

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BARNWELL COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

RECEIVED

FEB 26 2020

SC Court of Appeals

Case No. 2017-000688

Martha M. Fountain and Curtis Fountain Plaintiffs

v.

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

v.

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

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

APPELLANT'S PETITION FOR REHEARING

COMES NOW the Appellant Tippins-Polk Construction, Inc. ("Appellant"), by and through its undersigned attorneys, respectfully petitioning to this Honorable Court for a rehearing of the opinion filed in this case on February 12, 2020 pursuant to Rule 221 of the South Carolina Appellate Court Rules. In its opinion, the Court affirmed the trial court's ruling regarding the existence of a special relationship between Appellant and Respondent Fred's Inc. ("Fred's") and regarding the finding that Fred's and Respondent Wildevco, LLC ("Wildevco") (collectively, "Respondents") were without fault. Appellant respectfully submits that this Court overlooked or

misapprehended the following points:

I. THERE IS NO SPECIAL RELATIONSHIP BETWEEN APPELLANT AND FRED'S TO SUPPORT FRED'S' CLAIM FOR EQUITABLE INDEMNITY.

In its opinion, this Court affirmed the trial court's finding of the existence of a special relationship between Fred's, the tenant of the subject building, and Appellant, the general contractor hired by the owner, Wildevco, to construct the subject building. The existence of the special relationship was based upon the following facts:

- (1) Appellant was recommended to Wildevco for the Fred's project because Appellant had experience constructing other Fred's stores;
- (2) The construction contract between Wildevco and Appellant provided it was an agreement for the construction of "one Fred's store";
- (3) Wildevco agreed in its lease with Fred's to "cause construction" of the store in accordance with conceptual plans Fred's provided as an attachment to the lease;
- (4) Polk, the owner of Appellant, testified he knew Appellant was hired to build a Fred's store before construction began;
- (5) Polk testified that Appellant had previously constructed ten to fifteen other Fred's stores;
- (6) Polk testified that representatives of Fred's often visited the site during construction and examined every aspect of the building; and
- (7) Appellant owned a Fred's store located in a neighboring county.

It is undisputed that Respondents entered into a contract whereby Fred's agreed to lease the subject building from Wildevco following completion of construction by Wildevco,¹ and that Wildevco

¹ "All of said construction shall be done by [Wildevco] at its own cost and expense, in a good and workmanlike manner, using first quality materials in full compliance with all laws, rules and regulations of all governmental authorities having jurisdiction thereof." (R. p. 476).

hired Appellant pursuant to a separate contract to construct the subject building. The “relationship” between Fred’s and Appellant as it relates to the subject project, therefore, is that of a tenant and a general contractor, with the only commonality between the two being that they each entered into separate contracts with Wildevco relating to the construction of the subject building. For the following reasons, such a relationship is insufficient to support Fred’s equitable indemnity claim against Appellant.

A. Any negligence or breach of contract by Appellant was directed at Wildevco and not at Fred’s.

South Carolina law is clear that a party may recover for equitable indemnity in cases of imputed fault or if a special relationship exists between the parties. See, e.g., Vermeer Carolina’s, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 61, 518 S.E.2d 301, 305 (Ct. App. 1999). “A sufficient special 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.” Winnsboro v. Wiedman-Singleton, Inc., 307 S.C. 128, 132, 414 S.E.2d 118, 121 (1992) (emphasis added).

Here, Appellant’s breach of contract or negligence, if any, was directed at Wildevco and not at Fred’s. Appellant entered into a contract with Wildevco “for the construction of one Fred’s store w/ strip center to be located in the Town of Williston, South Carolina” (R. p. 470). Appellant’s contractual obligations stemming from this construction contract were owed to Wildevco as the owner of the subject property and the party that hired and paid Appellant to construct the building. Similarly, Appellant’s duties to construct the building commensurate with industry standards, in compliance with the applicable building codes, and in accordance with the architectural and site plans provided to it were owed to Wildevco as owner of the subject property. Therefore, any breach of the construction contract or breach of the aforementioned duties of care

would have been directed at Wildevco and, as such, a special relationship exists solely between Wildevco and Appellant.

Looking to the string cite of cases on page seven of the opinion wherein the Court cited to appellate court decisions where a special relationship was recognized, in each of these cases there is a *direct* relationship between the indemnitor and indemnitee. For example, in First Generation Services of Charleston, Inc. v. Miller, 314 S.C. 439, 443, 445 S.E.2d 446, 448 (1994), the South Carolina Supreme Court determined that there is a special relationship between a contractor and subcontractor sufficient to support an equitable indemnity claim. In Stuck v. Pioneer Logging Machinery, Inc., 279 S.C. 22, 24, 301 S.E.2d 552, 554 (1983), the South Carolina Supreme Court held that there is a special relationship between a purchaser of a defective vehicle and the seller of said vehicle. In Addy v. Bolton, 257 S.C. 28, 33, 183 S.E.2d 708, 709 (1971), the South Carolina Supreme Court determined that there is a special relationship between a landlord and a general contractor hired by the landlord who damaged a tenant's property. In Griffin v. Van Norman, 302 S.C. 520, 527, 397 S.E.2d 378, 382 (Ct. App. 1990), this Court found a special relationship existed between the seller of a home and an exterminator hired by the seller. Finally, in McCoy v. Greenwave Enterprises, Inc., 408 S.C. 355, 360, 759 S.E.2d 136, 138 (2014), the South Carolina Supreme Court determined that there is a special relationship between a property owner and a former owner of the same property by virtue of a purchase agreement between the two.

Not only are there contractual relationships between the indemnitors and indemnitees in each of the above-cited cases, but there are also, at the very least, *direct* relationships between the two which does not exist between Appellant and Fred's with respect to the subject project. In each of the above-cited cases, the special relationship existed between the parties by virtue of the indemnitor's negligence or breach of contract being directed at the indemnitee for which the

indemnitee incurred attorney's fees and costs in defending itself against the indemnitor's conduct. In cases where our appellate courts have recognized a special relationship, it has also been implicitly recognized that the parties must stand in such a relation with each other whereby duties are undertaken by the indemnitor and flow from the indemnitor directly to the indemnitee, whether such duties arise pursuant to contract or under common law negligence. Without such a direct and targeted relationship between the indemnitor and indemnitee which extends beyond the relationship established by virtue of one party getting sued for the other's wrongdoing, our appellate courts have generally held, until this case, that a special relationship does not exist.

Any negligence or breach of contract committed by Appellant during construction would have been directed at Wildevco, as the party that hired and paid Appellant, the owner of the subject property, and the signatory to the construction contract. Accordingly, for the foregoing reasons, Appellant respectfully requests the Court grant its petition for rehearing on this basis.

B. From the perspective of Fred's, Appellant is merely a remote or distant independent contractor.

As the Court is well aware, the South Carolina Supreme Court held in Rock Hill Telephone Co., Inc. v. Globe Communications, Inc., 363 S.C. 385, 390, 611 S.E.2d 235, 238 (2005), that the relationship between a utility company and a subcontractor hired by the utility company's independent contractor is an "attenuated one" and is insufficient to support an equitable indemnity claim between the utility company and the subcontractor. In that opinion, the Court stated as follows:

The utility hired an independent contractor to install an underground communications line. The contractor, in turn, hired a subcontractor to perform part of the work. Given these facts, we find that the subcontractor is merely a remote or distant independent contractor, and therefore does not have a special relationship with the utility as contemplated under our jurisprudence.

Id.

Here, there is an exceedingly similar relationship among the parties. Like the utility and independent contractor in Rock Hill Telephone, Fred's and Wildevco entered into a contract whereby Wildevco agreed to construct the subject building. Like the independent contractor and subcontractor in Rock Hill Telephone, Wildevco, *in turn*, hired Appellant to construct the store pursuant to a separate contract. Much like the utility in Rock Hill Telephone, Fred's "skipped a level" and declined to assert an equitable indemnity claim against its independent contractor, Wildevco, in favor of asserting such a claim against Wildevco's independent contractor, Appellant. However, much like the relationship between the utility and the subcontractor in Rock Hill Telephone, the relationship between Fred's and Appellant is an attenuated and tangential one, with the only commonality between the two being that they each entered into separate contracts with Wildevco relating to the construction of the subject building.

It is important to note that in explaining its decision in Rock Hill Telephone, the Court held that "[u]nlike the dissent, we find that there must be some kind of relationship between the parties beyond the relationship established by virtue of one party alleging that he was sued because of another party's wrongdoing." Id., 363 S.C. at 390 n.3, 611 S.E.2d at 235 n.3. In so stating, the Court implicitly recognized that there is a separate and independent relationship between the independent contractor and subcontractor whereby the subcontractor owed contractual obligations and common law duties of care to the independent contractor—a relationship which did not exist between the utility and the subcontractor. See Winnsboro, 307 S.C. at 132, 414 S.E.2d at 121 ("A sufficient special 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.") (emphasis added). The independent contractor in

Rock Hill Telephone would have been able to assert a claim for equitable indemnity against its subcontractor (assuming an absence of fault on the part of the independent contractor) because, if sued as a result of the subcontractor's breach of contract or negligence, such breach of contract or negligence by the subcontractor would have been directed at the independent contractor, not at the utility (with whom the subcontractor did not have a direct relationship). Here, however, there is no relationship between Fred's and Appellant with respect to the subject project beyond which was "established by virtue of one party alleging that he was sued because of another party's wrongdoing." Id.

The only commonality between Fred's and Appellant is that they each entered into separate contracts with Wildevco relating to the construction of the subject building, and such a relationship is insufficient to support Fred's equitable indemnity claim against Appellant. Accordingly, for the foregoing reasons, Appellant respectfully requests the Court grant its petition for rehearing on this basis.

C. The Court's reliance upon previous projects and course of dealings between Appellant and Fred's in support of its finding of a special relationship was, respectfully, misguided.

As indicated above, the Court focuses largely upon Fred's and Appellant's relationship with respect to previous projects separate and apart from the construction of the subject Fred's store, essentially ruling, in part, that because Fred's and Appellant have previously engaged in business dealings with each other this creates a special relationship between the two for subsequent projects. Specifically, the Court found the following facts in its opinion:

- (1) Appellant was recommended to Wildevco for the Fred's project because Appellant had experience constructing other Fred's stores;
- (2) Polk testified that Appellant had previously constructed ten to fifteen other Fred's stores; and

(3) Appellant owned a Fred's store located in a neighboring county.

Based on the foregoing, the Court determined that a special relationship exists between Fred's and Appellant.

Respectfully, the Court's reliance upon previous course of dealing and prior construction projects is misguided, especially considering that there is no nexus between the previous projects and the subject project. Further, there is no opinion of which Appellant is aware which has considered, either expressly or implicitly, previous construction projects and/or previous course of dealings in determining whether a special relationship exists between parties related to the subject project, occurrence, or transaction underlying the equitable indemnity claim. Rather, the appropriate inquiry is whether there existed a special relationship between Fred's and Appellant *with respect to the subject project* which underlies the equitable indemnity claim. As discussed above, there is no special relationship between Fred's and Appellant with respect to this project. The only commonality between the two is that they each entered into separate contracts with Wildevco relating to construction of the subject building, and there is no relationship between them beyond which was established by virtue of Fred's alleging that it was sued because of Appellant's wrongdoing. Appellant's previous experience constructing other Fred's stores and its ownership of a separate Fred's store (which Appellant did not build) has no bearing on the subject project. (R. p. 410).

It was improper for the Court to consider previous projects and course of dealings between Fred's and Appellant in determining that a special relationship existed between them. Accordingly, for the foregoing reasons, Appellant respectfully requests the Court grant its petition for rehearing on this basis.

II. THE COURT ERRED IN AFFIRMING THE TRIAL COURT'S FINDING THAT RESPONDENTS WERE NOT AT FAULT.

“A plaintiff asserting an equitable indemnification cause of action may recover damages if he proves: (1) the indemnitor was liable for causing the plaintiff’s damages; (2) the indemnitee was exonerated from any liability for those damages; and (3) the indemnitee suffered damages as a result of the plaintiff’s claims against it, which were eventually proven to be the fault of the indemnitor.” Walterboro Cmty. Hosp. v. Meacher, 392 S.C. 479, 485, 709 S.E.2d 71, 74 (Ct. App. 2011) (citing Vermeer Carolina’s, 336 S.C. at 63, 518 S.E.2d at 307). “The most important requirement for the finding of equitable indemnity is that the party seeking to be indemnified is adjudged without fault and the indemnifying party is the one at fault.” Vermeer Carolina’s, 336 S.C. at 63, 518 S.E.2d at 307. Under South Carolina law, there can be no indemnity among mere joint tortfeasors. Id. (citing Scott v. Fruehauf Corp., 302 S.C. 364, 396 S.E.2d 354 (1990)). “If the second party is also at fault, he comes to court without equity and has no right to indemnity.” Vermeer Carolina’s, 336 S.C. at 63, 518 S.E.2d at 307.

A. Respondents breached independent duties of care owed to Plaintiffs under common law premises liability, duties which Appellant did not owe to Plaintiffs and, therefore, cannot be deemed to have breached.

In the underlying action, Plaintiffs sued Respondents for negligence sounding in common law premises liability, namely, failing to discover and remedy/warn of alleged dangerous conditions existing on the subject property. Respondents were not sued for negligent construction of the subject building. Specifically, Plaintiffs’ Complaint alleged as follows:

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 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.

(R. p. 145).

“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, 205 (Ct. App. 2008). “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. A business visitor, such as Plaintiff Martha Fountain in the underlying case, “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. at 199, 659 S.E.2d at 203. “An invitee enters the premises with the implied assurance of preparation and reasonable care for his protection and safety while he is there.” Landry v. Hilton Head Plantation Prop. Owners Ass’n, Inc., 317 S.C. 200, 203, 42 S.E.2d 619, 621 (Ct. App. 1994). “A landowner owes an invitee a duty of due care to discover risks and to warn of or eliminate foreseeable unreasonable risks.” Id. (citing F. Patrick Hubbard & Robert L. Felix, *The South Carolina Law of Torts* 76 (1990)). 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. 240, 348, 638 S.E.2d 96, 100 (Ct. App. 2006).

The foregoing duties of care are independent duties owed by Fred’s and Wildevco to Plaintiffs under common law premises liability; however, Appellant, who completed construction of the subject Fred’s store approximately five years prior to the subject incident, did not owe any such duties to Plaintiffs. See Dunbar v. Charleston & W. Carolina Ry. Co., 211 S.C. 209, 216, 44 S.E.2d 314, 317 (1947) (“The liability of an owner or occupant of real estate in reference to injuries caused by a dangerous or defective condition of the premises depends in general upon his having control of the property. In fact, such liability depends upon control, rather than ownership, of the premises.”); see also Miller v. City of Camden, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997) (“One who controls the use of property has a duty of care not to harm others by its use. Conversely, one who has no control owes no duty.”). Respondents’ duty to Plaintiffs and other patrons is separate and apart from any duty related to the construction of the Fred’s store. Plaintiffs’ claims against Respondents were based upon the allegation that Respondents breached this duty to

discover and warn of or eliminate risks. However, Plaintiffs' claims against Respondents were not based on the creation of an unsafe condition.

Therefore, during the approximately five years that the alleged defective curb existed at the subject property, Respondents owed Plaintiffs and other patrons a duty to discover the alleged defective curb and either warn of or eliminate the condition, which they did not do. During trial, Wildevco's expert testified that there is a recognized safety standard for owners and occupants of public buildings to conduct inspections of the premises looking for tripping hazards similar to the condition that caused Plaintiffs' injuries. (R. p. 355–56). Respondents' expert further established that Wildevco, as the owner of the subject property, and Fred's, as the occupier of the subject property, have a duty to take affirmative action to inspect for tripping hazards around the property. Id. However, Wildevco's representative, Tad Barber ("Barber"), admitted that it failed to follow the standard of care opined by Respondents' expert. Barber testified that Wildevco did not inspect the property for tripping hazards and testified that Wildevco did not hire anyone to inspect the property for tripping hazards. (R. pp. 276, 300, 302–03). Fred's did not have a representative testify on its behalf. Barber testified that Fred's would have performed a punch list inspection prior to it taking possession of the subject property, but the record is otherwise devoid of Fred's undertakings of inspections of its premises. (R. pp. 285–86).

This breach of duty is what Respondents were sued for by Plaintiffs, which is a duty that was not owed to Plaintiffs by Appellant. Applying the Court's conclusion logically, the determination that Respondents were not at fault stands for the premise that despite shopkeepers' admissions that they have an obligation to inspect the premises to discover hazards so as to avoid injury to their invitees, that they admittedly fail to perform that duty at any point in time, and they are subsequently sued by a patron as a result of the condition which existed for years, that the

shopkeepers are insulated from negligence because the shopkeepers did not construct the building. Such a conclusion is counter to well-established precedent that a “landowner owes an invitee a duty of due care to discover risks and to warn of or eliminate foreseeable unreasonable risks.” See Landry, 317 S.C. at 203, 42 S.E.2d at 621. This principal of well-established law applies whether or not shopkeeper constructed the building.

Accordingly, for the foregoing reasons, Appellant respectfully requests the Court grant its petition for rehearing on this basis.

B. Wildevco negligently oversaw construction of the subject project and, therefore, is a joint tortfeasor.

1. Wildevco supplied defective construction plans for the project.

Wildevco was the developer for the subject project and was tasked with overseeing construction of the subject building. (R. p. 475–76) (“The Lessor agrees to cause construction of said Demised Premises and other improvements . . . at its own cost an expense, in a good and workmanlike manner, using first quality materials in full compliance with all laws, rules and regulations of all governmental authorities having jurisdiction thereof.”). Included with the foregoing was Wildevco’s obligation to procure construction plans. (R. p. 476).

The trial court’s order specifically stated that the testimony at trial indicated that there may have been potential areas of confusion in the drawings and plans, including a possible discrepancy between the architectural drawings and the site plans. (R. p. 20). This discrepancy between the two sets of plans involved the very issue the caused Plaintiff Martha Fountain to trip and fall. While the Court notes that Appellant did not contact the engineer regarding the discrepancy or seek clarification of the plans, it is undisputed that Wildevco supplied the plans for the subject project and the plans contain discrepancies. For example, Barber testified as follows at trial:

Q. And you’d agree with me there’s some confusion between

the architect's plans and the engineer's plan; correct?
A: There were some differences apparently, yes.
Q: And those differences could cause some confusion; correct?
A: I suppose.
Q: And you hired the architect, you hired the engineer; correct?
A: Correct.
Q: And then you took those plans and you gave them to
Tippins-Polk; correct?
A: Correct.

(R. pp. 280–81). Furthermore, Tilden Hilderbrand (“Hilderbrand”), a professional engineer licensed in South Carolina and the site engineer for the subject project, testified at trial that the architectural plans and site plans “appear to be different” (R. 262) and that these discrepancies could be confusing. (R. p. 250).

“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 C.J.S., *Contracts* § 329 at 781). The testimony at trial and the trial court’s findings of fact state that there are possible discrepancies in the plans which could have caused confusion. This Court noted this finding but stated that it was Appellant’s responsibility to alert the engineer/architect and otherwise seek clarification of the plans. However, Appellant is not arguing that it is not at fault and this has never been something that has been asserted by Appellant; rather, the only relevant inquiry as it relates to Wildevco is whether it, at the very least, is one percent negligent in causing Plaintiffs’ injuries. It is clear that the “discrepancy” is what ultimately led to the alleged defective curbing. As Wildevco was the party that supplied the plans which contained this discrepancy, and in supplying the plans impliedly warranted their sufficiency, Wildevco is at least partially at fault in causing the alleged defective condition over which Plaintiff Martha Fountain tripped and fell.

2. Wildevco tasked an unqualified person to oversee construction of the subject building.

Furthermore, Wildevco is also at least partially at fault as it tasked Barber, an unqualified person, to oversee the construction of the subject store. Wildevco knew or should have known that Barber was unqualified to oversee the project and doing so created an undue risk of harm to the general public, including Plaintiffs. Accordingly, Wildevco was at fault for Plaintiffs' injuries because Wildevco tasked Barber with overseeing the construction when he was not qualified to do so.

The Court states in its opinion that Appellant has cited no authority that an owner of property has a duty to hire a qualified person to oversee construction. However, Wildevco is not only the owner of the subject property but is also the developer of the subject property. Under South Carolina law, developers can be held liable for their own negligent construction. See Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co., 425 S.C. 276, 288, 821 S.E.2d 509, 515 (Ct. App. 2018). The trial court specifically concluded that "Thaddeus 'Tad' Barber is a partner in Wildevco and was responsible for overseeing the project"— a finding of fact which was not disturbed on appeal. (R. p. 19). However, the trial court also found (a finding which this Court adopted) that Barber "had no education or formal training in construction, engineering and/or architectural." Id. As developer, Wildevco failed to hire someone qualified to oversee construction of the project.

"In circumstances where an employer knew or should have known that its employment of a specific person created an undue risk of harm to the public, a plaintiff may claim that the employer was itself negligent in hiring, supervising, or training the employee, or that the employer acted negligently in entrusting its employee . . . created an unreasonable risk of harm to the public." James v. Kelly Trucking Co., 377 S.C. 628, 631 (2008)(citing Restatement (Second) of Torts §

317 (1965)(cited with approval in Degenhart v. Knights of Columbus, 309 S.C. 114, 116 (1992)). As this recitation suggests, “the employer’s liability under such a theory does not rest on the negligence of another, but on the employer's own negligence.” Id. Furthermore, “[i]t seems to be well settled that where a person holds himself out as specially qualified to perform work of a particular character, there is an implied warranty that the work which he undertakes shall be of proper workmanship and reasonable fitness for its intended use.” Hill, 219 S.C. at 271. This Court determined that Wildevco was developer for the project and that Barber was responsible for overseeing the project. However, Barber had no education, training, or experience in construction; was not qualified to read architectural and site plans (R. 291); and was not qualified to conduct inspections of the subject project to determine whether or not the building met building codes and industry standards (R. p. 276). Aware of his lack of knowledge, it would have been reasonable for Barber to hire the architect and/or site engineer to inspect the property and ensure it was built in accordance with the architectural plans and site plans secured from them by Wildevco. (R. p. 294), or at least conduct a final inspection (which Barber does not recall doing) (R. p. 295). Barber’s lack of knowledge was, at the very least, a link in the causal chain of Plaintiffs’ injuries which renders Wildevco to be at least partially at fault.

Wildevco, as developer of the subject project, failed to provide someone qualified to oversee the project, and as a result, Wildevco failed to comply with the standard of care that was required from a developer and is liable for Plaintiffs’ injuries. Accordingly, Wildevco is at least one percent at fault for Plaintiffs’ injuries and is prohibited from recovering under equitable indemnification because of unclean hands.

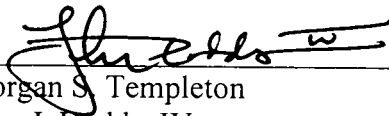
Accordingly, for the foregoing reasons, Appellant respectfully requests the Court grant its petition for rehearing on this basis.

CONCLUSION

WHEREFORE, for the reasons set forth above, Appellant respectfully requests the Court grant its petition for rehearing; reverse the trial court's order finding the existence of a special relationship between Fred's and Appellant and finding that Fred's and Wildevco were not at fault; and remand this matter to the circuit court.

Dated this 25th day of February, 2020.

WALL TEMPLETON & HALDRUP, P.A.



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THE STATE OF SOUTH CAROLINA
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Court of Common Pleas

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Doyet A. Early, III, Circuit Court Judge

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

PROOF OF SERVICE

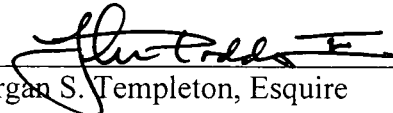
I, John J. Dodds, IV, of Wall Templeton & Haldrup, do hereby certify that I have served the Appellant's Petition for Rehearing, by depositing the same in the United States Mail, properly posted on February 25th, 2020 addressed as follows to counsel of record:

Lee Ellen Bagley, Esq.
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SIGNATURE INTENTIONALLY ON FOLLOWING PAGE

WALL TEMPLETON & HALDRUP, P.A.

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

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February 25, 2020

The Honorable Jerry Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RECEIVED
FEB 26 2020
SC Court of Appeals

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

Dear Mr. Kitchings:

Please find enclosed an original and seven copies of Appellant's Petition for Rehearing in the above referenced matter. I am also enclosing the requisite \$50 filing fee. Please file the original and return a filed-stamped copy to me in the envelope provided for your convenience.

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

Thank you for your time and attention to this matter.

Sincerely,

WALL TEMPLETON & HALDRUP, P.A.

John J. Dodds, IV

JJD,IV/sjs

Enclosures

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

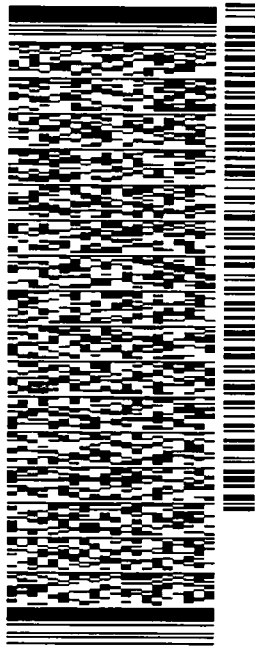
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UNITED STATES US

SHIP DATE: 25FEB20
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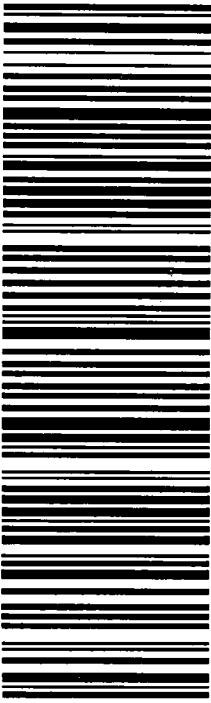
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