THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM BARNWELL COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2017-000688

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

v.

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

v.

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

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

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATION OF COUNSEL

The undersigned hereby certifies that Appellant filed a petition for rehearing with the Court of Appeals and the Court of Appeals ruled on the petition with finality on March 31, 2020. (App. p. 860).

QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals' decision conflict with this Court's holding in Rock Hill Telephone v. Globe Communications, Inc., 363 S.C. 385, 611 S.E.2d 235 (2005) requiring that there must be a special relationship between the parties seeking equitable indemnity?

II. Did the Court of Appeals' decision misapply nearly a century of premises liability jurisprudence from this Court regarding the Respondents independent duties owed to the Plaintiffs which could not have been breached by Appellant?

III. Did the Court of Appeals err in overlooking the breach of the independent duties owed to the Plaintiff so as to find Respondents free from fault so as to allow for an equitable indemnity claim?

STATEMENT OF THE CASE

This is a premises liability matter arising out of a trip-and-fall that occurred at a Fred's store in Williston, South Carolina. Respondent Fred's, Inc. ("Fred's") was the tenant of the subject building pursuant to a written lease (the "Lease") and Respondent Wildevco, LLC ("Wildevco") was the developer, owner, and landlord of the property and improvements located thereon. (App. p. 22). Appellant Tippins-Polk Construction, Inc. ("Appellant") was the general contractor hired by Wildevco to construct the subject building. Id.

In 2005, Respondents entered into the Lease for the subject building, whereby Wildevco agreed to construct and lease the building to Fred's in which Fred's would operate one of its stores.

(App. pp. 479–533). According to the Lease, Wildevco agreed to construct the building and other improvements in accordance with the "Plot Plan" and "Project Criteria" provided by Fred's. (App. pp. 481–82). Wildevco was required "to provide [Fred's] with construction plans from, or provided by [Wildevco's] builder," which plans were further required to "be approved, dated and initialed by [Fred's]." (App. p. 482). "All of said construction [was to] be done by [Wildevco] at its sole cost and expense . . . ." Id. The Lease also provided that Wildevco agreed to "keep and repair the exterior of the Demised Premises, including the parking lot, parking lot lights, entrance and exits, sidewalks, ramps, [and] curbs . . . ." (App. p. 485). The term of the Lease was for ten years to commence April 1, 2005. (App. p. 482–84).

As part of its obligations under the Lease, Wildevco hired an architect to provide architectural plans and specifications for the building and hired engineers to provide site plans for the property. (App. p. 278). The site engineer for the subject project was Hass & Hilderbrand, Inc. (the "Engineer"). The Engineer prepared the site plans for the subject project, which set forth "how site will be graded, how the utilities are installed; basically everything on the property that's developed from the ground down, including pavement." (App. p. 240). The Engineer used the architectural plans as its basis for creating the site plans. (App. p. 249). However, the architectural plans that were provided to the Engineer were different from the final stamped architectural plans. (App. p. 263). Furthermore, both the Engineer and the trial court acknowledged that the sidewalk details in the architectural plans conflicted with the sidewalk details in the site plans. (App. p. 23; R. p. 256). Specifically, it was noted that the site plans did not include a handicap ramp and indicated a nine-foot sidewalk, while the architectural plans included a ramp and indicated a sidewalk in excess of ten feet. Id.

Pursuant to the contract between Wildevco and the architect, Christopher Booker

Architects (the "Architect"), Wildevco had the option of requesting field inspections by the Architect for the price of $100.00 per visit; however, Wildevco never requested the Architect to conduct any such field inspections to ensure that the building and improvements were constructed in accordance with the architectural plans. (App. p. 565; App. p. 294). Furthermore, the Engineer testified at trial that it was regular for developers to request field inspections to ensure that the project was constructed in accordance with the site plans. (App. p. 258–59). However, Wildevco never requested the Engineer to conduct any such inspections. Id. According to Thaddeus Barber ("Barber"), Wildevco's construction manager,

> I felt like between the general contractor, the architect, and the engineers, that they were the ones that had the expertise to be able to determine whether things were missing or done incorrectly. They would – between the three of them, somebody would bring up an issue.

(App. p. 294). As discussed in further detail below, the conflict architectural and site plans ultimately led to the condition which caused Plaintiff Martha Fountain to trip and fall.

Wildevco ultimately hired Appellant as the general contractor to construct the subject building. (App. p. 476–78).[1] Pursuant to the contract, Appellant agreed to construct the Fred's store in accordance with the architectural plans and site plans provided to it. Id. Construction proceeded and the Certificate of Occupancy was ultimately issued in October 2005. (App. p. 561).

On or about March 10, 2010, Plaintiff Martha Fountain was entering the subject building and "tripped on the raised sidewalk in front of the store's entrance and fell[,]" causing her to sustain various personal injuries. (App. p. 147). Plaintiffs Martha and Curtis Fountain ("Plaintiffs") thereafter filed this premises liability action on May 12, 2020 in the Barnwell County Court of Common Pleas against Fred's and Wildevco. (App. pp. 147–49). Specifically, Plaintiffs'

[1] Fred's was not a party to the contract between Wildevco and Appellant. Id.

complaint alleged that Respondents were negligent in the following particulars:

> (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; [and]
> (g) In such other particulars that the evidence may establish.

(App. p. 148). Notably, Plaintiffs did not allege negligence based upon the creation of an unsafe condition. (App. pp. 147–49).

Two years after the filing of the complaint, Respondents filed an amended answer and third-party complaint asserting various claims, including a claim for equitable indemnity, against Appellant. (App. pp. 156–63). The case was litigated and was ultimately given a date certain trial date of March 21, 2016. On March 21, 2016, Respondents and Appellant appeared before the court at which time Wildevco moved for a continuance. (App. p. 172–73). During the hearing, counsel for Wildevco informed the court that Plaintiffs had settled their claims against Respondents and that Respondents would be proceeding on its sole remaining claim of equitable indemnity. (See generally App. pp. 170–77).

On April 21, 2016, the settlement agreement between Plaintiffs and Respondents was executed, the following portion of which was cited in Wildevco's memorandum in support of its third-party complaint:

> 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.

(App. p. 145). Having carved out a potential contribution claim against Appellant, Respondents appeared before Judge Early on the morning of trial and moved to amend their third-party complaint to add contribution as an additional claim against Appellant. (App. p. 183). The trial court denied the motion to amend, and the trial on the sole remaining claim of equitable indemnity occurred on June 6 and 7, 2016 before Judge Early. (App. p. 191).

At the conclusion of trial, the court took the matter under advisement and subsequently filed an Order and Judgment in favor of Respondents on August 1, 2016. (App. p. 442; App. p. 18). The Order concluded, in part, that Appellant "breached its contractual obligation and its duty of care to [Respondents] in failing to construct the premises free from latent defects." (App. p. 27). The Order further stated that "[t]he construction defects, for which [Appellant] was solely responsible, were the sole and proximate cause of Mrs. Fountain' injuries . . . ." (App. p. 28). The trial court determined that a special relationship existed between Fred's and Appellant to support its equitable indemnity claim, and also ruled that Respondents were without fault in causing Plaintiff's damages. (App. p. 10–11). Judgment was entered against Appellant in favor of Wildevco for the total sum of $305,418.30 and in favor of Fred's for the total sum of $76,691.82. (App. p. 29).

Appellant timely filed post-trial motions, which were denied. (App. pp. 35–62). Appellant thereafter timely filed an appeal to the South Carolina Court of Appeals. The appeal was argued on May 15, 2019 and an opinion was issued by the Court of Appeals on February 12, 2020 affirming in part and reversing in part the trial court's Order. (App. pp. 817–38). In pertinent part,

the Court of Appeals affirmed the existence of a special relationship between Fred's and Appellant and affirmed the trial court's ruling that Respondents were without fault, which are the rulings Appellant respectfully seeks this Court to review. Id. Appellant timely filed a petition for rehearing on February 26, 2020. (App. pp. 839–55). The petition was denied by the Court of Appeals on March 30, 2020. (App. p. 860). This petition for writ of certiorari follows.

ARGUMENT

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

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. Wiedman-Singleton, 303 S.C. 52, 56, 398 S.E.2d 500, 503 (Ct. App. 1990). In other words, "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 is exposed to liability by the wrongful act of another in which he does not join." Stuck v. Pioneer Logging Mach., Inc., 279 S.C. 22, 24, 301 S.E.2d 552, 553 (1983). The sole basis for the court's determination that Fred's may maintain an equitable indemnity claim against Appellant is that "a special relationship existed between Fred's and [Appellant] for the purposes of equitable indemnification." (App. p. 824). This conclusion ignores the tenets of Rock Hill Telephone v. Globe Communications, Inc., 363 S.C. 385, 611 S.E.2d 235 (2005).

A. The Court of Appeals' decision affirming the existence of a special relationship between Fred's and Appellant is in conflict with Rock Hill Telephone v. Globe Communications.

In Rock Hill Telephone, a utility company received a permit from the South Carolina Department of Transportation ("DOT") to install an underground cable along a highway. Id. at

388, 611 S.E.2d at 236. The utility hired an independent contractor to complete the work. Id. In turn, the independent contractor subcontracted a portion of the work to a subcontractor. Id. One evening, a car driven by the plaintiff struck the subcontractor's backhoe, causing severe injuries to the plaintiff. Id. The plaintiff thereafter sued the utility company and the subcontractor. Id. Both defendants ultimately settled with the plaintiff, and the utility then sued the subcontractor for equitable indemnity seeking to costs paid to the plaintiff in settlement. 363 S.C. at 388, 611 S.E.2d at 236–37. The United States District Court for the District of South Carolina certified the following question, in pertinent part, for the South Carolina Supreme Court: "Is the relationship between a utility holding a construction permit from the South Carolina Department of Transportation (DOT) and a subcontractor hired by the utility's independent contractor a 'special relationship,' allowing for a claim of equitable indemnity by the utility against the subcontractor?"

This Court answered the question in the negative and determined that a special relationship did not exist between the utility and the subcontractor. Id. at 388, 611 S.E.2d at 237. In so holding, the Court acknowledged that it has "held that the relationship between a contractor and a subcontractor supports a claim for equitable indemnification." Id. at 389, 611 S.E.2d at 237. "In the present case, however, the relationship between the utility and the subcontractor is an attenuated one." Id. at 390, 611 S.E.2d at 237. The Court continued,

> 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. (emphasis added).

Here, the relationships among the parties are analogous to those scrutinized in Rock Hill Telephone. Fred's contracted with Wildevco to have a building constructed and for Fred's to lease

the building from Wildevco as a Fred's store. (App. pp. 22–23). Pursuant to their contract, "[a]ll of said construction [was to] be done by [Wildevco] at its sole cost and expense . . . ." (App. p. 482). Wildevco, *in turn*, contracted with Appellant pursuant to a separate contract[2] to construct the building pursuant to the architectural and site plans provided to it. (App. p. 476). Like the relationship between the utility and the subcontractor, 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 subject building.

It is also 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. at 390 n.3, 611 S.E.2d at 237 n.3. In so stating, the Court recognized that there were two separate and independent relationships among the parties—one between the utility and the independent contractor, and one between the independent contractor and the subcontractor—with the overlap between the defendants being that they each entered into separate contracts with the independent contractor relating to the installation of the underground cable. Here, similarly, there are two separate and independent relationships among the parties—one between Fred's and Wildevco, and one between Wildevco and Appellant—with the commonality being that both Fred's and Appellant entered into separate contracts with Wildevco relating to the construction of the subject building. However, there is no relationship between Fred's and Appellant with respect to the subject project beyond which was "established by virtue

[2] It should be noted that the terms of the contract between Wildevco and Fred's were not referenced or incorporated by reference into the contract between Wildevco and Appellant. (App. p. 476) ("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.").

of [Fred's] alleging [it] was sued because of [Appellant's] wrongdoing." See Rock Hill Tele., 363 S.C. at 390 n.3, 611 S.E.2d at 237 n.3.

The Court of Appeals' affirming the trial court's finding of a special relationship is directly in conflict with Rock Hill Telephone and the decision should be reversed. Otherwise, the decision as it currently exists is in direct conflict with Rock Hill Telephone. Respectfully, the Court of Appeals lacks the authority to rule against prior published precedent from the Supreme Court but is instead bound by the decisions of the Supreme Court, including Rock Hill Telephone. See S.C. Const. art V, § 9 ("The decisions of the Supreme Court shall bind the Court of Appeal as precedents."); see also Campbell v. Robinson, 398 S.C. 12, 18, 726 S.E.2d 221, 225 (Ct. App. 2012) (stating the Court of Appeals may not overrule Supreme Court precedent). For the Court of Appeals' decision to stand, which departs from established Supreme Court precedent, it would be necessary for this Court to either reverse the Court of Appeals or overrule the sound reasoning of Rock Hill Telephone.

B. Even if it is not required that Rock Hill Telephone be overruled, the Court of Appeals' decision affirming the existence of a special relationship between Fred's and Appellant is inconsistent with previous appellate court decisions.

In its opinion, the Court of Appeals 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. (App. p. 824). The existence of this special relationship was based upon the following findings of fact:

(a) Appellant was recommended to Wildevco for the subject project because Appellant had experience constructing other Fred's stores;
(b) The construction contract between Wildevco and Appellant provided it was an agreement for the construction of "one Fred's store";
(c) 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;

(d) The owner of Appellant testified that he knew Appellant was hired to build a Fred's store before construction began;

(e) Appellant had previously constructed ten to fifteen other Fred's stores;

(f) Representatives of Fred's often visited the site during construction and examined every aspect of the building; and

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

(App. pp. 823–24). It is undisputed that Respondents entered into a contract with each other whereby Fred's agreed to lease the subject building from Wildevco following completion of construction by Wildevco, and that Wildevco 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 is, therefore, 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 subject building.

In 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 which does not exist between Fred's and Appellant. See First Gen. Servs. of Charleston, Inc. v. Miller, 314 S.C. 439, 443, 445 S.E.2d 446, 448 (1994) (special relationship between contractor and subcontractor); but see Rock Hill Telephone, 363 S.C. at 390 611 S.E.2d at 237 (relationship between contractor and remote or distant independent contractor insufficient); see also Stuck v. Pioneer Logging Mach., Inc., 279 S.C. 22, 24, 301 S.E.2d 552, 554 (1983) (special relationship between a purchaser of a defective vehicle and the seller of said vehicle); Addy v. Bolton, 257 S.C. 28, 33, 183 S.E.2d 708, 709 (1971) (special relationship between landlord and general contractor hired by landlord who damaged tenant's property); Griffin v. Van Norman, 302 S.C. 520, 527, 397 S.E.2d 378, 382 (Ct. App. 1990) (special relationship between the seller of a home and an exterminator hired by the seller); and

McCoy v. Greenwave Ents., Inc., 408 S.C. 355, 360, 759 S.E.2d 136, 138 (2014) (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 (with the exception of Rock Hill Telephone), 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. It should also be noted that in these 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. See, e.g., 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). In such cases, our appellate courts have recognized that parties in a special relationship must stand in such a relation with each other whereby duties are undertaken by the indemnitor and flow from the indemnitor to the indemnitee. 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, such as in Rock Hill Telephone, our appellate courts have determined that a special relationship does not exist—that is, until the decision reached by the Court of Appeals in this case.

To justify the lack of a special relationship with respect to the subject project, the Court of Appeals focused on a number of factors with respect to previous course of dealings between the parties and prior construction projects. (App. p. 823–24). While courts typically determine the

existence of a special relationship on a case by case basis, it does so by examining the facts and circumstances specific to the project, occurrence, or transaction underlying the equitable indemnity claim. 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. The Court of Appeals' decision not only introduces the concept that our courts can and should look at any and all facts and circumstances, including those with no nexus to the underlying claim itself, it also will have the effect of eradicating the decades-long requirement that a relationship be "special." At the very least, this is a novel issue of law which should be considered by this Court.

The remaining factors the Court of Appeals considered in finding a special relationship all relate to Appellant's knowledge that the building it was constructing would be a Fred's store. (App. p. 824). Appellant simply having knowledge that it was constructing a Fred's store does not, in and of itself, give rise to a special relationship between it and Fred's. If the hallmark of a relationship is two or more parties being connected or interrelated, a contractor's knowledge that another would be a tenant in the building it was constructing for another has no bearing on the *relationship* between contractor and the tenant. Similar to the above discussion, there is no opinion of which Appellant is aware which has considered a purported indemnitor's knowledge in determining whether a special relationship exists between it and the purported indemnitee. At the very least, imposing this knowledge component in a court's determination of the existence of a special relationship is a novel issue of law which should be considered by this Court.

Though the Court of Appeals stops short of holding that Fred's is a third-party beneficiary[3]

[3] Windsor Green Owners' Ass'n, Inc. v. Allied Signal, Inc., 362 S.C. 12, 17, 605 S.E.2d 750, 752

to the Wildevco-Appellant contract, the Court's focus upon Appellant's knowledge that it was constructing a Fred's store appears to stand for the proposition that Fred's status as an alleged third-party beneficiary gives rise to a special relationship between it and Appellant. Even assuming Fred's is a third-party beneficiary, which is denied, this status is insufficient, in and of itself, to give rise to a special relationship between it and Appellant. See Winnsboro, 303 S.C. at 56, 398 S.E.2d at 502 ("Unfortunately, indemnity is sometimes confused with other legal concepts such as suretyship, consequential damages, assignment, or third party beneficiary rights."); see also McPherson v. Mich. Mut. Ins. Co., 306 S.C. 456, 464, 412 S.E.2d 445, 450 (Ct. App. 1991) (rev'd on other grounds by McPherson, 310 S.C. 316, 426 S.E.2d 770 (1993)) ("The right to indemnity is personal to the indemnitee and creates no legal or equitable interest in third party beneficiaries by contract or lien."). To the extent the Court of Appeals' decision stands for the proposition that Fred's alleged status as a third-party beneficiary to the Wildevco-Appellant contract gives rise to a special relationship between it and Appellant, this Court should grant the instant petition to consider this novel issue of law.

II. RESPONDENTS WERE SUED BY PLAINTIFFS FOR BREACHING INDEPENDENT DUTIES OF CARE OWED TO PLAINTIFFS UNDER COMMON LAW PREMISES LIABILITY, DUTIES WHICH APPELLANT DID NOT OWE AND, THUS, COULD NOT HAVE BEEN BREACHED BY APPELLANT.

"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

(Ct. App. 2004) ("[I]f 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.").

indemnitor." Walterboro Cmty. Hosp. v. Meacher, 392 S.C. 479, 485, 709 S.E.2d 71, 74 (Ct. App. 2011) (emphasis added).

In the underlying action, Plaintiffs sued Respondents for negligence sounding in common law premises liability, namely, for failing to discover and remedy/warn of alleged dangerous conditions existing on the subject property. 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:
>
> . . .
>
> (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.

(App. p. 148). Plaintiffs specifically chose not to sue Appellant (or Respondents for that matter) for creating the alleged dangerous condition. (App. pp. 147–53).

"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. "A landowner owes an invitee a duty of due care to discover risks and to warn of or eliminate foreseeable unreasonable risks." Landry v. Hilton Head Plantation Prop. Owners Ass'n, Inc., 317 S.C. 200, 203, 42 S.E.2d 619, 621 (Ct. App. 1994) (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.

The essence of an equitable indemnity claim is that the indemnitor was liable for causing the plaintiff's damages and that the indemnitee was exposed to liability by the wrongful act of the indemnitor. See Walterboro Cmty. Hosp. v. Meacher, 392 S.C. 479, 485, 709 S.E.2d 71, 74 (Ct. App. 2011); see also Stuck, 279 S.C. at 24, 301 S.E.2d at 553. Respondents were exposed to liability to Plaintiffs for their own negligence arising from a breach of their duty of care arising under premises liability law; Respondents were not potentially liable for the negligence of Appellant (regardless of whether Appellant was, in fact, also negligent in creating the condition). Plaintiffs could have sued Respondents for creating the alleged defect or could have sued Appellant; however, Plaintiffs, as masters of their complaint, chose not to do so. See The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25 (1913) ("Of course, the party who brings a suit is master to decide what law he will rely upon."); see also Chavis v. Fid. Warranty Servs., 415 F.Supp.2d 620, 627 (D.S.C. 2006) ("It is well established that the plaintiff is the master of his complaint.") (citations omitted). Furthermore, by the time Plaintiffs settled with Respondents, both the statute of limitations and statute of repose had already run with respect to any potential claims by Plaintiffs against Appellant. To the extent there was any liability for what Respondents were sued for by Plaintiffs, it would be the sole liability of Respondents as owners/occupiers of the subject property. As a matter of law, Appellant was not and could not possibly have been liable for causing Plaintiffs' damages in the underlying action. The Court of Appeals opinion ignores decades of premises liability jurisprudence, and, more importantly, ignores the very basis for the commencement of this lawsuit against Respondents.

III. THE COURT OF APPEALS ERRED IN DETERMINING THAT RESPONDENTS WERE WITHOUT FAULT IN CAUSING PLAINTIFFS' DAMAGES.

"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. It cannot be emphasized enough, that if the Respondents were even slightly at fault, their equitable indemnity claim must fail.

A. Respondents breached independent duties of care owed to Plaintiffs under common law premises liability.

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 failed to do. During trial, Respondents' expert, Steve Hunt ("Hunt"), testified that there is a recognized safety standard for owners and occupants of buildings to conduct inspections of the premises looking for tripping hazards similar to the condition that caused Plaintiffs' injuries. (App. pp. 361–62). Hunt testified as follows:

> Q: Now, you'll agree with me owners and occupants of buildings open to the public have a recognized safety standard to inspect their properties with an interest in preventing pedestrian falls, correct?
>
> A: Yes, and in this case, which is interesting that you brought this out, *this is a maintenance issue. It is also something that – a condition of that can be observed by management, so they do have the duty to inspect* . . . .

Id. (emphasis added). Hunt continued to testify, however, that Respondents "relied upon the contractor to build it property . . . ." (App. p. 361). While that may be the case, such reliance in no way, shape, or form relieves Respondents of their duties of care as owners/occupiers of the premises. Such a conclusion runs contrary to almost a hundred years of jurisprudence in this State

that a landowner owes an invitee a duty of due care to discovery risks and to warn of or eliminate them. See, e.g., Bradford v. F.W. Woolworth Co., 141 S.C. 453, 140 S.E. 105, 108 (1927) (Blease, J., concurring) ("The authorities are entirely agreed upon the proposition that an owner or occupant of lands or buildings who directly or by implication invites or induces others to go thereon or therein owes to such persons a duty to have his premises in a reasonably safe condition and to give warning of latent or concealed perils.").

Barber, Wildevco's representative, admitted that Wildevco failed to follow the standard of care opined by Respondents' expert. (App. pp. 279,[4] 303,[5] 305–06[6]). Furthermore, and as cited above, Wildevco specifically agreed in the Lease that it would "keep and repair the exterior of the

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[4] Barber testified at trial:

> Q: Did you conduct any inspections to determine whether or not the building met building codes or building standards?
> A: No. I'm not qualified to -- . . . I wouldn't know how to do that.

[5] Barber continued:

> Q: Were you conducting anything relating to safety purposes during these inspections?
> A: They weren't really inspections in the sense that I have a checklist on the things. I mean, that was – they were – I'd go there and – you know, observe the condition of the parking lot and whether the lights were working, things like that. I didn't specifically go in looking for safety issues with the exception of the lighting. I would make sure it was lit at night.

[6] Barber testified as follows:

> Q: Have you ever conducted a – has Wildevco ever conducted an inspection around the store looking for tripping hazards?
> A: Not specifically, no.
> Q: Have you ever hired anybody to go around the store looking for tripping hazards?
> A: No.

Demised Premises, including the parking lot, parking lot lights, entrance and exits, *sidewalks, ramps, [and] curbs* . . . ." (App. p. 485) (emphasis added).

As it relates to Fred's conduct, Fred's did not have any representatives testify at trial. The record is completely devoid of Fred's undertakings except Barber's testimony that Fred's would have performed a punch list inspection prior to it taking possession of the property. (App. pp. 288–89). The Court of Appeals also noted that

> Barber also testified that he did not conduct an inspection for tripping hazards at the Fred's store. However, the lease agreement between Fred's and Wildevco provided that Wildevco was only responsible for "keeping and maintain[ing]" the exterior of the premises while Fred's was responsible for the interior of the store.

(App. p. 827 n.17). Even assuming Wildevco's obligation under the lease to "keep and maintain" the sidewalks and curbs does not include inspecting them for defects and thereafter warning of or eliminating said defects, then this duty to do so falls squarely on Fred's as the occupier in control of the premises. It is clear that Fred's never discovered and remedied/warned of the alleged defective condition, and there is no evidence of any conduct on the part of Fred's to the contrary.

Applying the Court of Appeals' decision logically, holding that Respondents were without fault in causing Plaintiffs' damages stands for the premise that despite a shopkeeper's obligation to discover hazardous conditions and remedy/warn of said conditions, and despite a shopkeeper's failure to do so, that such shopkeeper is insulated from negligence because it did not construct the building. Should the Court of Appeals' decision stand, not only will shopkeeper's not be held accountable for their actions and omissions, but an injured plaintiff may potentially be without recourse at all if he or she is injured at a premises constructed before the applicable limitations or repose period. Not only is this contrary to sound public policy, but 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 all of which demonstrates at least *some* liability on the part of Respondents serving as a bar to an equitable indemnity claim.

B. Wildevco negligently oversaw development and 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. (App. p. 481–82) ("The Lessor agrees to cause construction of said Demised Premises and other improvements . . . 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."). Included with the foregoing was Wildevco's obligation to procure construction plans. (App. p. 482).

The trial court's order specifically noted that the testimony at trial indicated that there may have been areas of confusion in the drawings and plans, including a possible discrepancy between the architectural drawings and the site plans. (App. p. 23). This discrepancy between the architectural plans and the site plans involved the very issue that caused Plaintiff Martha Fountain to trip and fall. Both the trial court and the Court of Appeals held, essentially, that Appellant was at fault in failing to contact the engineer and/or architect for review if discrepancies were discovered or to request clarification of the plans. (App. pp. 27–28); (App. pp. 828–29). While Appellant may have been negligent in this regard, this does not relieve Wildevco's concurrent negligence in supplying defective and discrepant plans.

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.

(App. pp. 283–84). Furthermore, the Engineer testified at trial that the architectural plans and site plans "appear to be different" (App. p. 265) and that these discrepancies could be confusing. (App. p. 253).

"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. The Court of Appeals noted this finding but stated that it was Appellant's responsibility to alert the engineer/architect and otherwise seek clarification of the plans. However, the relevant inquiry is not whether Appellant was at fault in creating the condition or failing to seek clarification of the discrepant plans; rather, the relevant inquiry is whether Wildevco was also at fault for providing such discrepant plans. 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."). This very discrepancy is what led to the construction of the defective curbing that caused Plaintiff Martha Fountain to trip and fall. 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 development and construction of the subject building.

Furthermore, Wildevco is also at least partially at fault in tasking 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 that doing so created an undue risk of harm to the general public, including Plaintiffs.

The Court of Appeals 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. (App. p. 829). The Court of Appeals continued, stating as follows:

> Appellant has cited no authority to support its position that a property owner has a duty to hire a qualified construction overseer—in addition to the general contractor—to manage the construction of a property. To the contrary, our courts have generally held that a property owner is not held answerable for the negligence of an independent contractor to whom he has committed the work about such property, *to be done without his control in its progress.*

Id. (internal citations omitted) (emphasis added). As an initial matter, and as discussed in detail above, Wildevco *did* exercise control over the construction of the subject building by procuring the architectural and site plans for construction of the subject building. These plans were given to Appellant from Wildevco pursuant to the construction contract between Wildevco and Appellant. (App. pp. 476–78). Pursuant to the contact between Wildevco and Appellant, Appellant was required to construct the building in accordance with the plans provided by Wildevco:

> The Contract Documents consist of the Agreement *and the Drawings and Specifications thereon, furnished by Chris Booker & Associates and the Site Plans, furnished by Hass & Hilderbrand, Inc.* . . . [and that Appellant] shall execute the entire work *described in the Contract Documents.*

(App. p. 476). Also included in the contract between Wildevco and Appellant was a project

schedule which specifically provided dates by which time Appellant was required to complete the various phases of construction. (App. p. 478). Further, Barber testified that Wildevco "managed, I guess, the construction process," which included "from the very beginning . . . engaging engineers and architects and general contractors to do the construction on the property." (App. p. 275). The contention that Wildevco surrendered control in the progress of construction of the subject building is flatly wrong. Wildevco managed the construction process; hired the architect, engineer, and general contractor; supplied the architectural and site plans; and mandated Appellant's project schedule, down to the very day, to complete the project.

Wildevco is not only the owner of the subject property but was 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. (App. p. 22). However, the trial court also found (a finding which the Court of Appeals adopted) that Barber "had no education or formal training in construction, engineering and/or architectural." Id. Barber also testified that he is "not qualified" to read architectural and site plans, and, of course, the discrepancy between the two led to the very defect that caused Plaintiffs' injuries. (App. p. 294). Lastly, Barber testified that he is "not qualified" to conduct inspections of the subject project to determine whether or not the building met building codes and industry standards and whether or not the building was constructed in accordance with the applicable plans and specifications. (App. p. 279). The Court of Appeals faults Appellant for failing to consult the architect or engineer about potential discrepancies in the plans. (App. pp. 828–29). That may be the case, but Wildevco certainly never

consulted with the architect or engineer.[7] (App. p. 297). Wildevco, as developer, should not be held to a different standard and, indeed, given Barber's lack of qualifications, Wildevco should have consulted with these parties.

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 (App. p. 294); and was not qualified to conduct inspections of the subject project to determine whether or not the building met building codes and industry standards (App. p. 279). 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. (App. p. 297), or at least conduct a final inspection (which Barber does not recall doing) (App. p. 298). 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.

CONCLUSION

The Court of Appeals' ruling that there was a special relationship is contrary to this Court's prior rulings. In addition, the Court of Appeals conclusion regarding the lack of liability on the part of Respondents is contrary to nearly a century of premise liability law. Tippins-Polk Construction, Inc. respectfully requests this Court issue a writ of certiorari to consider all questions presented and consider this appeal fully on its merits.

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[7] The contract between Wildevco and the Architect provided that the Architect would provide field inspections at $100 per visit. (App. p. 565). However, Wildevco never requested the Architect to conduct field inspections of the Fred's store. (App. p. 294). Rather, Barber testified that someone else would have detected any issues with the construction. (App. p. 294–95). Further, the Engineer testified that it was commonplace for owners to request his company inspect a completed project to ensure the project was completed in accordance with the site plans. (App. p. 258–59). However, Wildevco never requested the Engineer conduct any such inspections. Id.

Dated this 22nd day of April, 2020.

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