip-and-fall at the Fred's
25 store in Barnwell?

1 MR. LAFAVE: Objection.

2 THE COURT: Sustained.

3 MR. MCLEOD: On what, relevance?

4 THE COURT: Certainly.

5 MR. MCLEOD: Okay.

6 THE COURT: You hadn't laid any foundation for
7 other similar instances or anything else or that
8 there's any similarity if there were any falls.
9 Move along.

10 MR. MCLEOD: No further questions.

11 MR. LAFAVE: Thank you, Your Honor. I'll do my
12 best to be brief.

13 CROSS-EXAMINATION

14 BY MR. LAFAVE:

15 Q. Mr. Barber, can you tell me what the date is
16 that the lease agreement was entered into between
17 WILDEVCO and Fred's?

18 A. I believe it was in February of 2005.

19 Q. All right. The date of the construction
20 agreement with Tippins-Polk was entered into when?

21 A. April of 2005.

22 Q. So you actually had a lease agreement already
23 in place with Fred's before you ever entered into an
24 agreement for Tippins-Polk to build this property;
25 correct?

1 A. Yes.

2 Q. Okay. Had you done business with Tippins-Polk
3 prior to this build at Fred's?

4 A. No.

5 Q. And Tippins-Polk was referred to you as having
6 previously constructed Fred's stores; is that
7 correct?

8 A. Correct.

9 Q. Okay. Would you agree with me then, the
10 construction agreement, you were asked whether or
11 not Fred's was a party to that contract. And I'll
12 obviously concede that Fred's is not a signator on
13 that agreement. Correct?

14 A. That's correct.

15 Q. And that first paragraph, would you agree that
16 it indicates that the building that was to be
17 constructed was a Fred's store?

18 A. Yes, identified as a Fred's store with --

19 Q. Throughout your correspondence with
20 Tippins-Polk about this process, was there any
21 confusion as to who they were constructing a
22 building for?

23 A. No.

24 Q. Okay. So they understood and you understood
25 that this building was constructed for the use and

1 occupancy of Fred's?

2 A. Yes.

3 Q. Okay. You were asked about the architect. Who
4 identified that architect?

5 A. Who?

6 Q. Who selected the architect to do the draw?

7 A. WILDEVCO did.

8 Q. Okay. And who selected the engineer
9 Mr. Hilderbrand?

10 A. WILDEVCO.

11 Q. Do you know if there was any involvement or
12 interaction between anyone with Fred's and either
13 the architect or the engineer in this case?

14 A. The only involvement would have been with -- I
15 believe Fred's would have sent electronic
16 prototypical drawings to the architect for the basis
17 of their final drawings.

18 Q. Okay.

19 A. So that's the only interaction that I know of.

20 Q. And is the prototypical drawing you're
21 referring to what's noted as Exhibit C to the lease
22 agreement that you've been handed?

23 A. It would have been some version of that. It
24 may have been modified to -- my experience is that
25 these exhibits don't necessarily get updated as

1 quick as the actual plans do. So they -- I think
2 there's some language to say you request whatever
3 the latest plans are.

4 Q. Okay. Was there ever any intent to build the
5 building per this prototypical plan as far as the
6 scale-out with the sidewalks and the columns and the
7 ramps?

8 A. No. The prototypical plans are strictly
9 guideline because each state or region within the
10 state has different building requirements. So the
11 architect has to make adjustments to these plans to
12 comply with whatever the local building codes are.

13 Q. So Fred's would defer to you and defer to the
14 architect as to what the applicable building codes
15 were --

16 A. Yes.

17 Q. -- not based on requirements from this
18 prototypical building?

19 A. Yes.

20 Q. Okay. You were asked by counsel the difference
21 in the site plans and the architect plans and
22 whether -- this issue of confusion over the ramps.
23 Do you recall those questions?

24 A. Yes.

25 Q. In your capacity -- and I think the

1 construction agreement deems that you were the
2 construction manager, is that accurate, for
3 WILDEVCO?

4 A. Correct.

5 Q. Okay. Who would take the lead as far as
6 clarification of any confusion between architect's
7 plans and site plans?

8 A. I would expect that the general contractor
9 would.

10 Q. And is that what you hire them for is their
11 expertise and interpretation of plans and building
12 codes?

13 A. Yes.

14 Q. Okay. You were asked a lot of different
15 questions about the curbs and whether or not you
16 could walk up and visually see the change in
17 elevation. Do you recall that?

18 A. Yes.

19 Q. Okay. And it's clear that the concrete for the
20 sidewalk was a different color than the asphalt;
21 correct?

22 A. Correct.

23 Q. And you could see that there was a curb and
24 there was a transition; correct?

25 A. Yes.

1 Q. Okay. In walking up, looking at that, could
2 you see that that qualified as a dangerous
3 condition?

4 A. Not to me. I didn't perceive it as being a
5 danger.

6 Q. And would you expect that you would hire a
7 contractor who would build a building free of
8 dangerous conditions?

9 A. Yes.

10 Q. Expect a contractor to build a building that's
11 free of any latent defects, which you were asked
12 about, from the lease agreement?

13 A. Yes.

14 Q. So you didn't consciously go to the site
15 looking for latent defects that a contractor would
16 have created, would you?

17 A. I don't know that I could have identified a
18 latent defect, I mean, necessarily. So I wouldn't
19 be going specifically to look for them.

20 Q. And you were asked by counsel about
21 identification of trip hazards walking around the
22 building. Do you recall that?

23 A. Yes.

24 Q. Okay. And you said you never did that; is that
25 right?

1 A. Not specifically. I would look for hazards. I
2 mean, they could potentially be trip hazards or
3 other types. But I would look and make sure that
4 the property is free of any potential issues, yes.

5 Q. The photographs that you've seen, specifically
6 Plaintiff's Exhibit No. 1, this picture here, does
7 that curb appear to be in essentially the same
8 condition as it was when it was constructed?

9 A. Yes.

10 Q. Okay. No changes or modifications made by
11 WILDEVCO to that curb?

12 A. No.

13 Q. No changes or modifications made by Fred's to
14 that curb?

15 A. No.

16 Q. Okay. So if that qualified as a tripping
17 hazard, that would have been a tripping hazard
18 created in the construction; correct?

19 A. Yes.

20 Q. Okay. And wouldn't you expect your contractor
21 to not create tripping hazards in constructing the
22 building?

23 A. Yes.

24 MR. LAFAVE: No further questions, Your Honor.

25 THE COURT: Redirect, if any.

1 MS. LEWIS: Yes, very briefly, Your Honor.

2 REDIRECT EXAMINATION

3 BY MS. LEWIS:

4 Q. Mr. Barber, did Tippins-Polk call you at any
5 time to say, hey, Mr. Barber, there's confusion, it
6 appears to be between the architect's plans and the
7 engineer's plans, we need some clarification?

8 A. Not that I recall.

9 Q. Would you have expected them to do that if
10 there had been confusion or a lack of clarity on
11 their part?

12 A. Yes.

13 MS. LEWIS: Thank you, Your Honor. Nothing
14 further.

15 THE COURT: All right. You may step down.

16 MR. MCLEOD: Your Honor --

17 THE COURT: I -- my rule for 12 years, no
18 recross.

19 MR. MCLEOD: I don't intend to, Your Honor. We
20 had discussed previous about the deposition
21 designation.

22 THE COURT: We haven't gotten there yet.

23 MR. MCLEOD: Okay.

24 THE COURT: Let me run the trial, please.

25 All right. It's quarter to one. Y'all want to

1 break until about 2:00?

2 MS. LEWIS: That sounds good, Your Honor.

3 THE COURT: All right.

4 -- END OF TRANSCRIPT OF RECORD --

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C E R T I F I C A T E

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

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SC Court of Appeals

I, the undersigned, Bethanie K. Creppon, Circuit Court Reporter for the Second Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the trial of the captioned cause, relative to appeal in the Circuit Court for Barnwell County, South Carolina, on the 6th of June, 2016.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

May 16, 2017

s/Bethanie K. Creppon

Bethanie K. Creppon
Circuit Court Reporter