

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BARNWELL COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2017-000688

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S.C. SUPREME COURT

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.

APPENDIX VOLUME 3

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FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL COURT ERR IN FINDING THAT THERE WAS A SUFFICIENT SPECIAL RELATIONSHIP BETWEEN FRED'S AND APPELLANT TO SUPPORT A CLAIM FOR EQUITABLE INDEMNIFICATION?
- II. DID THE TRIAL COURT ERR IN FINDING THAT RESPONDENTS WERE WITHOUT FAULT?
- III. DID THE COURT ERR IN FAILING TO FIND THAT RESPONDENTS WERE ESTOPPED FROM RECOVERING DAMAGES NOT REQUESTED WITHIN THE COMPLAINT?
- IV. ALTERNATIVELY, DID THE COURT ERR IN AWARDING ATTORNEYS' FEES UNDER RESPONDENTS' CLAIM FOR EQUITABLE INDEMNIFICATION EVEN THOUGH THE FEES WERE FOR BOTH FOR DEFENDING PLAINTIFFS' CLAIM, AS WELL AS PROSECUTING THIS MATTER AGAINST APPELLANT, AND WERE SPECULATIVE?
- V. DID THE COURT ERR IN REFUSING TO CONSIDER A SIMILAR INCIDENT AT A FRED'S STORE IN A NEIGHBORING COUNTY?

STATEMENT OF THE CASE

Plaintiffs, Martha M. Fountain and Curtis Fountain, filed this premises liability action on May 12, 2010, asserting claims against Respondents, Fred's, Inc. ("Fred's") and Wildevco, LLC ("Wildevco"), for an alleged trip and fall at the Fred's store located in Williston, South Carolina. (R. pp. 144–46). Plaintiffs alleged, and Fred's admitted, that it was doing business in Barnwell County; and Plaintiffs alleged, and Wildevco admitted, that Wildevco was the owner of the premises. (See *id.*; see also R. pp. 148–49). Plaintiffs alleged that on or about March 10, 2010, Plaintiff, Martha Fountain, was entering the Fred's store and tripped on the raised sidewalk in front of the store's entrance and fell injuring herself. (R. p. 144). Plaintiffs specific claims against Respondents are that they failed: (1) to keep and maintain the premises; (2) take reasonable

precautions to avoid an unsafe condition; (3) to warn customers of a dangerous condition; (4) to inspect the premises; (5) to remedy the condition; and (6) to discovery risks, to warn of or make safe unreasonable risks. (R. p. 145). The Complaint further alleged that as a result of Respondents' failures, Plaintiffs sustained damages. (R. p. 146). Plaintiffs did not allege negligence based on a creation of an unsafe condition. (R. p. 145).

Two years after the filing of the Complaint, Respondents filed an Amended Answer and Third-Party Complaint asserting claims against Appellant, Tippins-Polk Construction. (R. pp. 155–59). In August 2015, Wildevco moved to amend their third-party complaint and asserted in their memorandum that the case between Plaintiffs and Respondents was a “premises liability matter.” (R. p. 86). Furthermore, Respondents' memorandum stated that “Plaintiffs contend [Respondents] have a duty to provide a safe premises for patrons of Fred's, including Plaintiff Martha Fountain, and [Respondents] breached that duty, proximately causing the injuries.” (R. pp. 86–87). 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. (R. pp. 1–11).

This matter was given a date certain trial date of March 21, 2016. On March 21, 2016, counsel for Respondents and Appellant appeared before Judge Brian Gibbons, whereby counsel for Wildevco moved for a continuance. (R. at 169–70). During the hearing, counsel for Wildevco informed the Court that Plaintiffs had settled their claims against Defendants on March 20, 2016. Id.

During the hearing on March 21, 2016, Counsel for Wildevco also acknowledged that the sole remaining claim that Respondents were asserting against Appellant was equitable indemnification. (See generally R. pp. 167–74). In response to Wildevco's motion to continue,

the Judge Gibbons issued a form 4 order on March 21, 2016, stating that the “only claim left is equitable indemnification” (R. p. 12). The order further stated that “the equitable indemnification claim is continued,” and “all remaining parties agree to hear this NJ via bench trial.” Id. No parties moved for to reconsider the Form 4 Order.

On April 21, 2016, a Settlement Agreement between Plaintiffs and Respondents was executed. (R. pp. 676–83). In the Settlement Agreement, Plaintiffs agreed to “release, acquit and forever discharge [Respondents] of and from any and all liability” (R. p. 677). The Settlement Agreement further stated that “it is the intent of this Agreement to relieve [Respondents] 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” (R. p. 681).

The Agreement noted that “this Agreement operate[s] as a satisfaction of any claim by Plaintiffs against any and all such Joint Tortfeasors, including [Appellant], 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 [Respondents].” Id. It continues, “As such, this agreement discharges any common liability of [Respondents] and any Joint Tortfeasors, including [Appellants] to Plaintiffs.” Id.

The Respondents’ claim for equitable indemnification was set to be tried before the Judge Doyet A. Early, III on June 6, 2016. On the morning of trial, Respondents moved to amend their complaint to add contribution as an additional claim against Appellant. As part of this motion, Respondents submitted a memorandum in support. (R. p. 179). The trial court denied the motion to amend, and the trial on the sole claim of equitable indemnification took place on June 6 and 7, 2016, before Judge Early. (R. p. 188).

At the conclusion of the trial, the Court took the matter under advisement, and subsequently filed an Order and Judgment in favor of Respondents on August 1, 2016. (R. p. 436; see also R. p. 15). 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.” (R. p. 24). The Order further stated that “[t]he construction defects, for which [Appellant] is solely responsible, were the sole proximate cause of Mrs. Fountain’s injuries” (R. p. 25). Judgment was entered against Appellant in favor of Wildevco for the total sum of Three Hundred Five Thousand, Four Hundred Eighteen and 30/100 Dollars (\$305,418.30) and in favor of Fred’s for the total sum of Seventy Six Thousand Six Hundred Ninety-One and 82/100 Dollars (\$76,691.82). (R. p. 26).

Counsel for Appellant received the filed Order and Judgment on August 3, 2016. Appellant filed a timely motion to make additional finding under Rule 52(b), SCRCP, and motion to reconsider/amend under Rule 59(e), SCRCP. (R. pp. 32–59). An order denying the motion to make additional findings and motion reconsider was filed on February 13, 2017, and Appellant received notice on February 17, 2017. R. p. 27. Appellant filed a timely notice of appeal on March 13, 2017. Furthermore, Appellant moved for, and was granted, leave to deposit funds for the judgments with the Barnwell County Clerk of Court during pendency of this appeal. (R. pp. 28–29).

STATEMENT OF FACTS

Wildevco is the owner of property in Williston, South Carolina, on which a Fred’s Store was located under a ten-year lease – from 2005 to 2015. (R. p. 272). Wildevco was the developer and managed the construction process for the Fred’s Store in Williston. (R. p. 256). As part of

the construction process, Wildevco hired the architects to provide architectural plans for the Fred's Store, and Wildevco hired engineers to provide the site plans for the property where the Fred's Store is located. (R. p. 275).

Wildevco signed an agreement with Christopher Brooker Architects ("Architect") to provide architectural services. (R. p. 288; see also R. pp. 556–64). Wildevco expected the Architect to provide the site engineer with the most updated plans. (R. pp. 288–89). Under the terms of the architectural agreement, the Architect agreed to provide a life safety code study. (R. pp. 289–90). The architectural agreement also provided that the Architect would provide field inspections for \$100 per visit. (R. p. 559). However, Wildevco never requested the Architect to conduct field inspections of the Fred's store to ensure that that life safety plan was being implemented in the construction. (R. p. 291). Wildevco thought that someone else would have picked-up any issues up with the construction. (R. pp. 291–92).

Wildevco agreed that the purpose of field inspections is for the Architect to visit the construction site and to make sure that the project is being constructed pursuant to the Architect's plans. (R. p. 292). Even though Wildevco was going to be open to the public, Wildevco did not feel like it was necessary to request the Architect to inspect the construction to ensure it was built pursuant to the plans, and according to the life safety plan. Id.

Wildevco retained Hass & Hilderbrand, Inc. to prepare site plans for the Fred's Store in Williston. (R. p. 239). Tilden Hilderbrand drew the site plans and he testified that both the developer and the site work contractor use the site plans. (R. p. 241). As part of his duties as a site engineer, Mr. Hilderbrand has been requested by other owners to inspect a completed project to make sure that the project was completed in accordance to the site plans. (R. p. 255–56).

However, Wildevco did not request that Mr. Hilderbrand conduct a post construction inspections to ensure that the project was constructed according to the site plans. Id.

Mr. Hildebrand testified that the site plans provided “how site will be graded, how the utilities are installed; basically everything on the property that’s developed from the ground down, including pavement.” (R. p. 240). The site engineer uses the architectural drawings as a base for the site plans. (R. p. 246). However, Mr. Hilderbrand testified that the architectural plans that were provided to Hass & Hilderbrand were different from the final stamped architectural plans that were provided during the trial. (R. p. 260)..

Mr. Hilderbrand testified that the site plans contain elevation grades for the sidewalk curb. (R. p. 242). Mr. Hildebrand testified that the elevations on the site plans show there is no step-down along the front sidewalk curb and that the site plans provide for the sidewalk curb to be flush with the parking lot along the front of the building. (R. p. 243). Although Mr. Hilderbrand first testified that the sidewalk curb along the front of the Fred’s store was designed to be flush with the parking lot, he subsequently testified at trial that the site plans actually had elevations changes from 107.8 on the left side of the store, 107.9 at the front doors, and 107.5 on the right side of the store. (R. p. 244; see also R. pp. 257–58).

Mr. Hilderbrand testified that the site plans had a sidewalk curb of six inches along the front of the sidewalk in front of the neighboring units to the left of the Fred’s Store. (R. p. 258). Mr. Hilderbrand also testified that on the opposite side of the building along the right corner of the Fred’s Store there was a sidewalk curb of five inches. Id.

According to Mr. Hilderbrand’s testimony, Mr. Hildebrand first testified that the sidewalk curb was flush along the front of the building, and then changed his opinion and stated

that the site plans had the sidewalk only flush with the parking lot at the location of the doors. He testified that “no elevated edge was required since ADA access was required there.” (R. p. 244). Therefore, the site plans did not have a flush sidewalk along the entire front of the Fred’s store, but rather the sidewalk curb was designed with an elevation of six inches on the far left side of the building gradually sloping down until the sidewalk curb was flush with the parking lot at the store doors, then gradually sloping back up to five inches on the far right side of the building. (R. pp. 257–60). Although, the sidewalk curb was designed to gradually slope down from six inches on one corner and five inches on the other corner, Mr. Hildebrand testified a two inch curb across the front of the sidewalk edge would not be typical, and that a typical step-up would be six inches. (R. p. 248).

Mr. Hilderbrand testified that his site plans did not include a handicap ramp; however, he acknowledged that the site plans had several perpendicular lines in front of the sets of Fred’s doors. (R. pp. 246–47). Mr. Hilderbrand testified that he did not know what the perpendicular lines in front of the Fred’s doors which were on his plans indicated. Mr. Hilderbrand acknowledged that these perpendicular lines in front of the Fred’s doors on the Hass & Hilderbrand site plans could be confusing. (R. p. 250). He also acknowledged that the site plans did contain a design for a handicap ramp on page one of the site plans. (R. p. 253).

Mr. Hilderbrand further testified that Hass & Hildebrand site plans did not include details for the sidewalk area, and that his responsibility did not include designing the sidewalk. (R. p. 251). He testified that it was his responsibility to “tie into the sidewalk.” Id. Mr. Hilderbrand also acknowledged that the architectural plans for the construction of the Fred’s Store did include a handicap ramps at the front doors of the Fred’s Store. (R. p. 253).

Mr. Hilderbrand testified that when he reviewed the architectural plans, he decided that handicap ramps would not work because the sidewalk on the architectural plans was only nine feet wide. (R. p. 244). Therefore, Mr. Hilderbrand decided to make the sidewalk curb flush with the parking lot. (R. p. 243). He also testified that a ten foot sidewalk would be sufficient for a handicap ramp. (R. p. 252). Mr. Hilderbrand reviewed the stamped the architectural plans at trial and then testified that the architectural plans did call for a sidewalk of at least ten feet – ten feet, four inches. (R. p. 253). At this point, Mr. Hilderbrand acknowledged that the Hass & Hilderbrand site plans and the architectural plans for the Fred's Store did not comply with one another and were different. (R. p. 262). Mr. Hilderbrand testified that the architectural plans and his site plans "appear to be different." Id. The trial court confirmed Mr. Hilderbrand's testimony and noted for the record that the site plans did not include a ramp and had a nine foot sidewalk, while the architectural plans included a handicap ramp and had a ten feet plus sidewalk. (R. p. 253.)

Wildevco entered into a contract with Appellant to construct the Fred's Store on April 28, 2005. (R. pp. 470–73). The construction agreement between Wildevco and Appellant identified Thaddeus Barber ("Barber") as the construction manager. Id. Under the contract, Appellant agreed to construct the Fred's Store in accordance with the building plans, the site plans, the specifications, and the building code. Id. If there was any question about the site plans or the manner in which the property was being constructed, the questions would either be directed to the owner (Wildevco) or the preparer of the plans (the architect or engineer). Fred's was not a party to the construction contract between Wildevco and Appellant.¹ (R. p. 305).

¹ Counsel for Fred's concedes that Fred's was not a party to the construction agreement.

The construction contract between Wildevco and Appellant provide for a final inspection of the building. (R. pp. 470–73). The construction contract also provided for a punch out list where Wildevco could visit the project after completion of construction and to allow Wildevco an opportunity to identify construction issues which may be needed to be corrected. Id. Because the Fred's store was going to be open to the general public, it is reasonable for Wildevco—as owner—to make an inspection of the property, which Barber suspects that he did. (R. p. 276).

Barber was one of the partners of Wildevco and was responsible for managing the construction of the Fred's store on behalf of Wildevco. (R. p. 272). However, Barber: (1) did not have any education or work experience involving construction; (2) did not have any education or work experience involving architecture; and (3) did not have any education or work experience involving engineering. (R. p. 271). Barber visited the construction project periodically to do general observations to see what was going on at any particular time—for example, whether site work was being done or whether walls being put up. (R. p. 276). Wildevco as the developer, tasked Barber with managing the construction. (R. p. 271). Even though Barber was responsible for managing the construction of the Fred's Store, Barber was not qualified to conduct inspections to determine whether or not the building met building codes or building standards. (R. p. 276).

Under the lease agreement between Fred's and Wildevco for the Fred's store, Wildevco was responsible for having the construction done, and Wildevco was responsible for maintaining the Fred's store after construction. (R. p. 278). More specifically, Wildevco was responsible for maintaining the curbs and sidewalks.² Id. Barber testified that painting is part of maintenance of

² If the lease agreement required Wildevco to maintain the “curbs” then there must have been a curb

the Fred's store. (R. p. 296).

The construction was completed in October 2005 when the certificate of occupancy was issued by the County of Barnwell. (R. p. 555). The certificate of occupancy informed Wildevco that the construction of the Fred's store complied with the building code. Id. After completion of construction, it was plainly visible that: (1) there was a raised sidewalk curb in the front of the Fred's store; (2) there were handicap ramp cuts into the sidewalk curb; (3) the sidewalk curb was painted, and (4) the transition area between the sidewalk curb and the flush area of the handicap ramp was not painted. After construction Wildevco maintained the curbs and sidewalks. Barber testified the only "maintenance" that Wildevco provided was keeping it free of leaves and debris and trash, removing obstructions, and if something broke, providing repairs. (R. p. 279). However, Barber testified that Wildevco did not repaint the curb until 2012 or 2013 (after the incident), roughly seven or eight years after construction was completed. (R. p. 296). Barber also testified that he did not know "that the sidewalk curb was shorter than it should have been."³ (R. p. 280).

The front of the Fred's store has bollards or yellow posts in front of the propane tank rack. (R. p. 298). These bollards or yellow posts were not part of the Tippins-Polk construction project, and were installed sometime after completion of construction of the Fred's store. (R. pp. 298-99). The purpose of these bollards or yellow columns are to act as safeguards and warnings to keep vehicles from driving and crashing into the propane tanks. (R. p. 299).

contemplated within the lease agreement between Fred's and Wildevco. This is another example of how the site plans did not correlate with the building plans and designed use.

³ Here counsel for Wildevco indicates that the curb was constructed shorter than it should have been, clearly indicating that the plans did in fact call for a curb, and not flush.

Barber conducted periodic inspections of the Fred's store after construction, and continued to conduct these inspections all the way up to the time Plaintiff Martha Fountain tripped at the Fred's store. (R. p. 300). However, Barber did not look for safety issues, except for safety issues related to lighting of the parking lot. Id.

Although, Barber looked for safety issues related to lighting of the parking lot, Wildevco never conducted inspections around the Fred's store looking for tripping hazards. (R. p. 302). Furthermore, Wildevco never hired anyone to conduct inspections at the Fred's store looking for tripping hazards. (R. pp. 302–03).

Barber testified that there was some differences between the site plans and the architectural plans, and that these differences could cause some confusion. (R. pp. 280–81). Wildevco tendered Stephen Hunt as an expert in the field of fall safety investigations, codes, regulations, and standards relative to building construction. (R. p. 322). Mr. Hunt testified that he has been a safety consultant for 39 years. (R. pp. 331–32). He testified that his past experiences as a safety consultant included being retained by retail stores to inspect their properties in an effort to find tripping hazards similar to what caused Plaintiff to trip. (R. p. 351). As part of the inspections of the retail stores, when Hunt came across a tripping hazard, he would safeguard the tripping hazard. (R. p. 352). Some of those safeguards included painting, which could help safeguard the hazard, but he testified that “it’s not as good as having a good design in the first place.” Id.

Hunt had published articles in his field, some of which were on his firm’s website. (R. p. 354). One publication was a blog on the firm website where Mr. Hunt investigated someone tripping over a wheel stop at an apartment complex that had migrated over and became a tripping

hazard. (R. pp. 354–55). Mr. Hunt acknowledged that, in the situation discussed in his publication, the apartment management company was not the party that installed the wheel stop, it was someone else. (R. p. 355). Mr. Hunt’s conclusion in the publication was that the apartment management company failed to provide a safe pedestrian walkway where one was expected by the nature of the environment. Id. Mr. Hunt also acknowledged that the 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. (R. pp. 355–56).

Mr. Hunt also testified that safety hierarchy is a principle that has been in place many, many years. (R. p. 360). He further testified that if you think you have a hazard, you should first try and design it out, so there is no hazard. Id. He also stated if you can’t design it out, then you put a safeguard in place to help people when they encounter the hazard. Id. He went on to testify that the last part of the hierarchy is that you warn people about the hazard. Id.

Mr. Hunt was provided a copy of the site plans and asked if the sidewalk at the Fred’s store was constructed properly, and Mr. Hunt testified that the sidewalk “probably was,” but “the curb ramp that were on the sidewalk were not constructed in accordance with these [site] plans.” (R. p. 324). The Court asked Mr. Hunt, “The site plan calls for it to be flush, is that correct?” (R. p. 332). Mr. Hunt testified that “the site plan called for it to be flush; in other words, there should have been no curved flare at all, no change in elevation, none at all.” Id. However, Mr. Hunt was then referred back to the “architectural plans,” and agreed that the architectural plans required painting of the sidewalk front edge – indicating that there was in fact a sidewalk curb called for within the architectural plans. (R. p. 333).

Mr. Hunt was asked whether it was his opinion that the sidewalk and curb ramp as

constructed did not comply with the **architectural** drawings, to which he responded, “that is correct, in all of those areas.” (R. p. 335). He was further asked whether he had an opinion as to whether Appellant should have known that the plans called for the sidewalks to be flush, to which he responded: “Yes. I mean, I would think a contractor should have the specialized knowledge and skill to be able to read the plans and know.”⁴ Id.

Mr. Hunt testified that the **site** plans [not architectural plans] included how to construct the sidewalk. (R. p. 338). However, Mr. Hunt further testified that the architectural plans also provide how to construct the sidewalk. (R. pp. 338–39). Mr. Hunt was further asked if the site plans control construction the sidewalks or do the architectural plans control, and Mr. Hunt testified that the “site plans do.” (R. p. 339). But, then Mr. Hunt continued and testified that “it’s a combination.”⁵ (R. p. 341).

Mr. Hunt was asked about how far the curb flare extended in front of the store door, and Mr. Hunt testified thirteen inches. (R. p. 342). He also acknowledged that the “controlling” site plans had a ramp of four feet wide, but the doorway was six feet wide. Id. Mr. Hunt acknowledged that as a result of having a four foot wide ramp and a six foot wide door, parts of the ramp flare would extend in front of the door. (R. pp. 342–43). However, Mr. Hunt testified that a typical ramp is the same width as the doors. (R. p. 343). Mr. Hunt was asked about the specific site plans and the Fred’s store at issue in this matter and he acknowledged that as a result of the site plans, which provide for a four foot wide ramp and a six foot wide door, the flares

4 The site engineer himself struggled interpreting his own design and change his testimony about the sidewalk curb during trial.

5 This is contrary to the site engineer’s testimony that the site plans did not control the construction of the sidewalk.

from the ramp will extend in front of the doorway. (R. pp. 343–44).

Mr. Hunt testified that during his investigations, he spoke to Mr. Hildebrand, and Mr. Hildebrand told him the parking lot was supposed to be flush all the way across the front of the store. (R. p. 344). However, Mr. Hunt testified that when he now looks at the site plans, it appears to show a 4.8 inch drop in elevation at one corner of the building. Id. He further testified that from the corner of the building with a sidewalk curb elevation of 4.8 inches, the sidewalk curb then gradually slopes down to where the sidewalk curb is supposed to be flush with the parking lot. Id.

Mr. Hunt was asked where the sidewalk curb was supposed to be flush according to the site plans, and he testified around the front entrance way. (R. p. 345). Mr. Hunt noted that “you’ve got a long run” of the front sidewalk curb, and that the 4.8 inch elevation of the sidewalk curb at the corner of the store “gets shorter and shorter” until it becomes flush in front of the entrance to the store. (R. p. 346). Mr. Hunt also testified that “when you have elevations, you can work with them, but they shouldn’t be under four [inches],” because “it’s in the building code, that four-inch minimum.” (R. p. 342). Hunt also testified that the elevation of the sidewalk curb would be under four inches once you moved one foot from the corner of the building when applying the maximum slope permitted. (R. p. 347). Therefore, the sidewalk curb would be under four inches starting one foot from the corner all the way until the sidewalk curb became flush at the entrance of the building. (See R. pp. 347–51).

Mr. Hunt was asked whether it was his opinion that anything under four inches is a tripping hazard, and he responded “I guess I’m saying that, that anything under four inches can be a tripping hazard, yeah.” (R. p. 345). Mr. Hunt was asked “if anything under four inches was

a tripping hazard, you would not want to design a plan where you have less than four inches of a curb going across the front of the Fred's store." Id. Mr. Hunt responded "no". Id. Mr. Hunt further testified that "when you've got a real small change in elevation that runs the entire length around the entrance that's where you have no visual cues – there is nothing to visually cue you in on that height." (R. p. 351).

Edward William Polk, the owner of Tippins-Polk Construction, testified on behalf of Appellant. (See R. p. 400). Mr. Polk testified that Wildevco provided the architectural and civil site plans. (R. p. 400–01). Mr. Polk further testified that both the architectural plans and the site plans contained a sidewalk curb with handicapped ramps. (R. pp. 401–02). Mr. Polk also stated that when there is a discrepancy between the architectural plans and the site plans, you refer to the architectural plans. (R. pp. 402–03).

STANDARD OF REVIEW

"Equitable indemnity is an action in equity." Walterboro Community Hosp. V. Meacher, 392 S.C. 479, 484 (Ct. App. 2011)(citing Verenes v. Alvanos, 387 S.C. 11, 18 n. 6 (2010) (noting a cause of action for equitable indemnity is necessarily equitable in nature)); see Loyola Fed. Sav. Bank v. Thomasson Props., 318 S.C. 92, 93 (Ct. App. 1995) (same). "In an action in equity tried by a judge alone, the appellate court may find facts in accordance with its view of the preponderance of the evidence." Id. (quoting Goldman v. RBC, Inc., 369 S.C. 462, 465 (2006)). "However, this broad scope of review does not require the appellate court to disregard the findings made below." Id.

ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING THAT THERE WAS A SUFFICIENT SPECIAL RELATIONSHIP BETWEEN FRED'S AND APPELLANT TO SUPPORT A CLAIM FOR EQUITABLE INDEMNIFICATION.

There is no "special relationship" between Fred's and Appellant that would give rise to a right of indemnification. There was not any contractual relationship between Fred's and Appellant, and Appellant was merely a remote or distant independent contractor. Appellant does not have a special relationship with Fred's as contemplated under South Carolina jurisprudence, and therefore there is no right for equitable indemnification.

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, 303 S.C. 52, 56 (Ct. App. 1990). (emphasis added). Fred's was not faced with imputed fault, and there was no recognized special relationship between Fred's and Appellant.

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 Fred's was potentially liable under the premises liability claims asserted by Plaintiffs, it would be evident that Fred's was potentially at fault based on their own actions or inaction, not based on imputed fault arising out of the actions of Appellant.

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. See Meadows v. Heritage Vill. Church & Missionary Fellowship, Inc., 305 S.C. 375, 376–80. In Plaintiffs' premises liability claims against Respondents, Plaintiffs would have to

prove that Fred's created the condition which caused Plaintiffs' injuries, or prove that Fred's knew or should have known about the condition that caused Plaintiffs' injuries.

Fred's liability was not based on imputed fault arising out of the conduct of Appellant. The only liability Fred's faced from Plaintiffs' claims would have based on whether 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 Fred's is based on a special relationship with Appellant.

There is not a special relationship between Fred's and Appellant according to South Carolina law. The trial court incorrectly found that there was a special relationship between Fred's and Appellant based on "[Appellant]'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." (R. p. 23). Although the Court found there was a special relationship, the Court also acknowledges that the construction agreement was only between Wildevco and Appellant. (R. p. 20). Therefore, Fred's was not a party to the construction agreement.

The Court's finding a special relationship between Fred's and Appellant conflicts with South Carolina case law. In a Court of Appeals opinion, where the parties had an identical relationship to that of Fred's and Appellant, the court held that there was no special relationship that would give rise to a right to equitable indemnification. Rock Hill Telephone, 363 S.C. at 385 (Ct. App. 2005) 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. at 390.

In Rock Hill Telephone, Rock Hill Telephone Company needed to install an 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.” Id. at 390.

The relationships between Fred’s, Wildevco and Appellant in this matter are identical to the relationships of the parties involved in the Rock Hill Telephone decision. The trial 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. (R. pp. 19–20). The trial court’s finding states that Wildevco in turn contracted with Appellant to perform the work of constructing the building. Id. Just as the relationships in Rock Hill Telephone, there is no direct contract between Fred’s and Appellant. Just as the subcontractor in Rock Hill Telephone, Appellant is “merely a remote or distant independent contractor.” 363 S.C. at 390. Accordingly, under South Carolina law, there is no special relationship between Fred’s and Appellant that would give rise to equitable indemnification.

Since there is no imputed liability as to Fred’s, any claim for equitable indemnification must be based on a special relationship with Appellant. Under South Carolina law there is no special relationship between Fred’s and Appellant. Therefore, Fred’s has no right to equitable indemnification from Appellant.

II. THE TRIAL COURT ERRED IN FINDING THAT RESPONDENTS WERE WITHOUT FAULT.

Respondents failed to prove they were without fault, and there was overwhelming evidence that establishes that both Respondents were at least 1% at fault for Plaintiffs' injuries. Specifically, the trial court erred because: (a) Respondents' entire case involved proving Appellants were at fault, not their lack of fault; (b) the trial court acknowledges Respondents' liability by finding that the condition that caused Plaintiffs' injuries was a "latent defect;" (c) Wildevco admitted that it did not perform a recognized safety standard of routinely inspecting the premises looking for tripping hazards; (d) Wildevco provided defective plans for the project which had discrepancies related to the conditions that caused Plaintiffs' injuries; (e) Wildevco tasked an unqualified individual to oversee the construction of the Fred's store; and (f) Respondents acknowledged liability in the Settlement Agreement between Plaintiffs and Respondents. Because the only cause of action was for equitable indemnification, Respondents' fault in causing Plaintiffs' injuries bars any recovering under the unclean hands doctrine.

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, 303 S.C. at 56, aff'd 307 S.C. 128 (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 (2010)(citing Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Co., 336 S.C. 53 (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, 299 (Ct. App.

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, 24 (1983)).

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, 486 (Ct. App. 2011)(citing Fowler v. Hunter, 388 S.C. 355, 363 (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. “Equitable indemnity cases involve a fact pattern in which the first party is at fault, but the second party is not.” Id. (citing Vermeer Carolina's, Inc., 336 S.C. at 63). “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.” Id. “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, 336 S.C. at 63. As the trial 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 is was *potentially* liable to the plaintiff in the underlying case.” R. at 18. (citing Otis Elevator v. Hardin Constr. Co. Group, 316 S.C. 292, 297 (1994)(emphasis 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 (Ct. App. 2009)(quoting First Union Nat'l Bank of S.C. v. Soden, 333 S.C. 554, 568 (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 inequitableness or bad faith relative to the matter in which he seeks relief.” Id. (quoting Emery v. Smith, 361 S.C. 207, 220 (Ct. App. 2004); see also Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 814 (1945).

Plaintiffs’ claims asserted against Respondents arise solely out of premises liability. Respondents admitted in a memorandum in support of a motion to amend their complaint 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. (R. p. 86). However, the trial court’s order fails to even discuss premises liability law in South Carolina. Therefore, for the trial court to properly analyze whether Respondents were liable to Plaintiffs, the trial court must apply South Carolina premises liability law to the facts. The facts and evidence establish that Respondents were at fault for Plaintiffs’ injuries, and Plaintiff’s claim for equitable indemnification are barred under the “unclean hands” doctrine.

“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 (Ct. App. 2008)(citing Hurst v. East

Coast Hockey League, Inc., 371 S.C. 33, 37 (2006)); see also Bramlette v. Charter-Medical-Columbia, 302 S.C. 68 (1990); Anderson v. Racetrack Petroleum, Inc., 296 S.C. 204 (1988); Shipes v. Piggly Wiggly St. Andrews, Inc., 269 S.C. 479 (1977); Kershaw Motor Co. v. Southern Ry., 136 S.C. 377 (1926); Sims v. Giles, 343 S.C. 708 (Ct. App. 2001); Small v. Pioneer Machinery, Inc., 329 S.C. 448 (Ct. App. 1997); Cook v. Food Lion, Inc., 328 S.C. 324 (Ct. App. 1997); Vinson v. Hartley, 324 S.C. 389 (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 (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). “The law recognizes two types of invitees: the public invitee and the business visitor.” Id. (citing Sims, 343 S.C. at 717). “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 Un. Methodist Church, 329 S.C. 433, 441 (Ct. App. 1997). “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 (1965); Sims, 343 S.C. at 717; Goode, 329 S.C. at 441; Hoover v. Broome, 324 S.C. 531, 536 (Ct. App. 1996) (“A customer of a store is classified as an invitee.”) (citing Shipes, 269 S.C. 479).

“Storekeeper liability is founded upon the duty of care a possessor of land owes to an invitee.” Wintersteen v. Food Lion, Inc., 344 S.C. 32, 36 (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 (Ct. App. 2004); Larimore v. Carolina Power & Light, 340 S.C. 438, (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, 203 (1994); see also Singleton, 377 S.C. at 202, 659 S.E.2d 196, 205; Bryant v. City of North Charleston, 304 S.C. 123, 125 (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 F.P. Hubbard & R.L. Felix, *The South Carolina Law of Torts* (3rd Ed. 2004) 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, 348 (2006)(citing Bruno v. Pendleton Realty Co., 240 S.C. 46, 50–51 (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, 371 S.C. at 348 (quoting Bruno, 240 S.C. 46, 50–51. “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 (1991)(citing Felder v. K-Mart Corp., 297 S.C. 446 (1989); Moore v. Levitre, 294 S.C. 453 (1988); Abeles v. Great Atlantic & Pacific Tea Co., 244 S.C. 508 (1964); 240 S.C. at 50–51.

“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, 344 S.C. at 35.

Constructive notice is a legal inference, which substitutes for actual notice. Major v. City of Hartsville, 410 S.C. 1, 3–4 (2014)(citing Strother v. Lexington Cnty. Recreation Comm’n, 332 S.C. 54 (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 (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).

“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, 240 S.C. at 51 (citing Crocker v. WTAR Radio Corp., 194 Va. 572 (1953). “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, 126 (1991)(emphasis added).

a. Wildevco and Fred’s 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 by not establishing that they were not at fault. Therefore, the equitable claims against Appellant must fail. As noted in the Court’s Order, for Respondents to be successful in its equitable indemnification claims against Appellant, they must prove that: (1) Appellant was at fault in causing Plaintiffs’ damages; (2) Respondents were not at fault for Plaintiffs’ damages; and (3) Respondents sustained damages in protecting its interest in defending Plaintiffs’ claims. (R. p. 18). 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. Id. Furthermore, the Court noted that the party

seeking indemnification **must also prove** that they were “potentially” liable to Plaintiff in the underlying case. Id.

If Respondents 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, 316 S.C. at 291. 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 trial court, Wildevco and Fred’s failed to meet their burden for a claim of equitable indemnification.

Conversely, if they were “potentially” liable under Plaintiffs’ claims against Respondents, they are not free from fault (i.e., 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, 371 S.C. at 349. As noted above, to be liable under premises liability, the defendant must have created the unsafe conditions, or either knew or should have known about the unsafe condition. The only potential liability of Respondents is based on the second prong—whether they knew or should have known about the condition that caused Plaintiffs’ injuries.

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

b. The trial court's order found that the defect that caused Plaintiffs' injuries was a "latent defect," and thus should have found Respondents liable.

The trial court found that "latent defects" caused Plaintiffs' injuries, and thus found that Respondents knew or should have known about the defects. (R. pp. 24–25). Any potential liability of Respondents can only be based on whether Respondents knew or should have known about the conditions that caused Plaintiffs' injuries. The testimony at trial is that the condition that caused Plaintiff to trip and fall existed for nearly five years after construction. Under South Carolina, constructive notice is a legal inference, which substitutes for actual notice. Major, 410 S.C. at 3–4. "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.

South Carolina South Carolina courts have long defined "latent defect" as a defect which an owner has knowledge of, or should have knowledge of, and of which an invitee is reasonably unaware. Callander, 305 S.C. at 126 (citing Wilson v. Duke Power Co., 273 S.C. 610 (1979); Bruno, 240 S.C. at 51. Pursuant to the conclusions of law in the trial court's final order, the trial court concluded as a matter of law that Appellant failed to construct the store free from "latent defects." (R. pp. 24–25). The order also concludes that these defects "were the sole proximate cause of Mrs. Fountain's injuries after she tripped on the subject curb ramp and fell" (R. p. 25).

The trial court's conclusions of law state that Plaintiff's fall was solely caused by a latent defect. Id. Because South Carolina courts have long defined "latent defect" as one which the owner has, or should have knowledge of, and of which an invitee is reasonably unaware, the trial

court's order concludes, as a matter of law, that the defect, which solely caused Plaintiff's trip and fall, was a defect which Respondents had knowledge, or should have had knowledge of, and of which Plaintiffs were reasonably unaware. Therefore, Respondents are at least 1% at fault for Plaintiffs' injuries, and Respondents' claim for equitable indemnification must fail because of unclean hands doctrine.

c. Wildevco admitted that it breached the standard of care owed to Plaintiffs.

Wildevco admitted that it failed to adhere to its expert's recognized safety standard of inspecting the premises looking for tripping hazards. 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, 371 S.C. at 348; Landry, 317 S.C. at 203.

Respondents' 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 Respondents was based on the allegation that Respondents breached this duty to discover risks and to warn or eliminate risks. The Plaintiffs' claims against Respondents were not based on creating an unsafe condition.

Noticeably absent from the Court's Order is any reference to the testimony of Respondents' safety expert, and more specifically their expert's testimony regarding the "recognized safety standard" of owners and occupants of public premises to inspect premises for tripping hazards. During trial, Respondents' 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. (R. pp. 355–56). Respondents' expert established that Respondents, as owners and occupier, have a duty to take affirmative action to inspect for tripping hazards around the property. *Id.* However, Wildevco admitted that it failed to follow the standard of care opined by Respondents' safety expert, Steve Hunt. 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, and 302–03). Wildevco breached its duty owed to patrons, including Plaintiffs, by failing to inspect for tripping hazards at the property.

It cannot be said that Wildevco did nothing wrong because Wildevco failed to adhere to the standard of care established by Respondents' safety expert. "Under these circumstances requires a finding that [Wildevco] cannot be 'exonerated from any liability for those damages.'" See *Inglease*, 403 S.C. at 301 (quoting *Walterboro Cmty. Hosp.*, 392 S.C. at 485. 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 Plaintiffs' injuries. This failure is sufficient to establish that Wildevco was at least 1% at fault for Plaintiffs' injuries, and Wildevco's equitable claim is barred as a matter of law.⁶

d. Wildevco was at fault for Plaintiffs' injuries because Wildevco provided defective plans.

Wildevco provided the architectural plans and the site plans for the construction of the

⁶ Applying the trial 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 trial court's ruling mandates that the patron's sole recourse should lie against the builder (who was never sued by Plaintiffs). 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.

Fred's store to Appellant, and these plans were defective. The trial court's order stated that the testimony 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). The discrepancies between the two plans involved the very issue that cause Plaintiff to trip and fall. Therefore, Wildevco is liable for providing defective plans for the project that resulted in Plaintiffs' injuries.

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. (R. p. 20). 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." Id.

The testimony at trial was that the architectural plans had a sidewalk curb with handicap ramps at the doors, and the site plans had a sidewalk curb on either side of the front of the store, but gradually reduced down to being flush at the entrance of the store. (R. pp. 257–60). The site engineer testified that his own site plans could be confusing, and that the architectural plans the site engineer used to prepare the site plans were not the final drawings and were not the same as the architectural plans that were provided to Appellant for construction. (R. p. 262). Furthermore, Barber admitted that the plans could be confusing. (R. pp. 280–81).

Additionally, the testimony from Appellant was that the site plans were read to indicate a curb along the front until the ramps in front of the entrance doors. (R. pp. 401–02). Appellant also testified that if there was a discrepancies between the plans, the architectural plan would

control. (R. pp. 402–03).

“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 (1951)(citing 17 C.J.S., Contracts, § 329 at 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 Appellant. 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 Appellant for the construction of the store, and thus, impliedly warranted the sufficiency of the plans.

The testimony and the Court’s findings 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 sidewalk 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 Appellant, and accordingly at least 1% at fault for Plaintiffs’ injuries, and is prohibited from recovering under equitable indemnification because of the unclean hands doctrine.

- e. Wildevco was liable for Plaintiffs’ injuries because Wildevco negligently tasked Barber, an unqualified person, to oversee the construction of the Fred’s store.**

Wildevco tasked Barber with overseeing the construction project for the Fred’s store even though Barber was unqualified to oversee see the construction of a retail store open to the public. 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's findings of fact establishes that Wildevco was at fault in failing to hire someone qualified to act as Wildevco's construction manager to oversee the project. (R. p. 19). 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" (R. p. 23). 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." (R. p. 19). However, the Court also found that Tad Barber "had no education or formal training in construction, engineering and/or architectural." Id. In other words, the findings of fact stated that Tad Barber was tasked with overseeing the project, and 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 (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.

"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, 219

S.C. at 271. The Court's Order found that Wildevco 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 and is liable for Plaintiffs' injuries. Accordingly, Wildevco is at least 1% at fault for Plaintiffs' injuries, and is prohibited from recovering under equitable indemnification because of unclean hands.

f. The Settlement Agreement between Plaintiffs and Respondents acknowledges Respondents were liable for Plaintiffs' injuries as "joint-tortfeasors."

The Settlement Agreement prepared by counsel for Wildevco specifically states that the document seeks to release Respondents as "joint tortfeasors," along with other joint tortfeasors which included Appellant. (R. pp. 676–83; see also R. pp. 384–85). Respondents are estopped from taking an alternate position in the same legal proceeding, and therefore, Respondents admitted common liability for Plaintiffs' injuries. Id.

A Settlement Agreement between Plaintiffs and Respondent was executed on April 21, 2017, one month after the hearing before Judge Gibbons where counsel for Wildevco informed the court that the sole remaining claim was equitable indemnification, and Judge Gibbons signed an order stating the sole remaining claim was equitable indemnification. (R. p. 12).

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" (R. p. 681). 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. Id. As such, this agreement discharges any common liability of Wildevco and Fred’s and any Joint Tortfeasors, including Tippins-Polk Construction, Inc. to Plaintiffs.” Id.

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 (Ct. App. 2007) (quoting Poston by Poston v. Barnes, 294 S.C. 261, 263 (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 Respondents’ liability for contribution as joint tortfeasors. Furthermore, the Agreement stated it operated as a satisfaction and discharge of “common liability of [Respondents] and any Joint Tortfeasor, including [Appellant].” (R. p. 684). Based on this language, it is clear that Respondents intended to extinguish the common liability among Wildevco, Fred’s and Appellant in order to preserve Respondents’ claim for contribution against Appellant. Furthermore, the extinguishing of the common liability of Respondents occurred after Wildevco represented to Judge Gibbons that the sole claim remaining in the case was equitable indemnification.

Furthermore, S.C. Code Ann. § 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). Respondents could not extinguish or discharge what did not exist. See Vermeer Carolina's, Inc., 336 S.C. at 68. As testified to by Wildevco’s attorney, Wildevco’s attorney prepared the Settlement Agreement. (R. p. 387). This Settlement Agreement specifically discharged Respondents and Appellant’s common liability in order to preserve the claim for contribution. This discharge of common liability for Respondents must be carefully scrutinized in order to determine the impact upon the integrity of the judicial process, including the equitable indemnification claim asserted against Appellant. Ecclesiastes Prod. Ministries v. Outparcel Assoc., 374 S.C. at 493.

Respondents have agreed while the action is pending against them to discharge the common liability in order to maintain a right to contribution against Appellant. (R. p. 681). However, at trial Respondents took the position that Respondents were not at fault in their claims for equitable indemnification against Appellant. 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 (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, § 21. Respondents have taken the position that they were joint tortfeasors with

Appellant in the Settlement Agreement, and have admitted that they had common liability for Plaintiffs' injuries.

Furthermore, Wildevco filed a motion to amend to add a claim for contribution the day of trial, and Fred's joined in the motion. (R. p. 180). 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." (R. p. 142). 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." Id. Based on Wildevco's submissions to the Court, Wildevco confirms that there was common liability among Respondents, and that this common liability was discharged to assert a claim for contribution against Appellant.

Respondents acknowledged that they had common liability in Plaintiffs' injuries in the Settlement Agreement and in its submissions to the trial court. Respondents 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, Respondents are prohibited from recovering under a claim for equitable indemnification because they have admitted that they have unclean hands.

III. RESPONDENTS ARE BOUND BY THEIR OWN PLEADINGS AND ARE ESTOPPED FROM RECOVERING DAMAGES NOT REQUESTED WITHIN THE COMPLAINT.

Respondents' only requested damages arising from an award or judgment in favor of Plaintiffs; however, there was no award or judgment issued in favor of Plaintiffs in this case. "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 (Ct. App. 1993)(quoting Elrod v. All, 243 S.C. 425 (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.

Respondents' pleadings requested judgment against Appellant for an award or judgment issued in Plaintiff's favor. (R. p. 159). Respondents' complaint did not seek to recover from Appellant settlement payments made to Plaintiffs. Wildevco's Third Amended Complaint requests a "judgment over and against [Tippins-Polk] for all or part of any verdict or judgment over and against [Wildevco]." (R. pp. 165–66). 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." (R. p. 159). Respondents never moved at the end of trial to amend their complaint to conform to the evidence to include a request for settlement costs and fees.

Respondents 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 in favor of Plaintiffs. 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 and fees because the relief was not requested.

IV. ALTERNATIVELY, THE TRIAL COURT ERRED IN AWARDING ATTORNEYS' FEES UNDER RESPONDENTS' CLAIM FOR EQUITABLE INDEMNIFICATION BECAUSE THE FEES WERE FOR BOTH DEFENDING PLAINTIFFS' CLAIM, AS WELL AS PROSECUTING THIS MATTER AGAINST APPELLANT, AND WERE SPECULATIVE.

In the alternative to the Court reversing the trial court ruling in favor of Respondents, Appellant seeks to have the trial court's award of attorneys' fees reversed because the fees and costs included the prosecution of the equitable indemnification claims against Appellant, and because the fees are speculative. Wildevco's attorney admitted that Wildevco's fees and costs included work for both the prosecution of the claims against Appellant and the defense of Plaintiffs' claims. R. p. 387. Fred's fails to provide any indication as to what the fees were associated with – defense or prosecution. (See R. p. 389; see also R. p. 568). The award of the fees and costs should be reversed.

The attorneys' fees awarded by the trial 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 (1971). Town of Winnsboro, 307 S.C. 128; 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, 360 S.C. 241, 255 (Ct. App. 2004).

Wildevco produced a detailed billing statement as evidence of attorneys' fees. (R. pp. 571–675). 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. (R. p. 387). 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. Id. 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. Additionally, even if Wildevco cut the fees in half it was still for work on both defending claims and prosecuting the equitable indemnification claim.

Fred's introduced the Affidavit of Denise M. Brockwell in support of its claim for attorneys' fees. (R. pp. 565–67). However, Fred's did not 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.

Respondents' 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 and costs are not recoverable by Respondents.

V. THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO CONSIDER EVIDENCE OF A PRIOR SIMILAR INCIDENT THAT OCCURRED AT A FRED'S STORE IN A NEIGHBORING COUNTY, WHICH WAS RELEVANT TO WHETHER FRED'S HAD ACTUAL OR CONSTRUCTIVE NOTICE OF THE DANGEROUS CONDITION THAT IS THE SUBJECT OF THIS LITIGATION.

Evidence of similar acts is admissible 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 (Ct. App. 1990) (citing Reed v. Clark, 277 S.C. 310 (1982)). "It is simply a rule of relevance, logic, and common sense." Brewer v. Morris, 269 S.C. 607, 610 (1977). Evidence is relevant and admissible if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rules 401, 402, SCRE. "The admission of evidence is within the [circuit] court's discretion." R&G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 439 (Ct. App. 2000). "The court's ruling to admit or exclude evidence will only be reversed if it constitutes an abuse of discretion amounting to an error of law." Id.; see Gamble v. Int'l Paper Realty Corp. of S.C., 323 S.C. 367, 373 (1996) (noting that a ruling on the admission or exclusion of evidence will not be disturbed on appeal absent a clear abuse of discretion).

Here, the trial court erred in refusing to admit evidence pertaining to a similar incident that occurred roughly three months before the incident at issue at a Fred's store in a neighboring county (hereinafter referred to as "the Varnville store"). As was argued at trial in response to opposing counsel's objection, as a patron was approaching the entrance at the Varnville store, she tripped on the same type of curb/ramp transition on which the Plaintiff tripped as she entered the Williston store. (R. p. 407). While evidence of this prior accident may not be admitted for the

purpose of establishing negligence, such evidence nonetheless is admissible and should have been considered to establish the existence of a similar danger or defect at another Fred's store that would have put representatives of Fred's on actual or constructive notice of the danger or defect at issue. One fact in dispute in this matter is whether Fred's was aware that the sub/ramp transition at the entrance of the Williston store was a potential tripping hazard. If Fred's was aware of a similar trip and fall at the Varnville store, then Fred's should have been put on actual or constructive notice of the danger or defect at the Williston store, since the two curb/ramp transitions were substantially similar to each other. Furthermore, with actual or constructive notice of the danger or defect, Fred's should have warned or eliminated the condition prior to Plaintiff's trip and fall.

The prior accident was substantially similar and not too remote from the accident in question, and should have been admitted to prove Fred's actual or constructive notice. As a result of their actual or constructive notice of the danger or defect, under South Carolina premises liability law, Fred's is liable for failing to warn of or correct the condition prior to Plaintiff's trip and fall. Accordingly, had the evidence been admitted, it should have been considered in the allocation of fault between the parties. However, Judge Early would not even allow trial counsel to proffer such evidence at trial.

Therefore, for the foregoing reasons, the trial court abused its discretion in excluding relevant evidence of a prior similar incident.

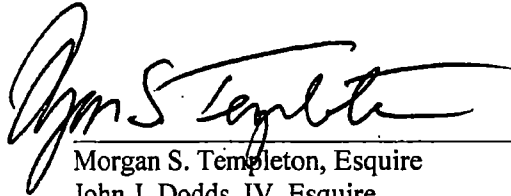
CONCLUSION

For the foregoing reasons, Appellant requests that the Court of Appeals reverse the trial court order granting judgment for Respondents, and granting judgment in favor of Appellant.

In the alternative, Appellant ask that the Court of Appeals reverse the trial court award of attorneys' fees and costs to Respondent.

Dated this 15th day of November, 2017.

WALL TEMPLETON & HALDRUP, P.A.

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

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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

NOV 20 2017

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.

CERTIFICATE OF COUNSEL

The undersigned certifies that Appellant's Final Brief complies with Rule 211(b), SCACR.

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IN 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

Appellate Case No. 2017-00068

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DEC 01 2017

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.

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IN 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

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STATEMENT OF ISSUES ON APPEAL

- I. WHETHER OR NOT THE TRIAL COURT ERRED IN FINDING THAT A SPECIAL RELATIONSHIP EXISTED BETWEEN RESPONDENT, FRED'S, INC. AND APPELLANT TO SUPPORT A CLAIM FOR EQUITABLE INDEMNIFICATION.
- II. WHETHER OR NOT THE TRIAL COURT ERRED IN FINDING RESPONDENT, FRED'S, INC. WAS WITHOUT FAULT.
- III. WHETHER OR NOT THE TRIAL COURT ERRED IN FAILING TO CONCLUDE RESPONDENT, FRED'S, INC. WAS ESTOPPED FROM RECOVERING DAMAGES NOT REQUESTED IN THEIR COMPLAINT.
- IV. WHETHER OR NOT THE TRIAL COURT ERRED IN AWARDING CERTAIN ATTORNEY'S FEES AND COSTS TO RESPONDENT, FRED'S, INC. BASED UPON APPELLANT'S CONTENTION THAT THEY WERE BOTH SPECULATIVE AND RELATED TO THE DEFENSE OF PLAINTIFFS' CLAIM AND PROSECUTION OF THE EQUITABLE INDEMNIFICATION CLAIM.

STATEMENT OF THE CASE

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. Prior to the trial of the underlying suit brought by Martha and Curtis Fountain Respondents reached a settlement agreement, which was later codified in an executed Settlement Agreement. Upon execution of the Settlement Agreement the only claim that remained was a claim for equitable indemnification by Respondents against Appellant.

A trial was held over the course of April 6 and 7, 2016 before The Honorable Doyet A. Early, III. At the conclusion of the trial Judge Early took the matter under advisement with an Order and Judgment later requested by Judge Early finding in favor of Respondents. The Order specifically concluded that "[Appellant] breached its contractual obligations and its duty of care to in failing to construct the premises free from latent defects" and that those "construction defects, for which [Appellant] is solely responsible, were the sole proximate cause of Mrs. Fountain's injuries." The trial court, in accordance with the foregoing findings, entered a judgment in favor of Respondent, Fred's, Inc. in the amount of Seventy-Six Thousand Six Hundred Ninety-One and 82/100 (\$76,691.82) Dollars. The Order and Judgment was filed on August 3, 2016 and Tippins-Polk has filed this motion related thereto. Appellant timely filed a Motion under Rule 52(b), SCRCP and Rule 59(e) to make additional findings and reconsider/amend. Appellant's motion was eventually denied by the trial court with Appellant timely filing their notice of appeal.

ARGUMENTS

I. THE TRIAL COURT CORRECTLY CONCLUDED THAT THERE WAS A SUFFICIENT SPECIAL RELATIONSHIP BETWEEN FRED'S AND APPELLANT TO SUPPORT A CLAIM FOR EQUITABLE INDEMNIFICATION.

As a cursory matter Respondent Fred's, Inc., first points to a sustainable claim for indemnification against Appellant under the accepted principle of imputed liability, which eliminates any need to establish the existence of a special relationship. It has been well settled 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." *Town of Winnsboro v. Wiedman-Singleton, Inc. (Winnsboro I)*, 303 S.C. 52, 398 S.E.2d 500 (Ct.App. 1990) *aff'd* 307 S.C. 128, 414 S.E.2d 118 (1992) (Winnsboro II). 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 the instant case it was established Respondent Fred's, Inc., was exposed to potential liability solely as a result of the wrongful act of Appellant in their negligent construction of the Respondent's premises.

Appellant takes the alternate position in their appeal by arguing there was no special relationship between them and Respondent Fred's, Inc. In support of its position Appellant 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 against the general contractor rather than a sub-contractor with whom a contract was made for services rendered to knowingly benefit Respondent Fred's, Inc.

In its Order the Court found the relationship with Respondent Fred's, Inc., and Appellant was not an attenuated action against a sub-contractor. Specifically, evidence was presented during the trial that Appellant had never previously done business with Respondent Wildevco but rather came about this opportunity on account of its relationship as a general contractor on the construction of another Respondent Fred's, Inc., store. Furthermore, it was noted the contract executed by and between Appellant and Respondent Wildevco was clearly known to have been for the benefit of Respondent Fred's, Inc., as they were directly referenced in the agreement and Rett Polk testified to knowing that the primary store in this shopping center was Respondent Fred's, Inc. (R. p. 410, lines 12-14). Furthermore, Mr. Polk testified to Appellant having built ten to fifteen stores for Respondent Fred's, Inc. (R. p. 410, lines 10-11). Mr. Polk even testified to the fact that Appellant is in fact an owner of another location operated by Respondent Fred's, Inc. (R. p. 406, lines 13-14). Likewise, Mr. Barber testified to having never previously had any relationship with Tippins-Polk. Therefore, there existed more than sufficient evidence presented to establish the existence of a direct relationship between Respondent Fred's, Inc., and Appellant such that an equitable indemnification claim between the parties is proper.

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 Respondent Fred’s, Inc., was created for their direct benefit as it specifically referenced the construction of a Fred’s store. (R. pp. 470-471). Moreover, Mr. Polk even testified to knowing the contract was for the building of a Fred’s store thus it can 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.

II. THE TRIAL COURT CORRECTLY CONCLUDED THAT RESPONDENT FRED’S, INC., WAS WITHOUT FAULT.

Respondent Fred’s, Inc., presented a claim for equitable indemnification under the premise that it was “compelled to pay damages because of negligence imputed to him as the result of another parties tortious act.” *Fowler v. Hunter*, 388 S.C. 355, 363, 697 S.E.2d 531, 535 (2010) (quoting *Vermeer Carolina’s, Inc. v. Wood/Chuck Chipper Co.*, 336 S.C. 53, 518 S.E.2d 301 (Ct.App. 1999)). A party who asserts a claim for equitable indemnification is entitled to 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 plaintiff’s claims against it which were eventually proven to be the fault of the indemnitor.” *Vermeer Carolina’s, Inc. v. Wood/Chuck Chipper Co.*, 336 S.C. 53, 63, 518 S.E.2d 301, 307 (Ct.App. 1999). “Equitable indemnity cases involve a fact pattern in

which the first party is at fault, but the second party is not. *Id.*, (See also *Town of Winnsboro v. Wiedman-Singleton, Inc. (Winnsboro I)*, 303 S.C. 52, 398 S.E.2d 500 (Ct.App. 1990), *aff'd*, 307 S.C. 128, 414 S.E.2d 118 (1992) (*Winnsboro II*). “If the second party is also at fault, he comes to court without equity and has no right to indemnity. *Id.*”

As Appellant repeatedly points out in its initial brief the underlying suit brought by Plaintiffs against Respondents was a premises liability/negligence suit. Specifically, the suit alleged that Plaintiff, Martha Fountain tripped and fell as a result of the presence of a dangerous condition on Respondents premises resulting in her sustaining bodily injuries. It is well settled law in the state of South Carolina that “[a] merchant is not an insurer of the safety of his customers but only owes the duty of exercising ordinary care to keep the premises in a reasonably safe condition. *Garvin v. Bi-Lo, Inc.*, 343 S.C. 625, 628, 541 S.E.2d 831, 832 (2001), (See also *Pennington v. Sayre Corp.*, 252 S.C. 173, 165 S.E.2d 695 (1969). Likewise, a merchant “is not required to maintain the premises in such a condition that no accident could happen to a patron using them.” *Denton v. Winn-Dixie Greenville, Inc.*, 312 S.C. 119, 120, 439 S.E.2d 292, 293 (Ct. App. 1993), (See also *Panoz v. Gulf & Bay Corporation*, 208 So.2d 297 (Fla. App.), *cert. denied*, 218 So.2d 166 (Fla.1968); *Gavin v. City of Chicago*, 97 Ill. 66 (1880); *Overton v. Wenatchee Beebe Orchard Co.*, 28 Wash.2d 377, 183 P.2d 473 (1947)). Specifically, in a matter involving a purported dangerous or defective condition a plaintiff, to recover damages for injuries as a result of said condition, “must show either (1) that the injury was caused by a specific act of the respondent which created the dangerous condition; or (2) that the respondent had actual or constructive knowledge of the dangerous condition and failed to remedy it.” *Garvin v. Bi-Lo, Inc.*, 343 S.C. at 625, (See also *Anderson v. Racetrac Petroleum Inc.*, 296 S.C. 204, 371 S.E.2d 530 (1988); *Pennington v. Zayre **833 Corp.*, 252 S.C. 176, 165 S.E.2d 695

(1969); *Hunter v. Dixie Home Stores*, 232 S.C. 139, 101 S.E.2d 262 (1957); *Cook v. Food Lion, Inc.*, 328 S.C. 324, 491 S.E.2d 690 (Ct.App.1998)).

During the trial of the suit now on appeal it was well settled and established that Appellant was the general contractor charged with the interpretation of the site plans and architectural plans and seeing to the construction of the premises in accordance therewith. There was further evidence presented that Respondent Fred's, Inc., had no direct involvement either in development of the plans or the construction of the premises such that there was sufficient evidence establishing that they did not create a dangerous condition. Alternatively, under a premises liability theory there would have had to be evidence, for Respondent Fred's, Inc., to have had liability, that they had actual or constructive knowledge of a dangerous condition and despite such knowledge they failed to remedy the condition. Appellant contends simply that Respondent Fred's, Inc., had been operating this business for several years with the curb ramp such that constructive notice of the condition existed. However, the foregoing contention is akin to Appellant arguing Respondent had constructive knowledge of a dangerous condition in a case where a customer is injured by the entrance door simply because they knew the entrance door was there without any obligation for establishing the shopkeeper knew of a danger inherent in the condition. In short there was no evidence presented during the trial of the equitable indemnification claim that would support a finding that Respondent Fred's, Inc., created the purportedly dangerous condition or had actual or constructive knowledge of the existence of a dangerous condition on its property such that there could be no liability on their behalf.

- a. Respondent Fred's, Inc. and Appellant were not joint tortfeasors such that there is a right of indemnity between them.

Under South Carolina law, there can be no indemnity among mere joint tortfeasors. *Id.*, at 64 (*See also Scott v. Fruehauf Corp.*, 302 S.C. 364, 396 S.E.2d 354 (1990)); (*See also Stuck v.*

Pioneer Logging Machinery, Inc., 279 S.C. 22, 301 S.E.2d 552 (1983)); (See also *Atlantic Coast Line R.R. v. Whetstone*, 243 S.C. 61, 132 S.E.2d 172 (1963)). Parties 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.* (See also *Scott, supra*). Joint tortfeasor” refers to “[t]hose who act together in committing wrong, or whose acts if independent of each other, unite in causing single injury”; “two or more persons jointly or severally liable in tort for the same injury to person or property.” *Id.* (quoting Black’s Law Dictionary 839 (6th ed. 1990)).

This matter is comparable to the case of *Bruno v. Pendleton Realty Co.*, which centered on a trip and fall that occurred in the parking lot of a shopping center. (240 S.C. 46 124 S.E.2d 580 (1962)). In the aforementioned matter a patron had fallen when he was stepping on the edge of a curb that was concealed by overgrown grass. *Id.* The Court noted simply that:

One 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, but 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. at S.C. 51. In the case at bar Respondent Fred’s, Inc., owed a duty, under a standard premises liability theory, to Plaintiff Martha Fountain to maintain and keep its premises in a reasonably safe condition. However, and alternatively, Appellant’s duty as established in *Fields v. J. Haynes Waters Builders, Inc.* is stated as that where “a builder who undertakes to supervise the construction of a building is under a duty to exercise reasonable care and such supervision to see that the work is done in conformity with the applicable building code ... and in a good and workmanlike manner.” (376 S.C. 545, 560, 658 S.E.2d 80, 88 (2008)). The Court expounded

upon this point and duly noting that it “has embraced the notion that in constructing a home, a builder warrants that the home is fit for its intended use as a dwelling, that the home was constructed in a workmanlike manner, and that the home is *free of latent defects*.” *Id.* at 561 (*emphasis added*). Finally, this warranty is noted to extend to the original purchaser as well as subsequent purchasers such that in the instant case it stands to reason that their warranty would cover both Respondents.

The trial court determined herein that, based upon the evidence presented, the condition at issue qualified as a latent defect at the time of the construction process overseen by Appellant. Upon the foregoing finding by the Court, it was clear and indisputable that Appellant has breached its duty owed to the Respondents such that they are liable to them for the equitable indemnification claim. As espoused in *Fields*, the duty owed by an entity, in the capacity of Appellant, was owed to the property owner and not to subsequent invitees there directly contradicting any potential argument of joint liability between Appellant and Respondents for the underlying injuries sustained by Plaintiffs.

- b. The finding that there existed a “latent defect” on the property does not establish fault on Respondent Fred’s, Inc.

Appellant submits that in holding that a latent defect was created in the construction of the premises that Respondent Fred’s, Inc., was found at fault was wholly misplaced and a complete misinterpretation of the findings. “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, 125, 406 S.E. 2d 361, 362 (1991); (*See also Wilson v. Duke Power Co.*, 273 S.C. 610, 258 S.E.2d 101 (1979); *Bruno v. Pendleton Realty*, 240 S.C. 46, 124 S.E.2d 580 (1962)). Furthermore a latent defect is seen as “one which a reasonably careful

inspection will not reveal.” *Id.*; (See also *Land v. Franklin National Insurance Company*, 225 S.C. 33, 80 S.E.2d 420 (1954); 26A C.J.S. *Defect*.

During the trial in this case Joseph Stephen Hunt was called on to testify regarding the condition created during the construction of the premises. Specifically, he referred to the particular issues with the curb ramp it is believed to have been the cause of Plaintiff’s fall as a construction defect as having been created by Appellant. Under the analysis of a latent condition as defined above is noted as being one which an owner should have knowledge of and which the invitee is unaware. However, Mr. Hunt specifically testified the condition at issue was not one that Respondent Fred’s, Inc. would reasonably have been aware of or able to identify through their inspections due to the training, experience, or education in construction necessary to discern and identify the construction defect. It is a direct result of the clear and undisputed testimony of Mr. Hunt that Respondent argues it had neither actual nor constructive knowledge of a latent condition.

- c. The Court properly excluded evidence of a purported similar incident in a neighboring county.

The trial court appropriately excluded evidence Appellant attempted to introduce relative to a purportedly similar incident as the admissibility of evidence is within the sound discretion of the trial court. “Evidence of similar accidents, transactions, 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.” *Watson v. Ford Motor Co.*, 389 S.C. 434, 453, 699 S.E.2d 169, 179 (2010); (See also *Whaley v. CSX Transp., Inc.*, 362 S.C. 456, 483, 609 S.E.2d 286, 300 (2005)). “Courts require a plaintiff to establish a factual foundation to show substantial similarity because evidence of similar incidents may be extremely prejudicial.” *Id.*, at 454. “A plaintiff must present

a factual foundation for the court to determine that the other accidents were substantially similar to the accident at issue.” *Id.* at 453.

In *Buckman v. Bombardier Corp.*, the District Court set forth factors that a court should consider when admitting evidence of other incidents to support a claim that the present accident was caused by the same defect: (1) the products are similar; (2) the alleged defect is similar; (3) causation related to the defect in the other incidents; and (4) exclusion of all reasonable secondary explanations for the cause of the other incidents.” 893 F.Supp. 547, 552 (E.D.N.C.1995) (citing *Hale v. Firestone Tire & Rubber Co.*, 756 F.2d 1322, 1332 (8th Cir.1985)).

Id.

In the case at bar Appellant sought to introduce evidence of a purported trip and fall from another of the Respondent’s stores located in a neighboring county. In its attempt to introduce this evidence Appellant was permitted to proffer testimony through their witness, Mr. Rett Polk, who was the reported general contractor at the store located in the neighboring county. Mr. Polk testified plainly, “we had the same incidence where we had a store constructed with the handicapped ramp per Fred’s plans and plans we were issued.” (R. p. 407, lines 18-20). However, Mr. Polk provided absolutely no additional details in regards to the specifics of the ramp in question or the allegedly similar incident. Pertinent to the analysis of admissibility Mr. Polk testified that a different architect prepared the architectural plans at the neighboring store and a different engineer prepared the site plans. Moreover, it was even admitted that the neighboring store’s site plans were not even the same as the plans relied upon in the construction of the store where the underlying incident giving rise to the equitable indemnification claim occurred. Simply put there was more than ample evidence proffered during Mr. Polk’s testimony for the trial court to rely upon to determine the conditions existing at the neighboring store were dissimilar enough to exclude any evidence of the allegedly similar incident.

III. THE TRIAL COURT CORRECTLY PERMITTED RESPONDENT FRED'S, INC., TO RECOVER THE DAMAGES AWARDED AT THE CONCLUSION OF THE TRIAL.

Respondent Fred's, Inc., in bringing its suit for equitable indemnification against Appellant, set forth the pertinent and required factual allegations to support the pursuit of such a cause of action. In conjunction with the foregoing cause of action, Respondent prayed for certain relief from the trial court, which included a request that "they be awarded judgment over and against [Appellant] for all or part of any verdict or judgment which may be recovered by Plaintiffs." Appellant, in reliance on the foregoing portion of the prayer for relief incorrectly contends Respondent is now not entitled to recover damages for the amount paid in settlement to Plaintiffs or fees incurred. The narrowly construed analysis by Appellant is flawed as it fails to acknowledge the additional language in the relief wherein Respondents requested "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." *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 62, 64, 518 S.E.2d 301, 307 (Ct.App. 1999). 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.

Appellant seems to take the position that Respondent is unable to recover damages irrefutably recovered under a properly pled equitable indemnification matter by virtue of some nuances in the prayer for relief. "The Rules clearly set forth the required contents of pleadings. Pleadings 'shall contain (1) a short and plain statement of the grounds including facts and statutes upon which the court's jurisdiction depends, unless the court already has jurisdiction to support it, (2) a short and plain statement of the facts showing that the pleader is entitled to relief, and (3) a prayer or demand for judgment for the relief to which he deems himself entitled.'" *Justice v. Pantry*, 330 S.C. 37, 41-42, 496 S.E.2d 871, 873 (Ct.App. 1998); (quoting Rule 8(a), SCRCPP). The court went on to state that "[P]leadings in a case should be construed liberally so that substantial justice is done between the parties." *Id.*; (quoting *Russell v. City of Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991)). "Our courts have held that 'it is the substance of the requested relief that matters regardless of the form in which the request for relief was framed.'" *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 437, 673 S.E.2d 448, 458 (2009); (quoting *Richland County v. Kaiser*, 351 S.C. 89, 94, 567 S.E.2d 260, 262 (Ct.App. 2002); (quoting *Standard Fed. Sav. & Loan Ass'n v. Munco*, 306 S.C. 22, 26, 410 S.E.2d 18, 20 (Ct.App. 1991)).

This matter, as pled in the multiple complaints, was clearly and unequivocally one for equitable indemnification, which permits the party entitled to such a remedy to recover damages, which may include settlement proceeds paid as well as attorney's fees and costs. To challenge the ruling of the trial court in the damages awarded, Appellant would have to argue and establish abuse of judicial discretion in this instance. Respondent, through general language, pleaded for recovery of "such other and further relief as the Court would deem just and proper," which when,

as required, are construed liberally affords the trial court the discretion to award all appropriate damages otherwise recoverable in a case for equitable indemnification.

IV. THE TRIAL COURT CORRECTLY PERMITTED RESPONDENT FRED'S, INC., TO RECOVER ATTORNEY'S FEES AND COSTS AS SUBMITTED AT TRIAL.

Appellant's final contention was that the trial court erred in its award of attorney's fees and costs to Respondent Fred's, Inc. Specifically, Appellant contends that the award by the trial court should be reversed due to their being no distinction in the fees as to whether they were associated with the defense of the underlying suit or prosecution of the equitable indemnification suit. Alternatively, Appellant submits that the fees and costs are based upon speculation and as such cannot be recovered. Appellant's contention as to the speculative nature of the award is wholly misguided. In support of its claim for attorney's fees and costs Respondent submitted an Affidavit of Denise M. Brockwell (R. pp. 565-567), which was notably admitted without objection. Through the aforementioned affidavit, Respondent set forth the precise amounts of attorney's fees and costs incurred in furtherance of their efforts to protect their 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." *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 61, 518 S.E.2d 301, 307 (Ct.App. 1999); (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* 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 Respondents and only through later efforts came to include the equitable indemnification claim against Appellant. Even Appellant cannot contend that the actions taken, which may also have benefited Respondent Fred's, Inc., in its claim for equitable indemnification were not done to protect their interests 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 Respondent Fred's, Inc., did not create a dangerous condition on its premises. Mr. Hunt was brought in to establish precisely all the manners in which Appellant breached its duty to create a property 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 Appellant 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.

Appellant further contends the attorney's 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 Appellant 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 Appellant consented, without objection, to the admission of the Affidavit of Denise

M. Brockwell (R. pp. 565-567), which was the evidence submitted to the trial court upon which the award of attorney's fees and costs was made.

The absence of an objection by Appellant is fatal to its claim now that these fees and costs are not recoverable. "Although limited exceptions exist, objections to the admission of evidence must be made when evidence is presented at trial to preserve error for appeal." *Parr v. Gaines*, 309 S.C. 477, 481, 424 S.E.2d 515, 518 (Ct.App. 1992); (*See also State v. Davis*, 309 S.C. 56, 419 S.E.2d 820 (Ct.App. 1992)). Moreover, in *Doe v. S.B.M.*, it was held that "[t]he failure to make an objection at the time evidence is offered constitutes a waiver of the right to object" and bars the litigant from later requesting review of the issue by the appellate court. (327 S.C. 352, 356, 488 S.E.2d 878, 880-81 (Ct. App 1997)); (*See also Cogdill v. Watson*, 289 S.C. 531, 347 S.E.2d 126 (Ct. App. 1986)); (citing *McReight v. MacDougall*, 248 S.C. 222, 149 S.E.2d 621 (1966)); (*See also Washington v. Whitaker*, 317 S.C. 108, 451 S.E.2d 894 (1994) (by failing to raise contemporaneous objection to plaintiffs' request for punitive damages, city waived any objection to propriety of punitive damages against municipality)); (*Ball v. Canadian Am. Express Co.*, 314 S.C. 272, 442 S.E.2d 620 (Ct. App. 1994) (failure to object at trial waives right to object on appeal)). In *Freeman v. A & M Mobile Home Sales, Inc.*, 293 S.C. 255, 359 S.E.2d 532 (1987), a scenario similar to the one at issue here presented itself when an attorney offered to simply present a court with an *estimate* of hours spent in the litigation of this case. (*Emphasis added*). 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.

It is undisputable that Appellant did not object to the submission of Ms. Brockwell's Affidavit (R. pp. 565-567) nor did they challenge the Invoice Details Report (R. p. 568) that

accompanied the Affidavit. In fact, Appellant stipulated and consented to the evidentiary submission of Respondent Fred's, Inc., that formed the basis for the trial court's conclusion as to the amount of attorney's fees and costs to be awarded. Based upon the foregoing precedent Appellant, due to their failure to contemporaneously object, has not properly preserved this issue for appellate review.

CONCLUSION

For the reasons stated herein, this Court should affirm the Order and Judgment of the trial court in full.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'M. LaFave', is written over a horizontal line.

December 1, 2017

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IN 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

Appellate Case No. 2017-00068

RECEIVED

DEC 01 2017

SC Court of Appeals

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

v.

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

v.

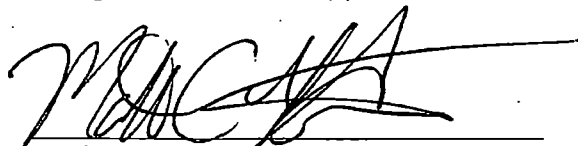
Tippins-Polk Construction, Inc. and Rhoad's Excavating Services, LLC Third Party
Defendants.

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

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

December 1, 2017



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BARNWELL COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2017-00068

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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.

FINAL BRIEF OF RESPONDENT WILDEVCO, LLC

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL COURT PROPERLY FIND THAT WILDEVCO WAS ENTITLED TO EQUITABLE INDEMNIFICATION WHERE THE EVIDENCE ESTABLISHED THAT TIPPINS-POLK WAS AT FAULT AND THAT WILDEVCO WAS WITHOUT FAULT IN CAUSING THE PLAINTIFFS' DAMAGES?
- II. DID THE TRIAL COURT PROPERLY FIND THAT WILDEVCO'S COMPLAINT WAS SUFFICIENT TO SUPPORT AN AWARD OF ITS ATTORNEYS' FEES AND COSTS PURSUANT TO ITS COMPLAINT?
- III. DID THE TRIAL COURT PROPERLY GRANT ATTORNEYS' FEES TO WILDEVCO WHERE THE FEES WERE REASONABLE AND WERE PROPERLY LIMITED TO THOSE FEES INCURRED IN DEFENDING THE UNDERLYING CLAIMS BY THE FOUNTAINS.

STATEMENT OF THE CASE

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

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

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

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

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

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

STATEMENT OF FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

STANDARD OF REVIEW

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

ARGUMENT

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In South Carolina, “[o]ne who operates a shopping center where stores are leased to merchants and the owner retains possession and control of the parking area and sidewalks, is not an insurer of the safety of those who use the parking lot and sidewalks as customers of the merchants leasing the stores...” However, ‘the owner of the premises owes the customers the duty of exercising ordinary care to keep the passageways, sidewalks and such other parts of the premises as are ordinarily used by the customers in transacting business in a reasonably safe condition.’” *O’Leary-Payne v. R.R. Hilton Head, II, Inc.*, 371 S.C. 340, 348, 638 S.E.2d 96, 100 (Ct. App. 2006) (quoting *Bruno v. Pendleton Realty Co.*, 240 S.C. 46, 50–51, 124 S.E.2d 580, 582 (1962)). Additionally, to recover damages for injuries caused by a dangerous or defective condition on a storekeeper’s premises, a plaintiff must show either (1) that the injury was caused by a specific act of the defendant which created the dangerous condition; or (2) that the defendant had actual or constructive knowledge of the dangerous condition and failed to remedy it. *Wintersteen v. Food Lion, Inc.*, 344 S.C. 32, 35, 542 S.E.2d 728, 729 (2001) (internal citations omitted).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁴ Tippins-Polk erroneously states that Mr. Hunt testified that “there is a recognized safety standard for owners and occupants of public buildings to conduct inspection of the premises looking for tripping hazards similar to the condition that caused Plaintiffs’ injuries.” (App.’s Br., pp. 28-29). Precisely to the contrary, Mr. Hunt testified that Wildevco did not have the specialized skill to discern the condition that caused Mrs. Fountain’s fall, that it did not have a duty to hire anyone else to inspect the property for such a condition and that it properly relied on Tippins-Polk to construct the subject sidewalk free of any such defects. (R. p. 337, lines 6-20; p. 355, line 24 – p. 356, line 13; p. 357, lines 14-22).

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

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

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

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

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

a perceived discrepancy in the plans. (R. p. 271, lines 12-20; p. 279, lines 10-23; p. 290, lines 16-19; p. 337, lines 6-20; p. 355, line 24 – p. 356, line 13; p. 357, lines 14-22; p. 417, lines 3-9).

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

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

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

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

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

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

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

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

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

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

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

The Settlement Agreement reads in pertinent part:

Plaintiffs agree that it is the intent of this Agreement to relieve Wildevco and Fred's of *any* liability for contribution or indemnity to any person or entity that is or *may* be responsible or liable to Plaintiffs as joint tortfeasors, joint obligors or indemnitors ("Joint Tortfeasors") for any damages or injury arising out of or relating to the Incident. Additionally, this Agreement and the payment made by or on behalf of Wildevco and Fred's pursuant to Section 1 of this Agreement operate as a satisfaction of any claim by Plaintiffs against any and all such Joint Tortfeasors, including Tippins-Polk Construction, Inc., and will reduce any damages recoverable against any and all such Joint Tortfeasors, to the full extent of the relative pro-rata share, *if any*, of the common liability of Wildevco and Fred's. As such, this Agreement discharges *any* common liability of Wildevco and Fred's and *any* Joint Tortfeasors, including Tippins-Polk Construction, Inc., to Plaintiffs.

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

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

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

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

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

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

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

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

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

Tippins-Polk avers throughout its brief that Wildevco may not recover in equity against it because Wildevco has unclean hands. “The doctrine of unclean hands precludes a [party] from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant.” *Straight v. Goss*, 383 S.C. 180, 206-207, 678 S.E.2d 443, 457-458 (Ct. App. 2009) (internal citation omitted). As discussed more fully above, Tippins-Polk presented no cognizable evidence of fault on the part of Wildevco to the trial court; therefore, the trial court properly found that Wildevco was without fault in causing the Fountains’ injuries. “The decision to grant equitable relief is in the discretion of the trial judge.” *Id.* Based upon the foregoing, Wildevco cannot have unclean hands and this Honorable Court should affirm the trial court’s judgment.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

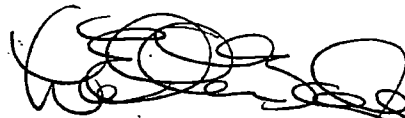
The trial court properly found that Wildevco incurred costs and expenses, including attorneys' fees, as a legal consequence of Tippins-Polk's negligent construction of the subject premises. Further, the requested fees were reasonable. (R. p. 569; p. 378, line 14 – p. 381, line 2; p. 386, line 6 – p.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

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

CONCLUSION

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

Respectfully submitted,



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December 4, 2017

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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

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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.

REPLY BRIEF OF APPELLANT

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Appellant Tippins-Polk Construction, Inc. ("Appellant") submits this reply brief in further support of its appeal.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN FINDING THAT FRED'S POSSESSED A VIABLE CAUSE OF ACTION FOR EQUITABLE INDEMNIFICATION AGAINST APPELLANT.

South Carolina courts "have long recognized the principle of equitable indemnification." Town of Winnsboro v. Wiedeman-Singleton, Inc., 307 S.C. 128, 130 (1992). An equitable indemnity claim may arise when a third party makes a claim against the indemnity plaintiff for damages the third party sustained as a result of another's tortious conduct. Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Se. Grp., 413 S.C. 615, 625 (Ct. App. 2015); see also Stuck v. Pioneer Logging Mach., Inc., 279 S.C. 22, 24 (1983) (stating that "a right to indemnity exists whenever the relation between the parties is such that either in law or equity there is an obligation on one party to indemnify the other"). South Carolina courts have allowed equitable indemnity "in cases of imputed fault or where some special relationship exists between the first and second parties." Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 60 (Ct. App. 1999). However, as discussed below, neither applies in the instant case as between Fred's, Inc. ("Fred's") and Appellant.

a. Fred's was potentially at fault based on its own actions or inaction, not based on imputed fault arising out of the actions of Appellant.

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. Wintersteen v. Food Lion, Inc., 344 S.C. 32, 35 (2001).

Here, Fred's liability was not based on imputed fault arising out of the conduct of Appellant. Rather, the only liability Fred's faced from Plaintiff's claim would have been based on whether Fred's own conduct, namely, whether it knew or should have known about the condition that caused Plaintiff's injuries. In its initial brief, Fred's incorrectly states that equitable indemnity is available under the imputed liability principle because it "was exposed to potential liability solely as a result of the wrongful act of Appellant in their negligent construction of Respondent's premises." (Brief of Fred's p. 3). This is not, and has never been, the law of this State. See Rock Hill Tel. Co. v. Globe Commc'ns, Inc., 363 S.C. 385, 389 (2005) ("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."). Rather, equitable indemnification based on imputed liability is reserved for cases where there is actually imputed liability, such as those involving respondeat superior or other forms of vicarious liability. See, e.g., Walterboro Cmty. Hosp. v. Meacher, 392 S.C. 479, 485 (Ct. App. 2011); see also Town of Winnsboro 303 S.C. at 56. There is no such relationship between Fred's and Appellant such that Fred's would be vicariously liable for the actions of Appellant, and simply claiming that Fred's has a right to equitable indemnification because Fred's was liable for the alleged negligent acts of Appellant is wholly improper.

Therefore, since the liability of Appellant is not imputed to Fred's, a right of equitable indemnification is not available on this basis.

- b. Fred's status as a third-party beneficiary does not give rise to a special relationship between it and Appellant such that it may maintain a cause of action for equitable indemnification against Appellant.**

Fred's argues, without citing any law in support, that the contract between Respondent Wildevco, LLC ("Wildevco") and Appellant was created for the direct benefit of Fred's, and,

therefore, that Fred's status as a third-party beneficiary to this contract creates a "special relationship" between it and Appellant such that it can maintain a claim for equitable indemnification against Appellant. (See Brief of Fred's pp.4-5). However, Fred's argument is misguided. The doctrine of third-party beneficiary merely allows a third-party beneficiary to enforce the underlying contract which was made for the third party's benefit. The Court of Appeals in Windsor Green Owners' Ass'n, Inc. v. Allied Signal, Inc. explained as much, stating the following:

Generally, one not in privity of contract with another cannot maintain an action against him in breach of contract, and any damage resulting from the breach of contract between the defendant and a third party is not, as such, recoverable by the plaintiff. However, if 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.

Id., 362 S.C. 12, 17 (Ct. App. 2004). Fred's argues that, because it is a third-party beneficiary to the contract between Wildevco and Appellant, it should be afforded "the same relation to the parties of the contract, . . ." Initial Br. of Resp. Fred's, Inc. at p.5. This argument may be persuasive in the context of a contractual indemnification claim where Fred's could argue that Appellant was breaching a contractual provision providing for indemnity; however, this is a claim for equitable indemnification. There is no contractual provision providing for Appellant to indemnify Wildevco, and thereby Fred's as a third-party beneficiary. Therefore, this Court should reject Fred's argument that its status as a third-party beneficiary gives rise to a special relationship between it and Appellant in the context of equitable indemnification.

- c. **Appellant is merely a remote or distant contractor, and should not be subject to a claim of equitable indemnification by Fred's.**

Furthermore, Fred's argues that the Rock Hill Telephone Co. case is "easily

distinguishable” from the case at bar. In Rock Hill Telephone Co., a utility company hired an independent contractor, who in turn hired a subcontractor to perform part of the work. The Supreme Court held that the relationship between the utility company and the subcontractor was too attenuated for there to be a special relationship giving rise to a claim of equitable indemnification. Id., 363 S.C. at 390. In this case, Wildevco hired Appellant to construct a building. Wildevco and Fred’s entered into a separate contract for Fred’s to lease the building after completion of construction. The present relationship between Fred’s and Appellant is that of a tenant and a general contractor, arguably even more attenuated than that of a subcontractor performing work on property for the actual owner of the property (as in Rock Hill Telephone Co.). With regard to Fred’s, Appellant is “merely a remote or distant contractor.” See Rock Hill Tel. Co., 363 S.C. at 390.

Accordingly, for the reasons stated above, this Court should reverse the circuit court’s finding that Fred’s possessed a viable cause of action for equitable indemnification against Appellant.

II. THE CIRCUIT COURT ERRED IN FINDING THAT RESPONDENTS WERE WITHOUT FAULT.

To recover damages on a claim for equitable indemnity, the indemnity plaintiff must prove the following: (1) the indemnity defendant was at fault in causing the third party’s damages; (2) *the indemnity plaintiff has no fault for those damages*; and (3) the indemnity plaintiff incurred expenses that were necessary to protect its interest in defending against the third party’s claim. See Inglese v. Beal, 403 S.C. 290, 299 (Ct. App. 2013) (emphasis added). “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 Cmtv. Hosp., 392 S.C. at 486; see Vermeer Carolina’s, 336 S.C. at 64 (“[T]here can be no [equitable] indemnity among

mere joint tortfeasors.”).

In a matter involving a purportedly dangerous or defective condition, a plaintiff must show the following to recover: (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. Garvin v. Bi-Lo, Inc., 343 S.C. 625, 628 (2001).

a. The circuit court erred in finding that Fred’s was without fault.

Regardless of the above, the circuit court erred in finding that Fred’s was without fault. As stated in Appellant’s initial brief, the trial court erred in refusing to allow counsel for Appellant to proffer evidence involving a similar slip-and-fall that would have put Fred’s on constructive notice of the dangerous condition. Evidence of similar acts is admissible 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 (Ct. App. 1990) (citing Reed v. Clark, 277 S.C. 310 (1982)). “It is simply a rule of relevance, logic, and common sense.” Brewer v. Morris, 269 S.C. 607, 610 (1977). Evidence is relevant and admissible if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rules 401, 402, SCRE. “The admission of evidence is within the [circuit] court’s discretion.” R&G Constr., Inc. v. Lowcountry Reg’l Transp. Auth., 343 S.C. 424, 439 (Ct. App. 2000). “The court’s ruling to admit or exclude evidence will only be reversed if it constitutes an abuse of discretion amounting to an error of law.” Id.; see Gamble v. Int’l Paper Realty Corp. of S.C., 323 S.C. 367, 373 (1996) (noting that a ruling on the admission or exclusion of evidence will not be disturbed on appeal absent a clear abuse of discretion).

The circuit court erred in refusing to allow counsel for Appellant to proffer, and refusing to admit, evidence pertaining to a similar incident that occurred roughly three months before the

incident at issue at a Fred's store in a neighboring county (hereinafter referred to as "the Varnville store"). As was argued at trial in response to opposing counsel's objection, as a patron was approaching the entrance at the Varnville store, she tripped on the same type of curb/ramp transition on which the Plaintiff fell in the instant case. While evidence of this prior accident may not be admitted for the purpose of establishing negligence, such evidence nonetheless is admissible and should have been considered to establish the existence of a similar danger or defect at another Fred's store that would have put representatives of Fred's on actual or constructive notice of the danger or defect at issue. One fact in dispute in this matter is whether Fred's was aware that the curb/ramp transition at the entrance of the Williston store was a potential tripping hazard. If Fred's was aware of a similar trip and fall at the Varnville store, then Fred's should have been put on actual or constructive notice of the danger or defect at the Williston store, since the two curb/ramp transitions were substantially similar to each other. Furthermore, with actual or constructive notice of the danger or defect, Fred's should have warned or eliminated the condition prior to Plaintiff's trip and fall.

The circuit court would not even allow counsel for Appellant to proffer the evidence, and this decision was an abuse of discretion. In addition, had the evidence been proffered, it should have been admitted as relevant to proving constructive knowledge of Fred's, and, therefore, fault on the part of Fred's. The prior accident was substantially similar and not too remote from the accident in question, and should have been admitted to prove Fred's actual or constructive notice. As a result of their actual or constructive notice of the danger or defect, under South Carolina premises liability law, Fred's is liable for failing to warn of or correct the condition prior to Plaintiff's trip and fall. Accordingly, had the evidence been admitted, it should have been considered in the allocation of fault between the parties.

Therefore, for the foregoing reasons, the trial court abused its discretion in excluding relevant evidence of a prior similar incident and in refusing to allow counsel for Appellant to proffer such evidence. This evidence should have been considered in determining the allocation of fault between the parties. Accordingly, the circuit court erred in determining Fred's to be without fault.

b. The circuit court erred in finding that Wildevco was without fault.

1. Wildevco admitted it breached the standard of care owed to Plaintiff.

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, to discover risks, and to warn of or eliminate foreseeable unreasonable risks. O'Leary-Payne v. R.R. Hilton Head, II, Inc., 371 S.C. 340, 348 (Ct. App. 2006). During trial, Wildevco'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 Plaintiff's injuries. (R. p. 356). Wildevco admitted that it failed to adhere to its expert's recognized safety standard of inspecting the premises to look for tripping hazards. (R. p. 297) ("Q. It would have been the reasonable thing to [conduct the inspection]? A. Yes.").

This failure is sufficient to establish that Wildevco was, at the very least, partially at fault for Plaintiff's injuries. Therefore, the circuit court erred in finding that Wildevco was without fault.

2. Wildevco was at fault in providing defective plans.

Wildevco provided the architectural plans and the site plans for the construction of the Fred's store to Appellant, and these plans were defective. The trial court's order stated that the

testimony indicated that there may have been potential areas of confusion in the drawings and plans, including a possible discrepancy between the architectural drawings and site plans. (R. p. 20). At the very least, providing defective and/or confusing plans, even if Appellant was partially at fault, constitutes negligence on the part of Wildevco and, therefore, giving Wildevco unclean hands. The testimony at trial was that the architectural plans had a sidewalk curb with handicap ramps at the doors, and the site plans had a sidewalk curb on either side of the front of the store, but gradually reduced down to being flush at the entrance of the store.

Regardless of whether Appellant was obligated to notify the engineer of discrepancies, and the fact that Appellant may have been negligent in failing to do so, the fact that Appellant was given conflicting and confusing plans by Wildevco, who oversaw the entire project, renders Wildevco at least partially at fault. The law imposes a duty upon a developer to exercise the reasonable degree of skill, care, and knowledge that is ordinarily employed by such building professionals. Allowing Wildevco to hide behind the guise of “We don’t have the specialized skill and knowledge to know that the plans were conflicting or confusing” is not only patently unfair, but against the general duty of care owed by developers. See Magnolia N. Prop. Owners’ Ass’n, Inc. v. Heritage Cmnty., Inc., 397 S.C. 348, 370 (Ct. App. 2012) (“[A] builder who undertakes to supervise the construction of a building has a duty to exercise reasonable care.”).

Therefore, Wildevco is, at the very least, partially at fault for providing conflicting and confusing plans, and, therefore, it is precluded from bringing a claim of equitable indemnification because it has unclean hands.

3. Wildevco negligently tasked Barber, an unqualified person, to oversee construction of the Fred’s Store.

Wildevco tasked Tad Barber (“Barber”), an employee of Wildevco, with overseeing the

construction of the Fred's store at issue, even though he was unqualified to oversee such construction. Wildevco admits in its initial brief that "it is undisputed that Mr. Barber does not have the specialized skill or knowledge that would enable him to render an opinion that the drawings of plans were defective." (Brief of Wildevco p. 19). Further, Wildevco states the following concerning Barber's qualifications: "[A]t no time prior to [Plaintiff's] accident was [Barber] aware that the site plans called for the sidewalk area where [Plaintiff] tripped to be flush with the parking lot pavement as he was not trained to read and interpret site plans and reasonably relief on [Appellant] to do so." *Id.* at 10. Further, the circuit court found that Barber "had no education or formal training in construction, engineering or architecture." (R. 19).

"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" *James v. Kelly Trucking Co.*, 377 S.C. 628, 631 (2008). [T]he employer's liability under such a theory does not rest on the negligence of another, but on the employer's own negligence." *Id.* Now, Wildevco seeks to hide behind Barber's ignorance, claiming that it should not be at fault because Barber lacked experience. This argument is akin to allowing one's five-year-old child to drive your car, then arguing that you are not at fault for the subsequent accident because the child does not know how to drive. Regardless of whether Appellant was negligent in following the plans or not requesting clarification, Wildevco was at least partially negligent in tasking (in Wildevco's own words) someone who "was not qualified and did not have the ability to determine whether or not the subject sidewalk area complied with building codes or standards, or the site plans." (Brief of Wildevco p. 11 n.3).

For the foregoing reasons, the circuit court erred in finding that Wildevco was not at least

partially at fault.

c. The settlement agreement between the Plaintiff and Respondents acknowledges that Respondents were liable for Plaintiff's injuries as "joint tortfeasors."

Judicial estoppel "is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant asserted in the same or related proceeding." Cothran v. Brown, 357 S.C. 210, 215 (2004). Under South Carolina law, all five of the following elements are necessary to apply the doctrine of judicial estoppel: "(1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent. Id. at 215–16.

The settlement agreement prepared by counsel for Wildevco specifically states that the document seeks to release Respondents as "joint tortfeasors," along with other joint tortfeasors which included Appellant. Respondents admitted common liability, and, therefore, Respondents are estopped from taking an alternate position in the same legal proceeding. Counsel for Wildevco argues in its initial brief that the settlement agreement does not acknowledge liability on the part of Wildevco; however, the agreement states that it operates as a satisfaction and discharge of "common liability of [Respondents] and any Joint Tortfeasor, including [Appellant]." Based on this language, it is clear that Respondents intended to extinguish the common liability among Wildevco, Fred's, and Appellant in order to preserve Respondents' claim for contribution against Appellant. Furthermore, the extinguishing of the common liability of Respondents' liability occurred after Wildevco represented to Judge Gibbons that the sole remaining cause of action was equitable indemnification.

Respondents have taken the position in the settlement agreement that they were joint tortfeasors with Appellant, and have admitted that they had common liability for Plaintiff's injuries. Respondents cannot extinguish what did not exist. See Vermeer Carolina's Inc., 336 S.C. at 68. Respondents should not be allowed to take the position that they have no liability for Plaintiff's injuries. See New Hampshire v. Maine, 532 U.S. 742, 750 (2001) (a party's later position must be consistent with its earlier position). Accordingly, the doctrine of judicial estoppel prohibits Respondents from recovering under a claim for equitable indemnification because they have admitted that they shared "common liability" with Appellant, and, thus, have unclean hands.

Therefore, this court should reverse the circuit court's finding that Respondents were without fault.

III. THE CIRCUIT COURT ERRED IN AWARDING ATTORNEYS' FEES BECAUSE THE FEES WERE SPECULATIVE.

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, 34 (1971) ("[I]n actions of indemnity, brought where the duty to indemnify is either implied by law or arises under contract, and no personal fault of the indemnitee has joined in causing the injury, reasonable attorneys' fees incurred in resisting the claim indemnified against may be recovered as part of the damages and expenses."). Furthermore, the amount of attorneys' fees cannot be left to conjecture, guess, or speculation; however, mathematical certainty is not required. See Moore v. Moore, 360 S.C. 241, 255 (Ct. App. 2004). "The evidence . . . should be such that a court or jury can reasonably determine an appropriate amount." Id.

Wildevco produced a billing statement as evidence of attorneys' fees, and the billing statement was highlighted in several colors indicating tasks that were related solely to the defense

of Plaintiff's claims and those that were related to both the defense and prosecution of the indemnification claim against Appellant. Not only can Respondents not claim attorneys' fees for prosecuting an equitable indemnification claim pursuant to the clear language of the South Carolina Supreme Court in Addy, but there was no discussion from counsel for counsel for Wildevco as to how the fees were divided between those incurred in defending Plaintiff's claims and those incurred in prosecuting the equitable indemnification claim. Furthermore, counsel for Fred's produced an affidavit from his paralegal; however, the affidavit clearly states the following: "The bills produced to and paid by Fred's were not broken down so as to distinguish between actions undertaken in the defense of the suit brought by [Plaintiff] and those to advance the Third-Party Complaint against [Appellant]." (See R. p. 566). Therefore, the amount of attorneys' fees claimed by both Wildevco and Fred's can only be determined by pure speculation, and, thus, are not recoverable.

Respondents' evidence as to attorneys' fees arising out of the defense of Plaintiff's claims are left to conjecture, guess, and speculation. Accordingly, such speculative attorneys' fees are not recoverable.

CONCLUSION

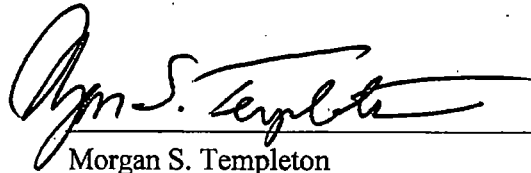
For the foregoing reasons, Appellant respectfully requests that this Court reverse the circuit court's order granting judgment for Respondents. In the alternative, Appellant respectfully requests this Court reverse the circuit court's award of attorneys' fees and costs to Respondents.

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Dated this 15th day of November, 2017.

Respectfully submitted,

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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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

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Martha M. Fountain and Curtis Fountain Plaintiffs

v.

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

v.

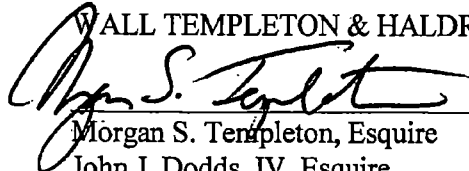
Tippins-Polk Construction, Inc. and Rhoad's Excavating Services, LLC..... Third-Party Defendants

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

CERTIFICATE OF COUNSEL

The undersigned certifies that Appellant's Final Reply Brief complies with Rule 211(b), SCACR.

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**THE STATE OF SOUTH CAROLINA
In The 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.

Appellate Case No. 2017-000688

Appeal From Barnwell County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 5714
Heard May 15, 2019 – Filed February 12, 2020

AFFIRMED IN PART AND REVERSED IN PART

Morgan S. Templeton and John Joseph Dodds, IV, both
of Wall Templeton & Haldrup, PA, of Charleston, for
Appellant.

Regina Hollins Lewis and Lee Ellen Bagley, both of
Gaffney Lewis, LLC, of Columbia, for Respondent
Wildevco, LLC.

WILLIAMS, J.: In this civil matter, Tippins-Polk Construction, Inc. (Tippins-Polk) appeals the circuit court's order entering judgment in favor of Fred's, Inc. (Fred's) and Wildevco, LLC (Wildevco) on Fred's and Wildevco's equitable indemnification claims asserted against Tippins-Polk. Fred's and Wildevco each brought equitable indemnification claims against Tippins-Polk for the cost of settling an underlying lawsuit brought against Fred's and Wildevco as a result of Tippins-Polk's alleged faulty construction of a Fred's store. On appeal, Tippins-Polk argues the circuit court erred in (1) finding a sufficient special relationship existed between Fred's and Tippins-Polk to support a claim for equitable indemnification; (2) finding Fred's and Wildevco were without fault in the underlying lawsuit; (3) awarding Fred's and Wildevco damages not requested in their pleadings; (4) awarding attorney's fees to Fred's and Wildevco for defending the underlying lawsuit and prosecuting the equitable indemnification action against Tippins-Polk; and (5) refusing to consider evidence of a similar incident at a Fred's store in another county. We affirm in part and reverse in part.

FACTS/PROCEDURAL HISTORY

Fred's is a Tennessee corporation that operated a retail store in Williston, South Carolina. The Fred's store at issue in this case was located on property in Williston owned by a development company, Wildevco. Pursuant to a lease agreement, Wildevco agreed to construct a store for Fred's on the premises and lease the property to Fred's for a ten-year period beginning in 2005. Wildevco entered into a construction agreement with Tippins-Polk, a general contractor, to complete the Fred's project. Fred's opened the Williston store around October 2005.

On March 10, 2010, Martha Fountain tripped over the curb ramp outside the entrance to the Fred's store and fell, sustaining injuries to her head, wrist, and elbow. Martha's injuries required her to undergo several surgeries, including the implantation and removal of hardware in her wrist. Martha also missed work, and she was ultimately unable to return to her prior employment due to lifting restrictions implemented as a result of her injuries. In May 2010, Martha and her husband, Curtis Fountain (collectively, the Fountains), filed a lawsuit against Fred's and Wildevco in which Martha claimed over \$90,000 in medical damages and lost wages. Curtis also filed a loss of consortium claim.

Wildevco and Fred's filed third-party claims against Tippins-Polk for equitable indemnification, negligence, breach of contract, and breach of warranty.¹ In March 2016, Wildevco and Fred's settled with the Fountains for \$290,000. Wildevco paid \$250,000, and Fred's paid \$40,000. On June 6-7, 2016, the circuit court held a bench trial solely on Wildevco and Fred's equitable indemnification claims against Tippins-Polk.

Wildevco and Fred's presented testimony from the Fountains detailing Martha's fall and consequential injuries. Martha stated she endured four different surgeries as a result of her fall, and she testified to the employment limitations she suffered due to her injuries. Curtis Fountain testified about the effect Martha's injuries had on the family's home life and financial situation.

Horace Tilden Hilderbrand, Jr. testified Wildevco hired his engineering company to prepare the survey and site plans for the Fred's store construction project. When shown a photograph of the finished sidewalk at the Fred's store, Hilderbrand noted an elevation change and a recessed ramp that differed from what the design called for in the site plans.² He mentioned the approximate two-inch height of the curb was not a typical curb height.³ Hilderbrand explained the site plans contained general notes about standard procedures or installation, and he stated the general contractor should have read the notes. He confirmed the sidewalk and curb shown in the picture of the Fred's store were not constructed in accordance with the site plans he prepared for the Fred's project.

Thaddeus Dill Barber testified he was the partner at Wildevco that managed the construction of the Fred's store project in Williston. Barber stated he hired the engineer, architect, and general contractor—Tippins-Polk—for the Fred's project. He explained the contract with Tippins-Polk dictated that Tippins-Polk would construct the Fred's store in accordance with building and site plans.

¹ 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 2014. Rhoad's Excavating did not appear, and an order of default was entered against it in July 2013.

² Hilderbrand testified the site plans would have included a drawing of wings at the sidewalk if the plans had called for the construction of a handicap curb ramp.

³ Hilderbrand stated curb heights are typically six inches.

The circuit court qualified Fred's and Wildevco's next witness, Joseph Stephen Hunt, as an expert in codes, regulations, and standards relative to building construction and in fall safety investigation. Hunt testified he reviewed the architect's drawings for the building and the engineer's site plans for the piece of land where the building was located.⁴ He stated the curb ramp on the sidewalk was not constructed in accordance with the site plans because the site plans never called for the construction of a ramp. Hunt further revealed the curb ramp was also improperly constructed. Hunt explained a normal curb step height is a minimum of four inches, but the curb step height in this case was only two inches.⁵ Hunt testified the curb ramp design in the margins of the site plans called for a curb ramp to be constructed on a sidewalk with a six-inch curb height or rise. He stated a curb ramp built at a six-inch curb height, with a required slope of 1:12, should have six-foot flares (flared sides with six feet of run). In this case, Hunt explained the curb height was two inches, so the flare length should have been two feet; however, the flares were actually four feet long. Hunt clarified this longer flare length was not a gradual slope but a wavy and irregularly constructed slope. He mentioned the flare of the curb that Martha tripped over protruded thirteen inches into the walking zone.⁶ Hunt testified the architectural drawings called for painting the curb, and the constructed curb ramp—as part of the curb—should have also been painted.

Hunt asserted the constructed curb ramp violated the building codes and regulations cited in the architectural drawings for the Fred's project. He stated a general contractor would have the specialized knowledge and skill to read a site plan or architectural drawing and know what was called to be constructed. Hunt opined that Wildevco's representative did not have the specialized knowledge to be able to discern the construction defect in the constructed ramp. Hunt stated the defects in the constructed ramp were the direct cause of Martha's fall.

Tippins-Polk presented the testimony of Edward William Polk, the owner of Tippins-Polk. Polk explained the site plans did not call for the sidewalk to be

⁴ Hunt testified the site plans controlled the construction of the sidewalk.

⁵ Hunt explained this was important because small changes in elevation are very difficult to see and perceive.

⁶ Hunt testified he was unaware of any other trip and falls at the Williston Fred's store before Martha's fall in 2010.

completely flush across the front edge. Polk testified that both the site plans and architectural drawings called for the construction of a handicap curb ramp. Polk stated the detail on the site plans with notated elevations indicated a handicap ramp should be constructed. He claimed the constructed handicap ramp complied with both the site plans and the architectural drawings. Polk asserted the "black lines" on the sidewalk in the site plans called for a handicap ramp because they "would not be there for any other purpose." At the close of the case, the circuit court denied motions for directed verdict from Fred's and Wildevco, and it denied a renewed motion for directed verdict from Tippins-Polk.⁷ The circuit court took the matter under advisement.

On August 1, 2016, the circuit court issued a written order entering judgment in favor of Wildevco and Fred's. In its order, the circuit court found: (1) Tippins-Polk to be solely responsible for Martha's injuries; (2) 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; (3) Fred's and Wildevco were without fault in the incident; and (4) the settlement agreement between Wildevco, Fred's, and the Fountains was reasonable and entered into without fraud or collusion. The circuit court ordered Tippins-Polk to pay \$305,418.30 as indemnification for the portion of the settlement paid by Wildevco.⁸ The court further ordered Tippins-Polk to pay \$76,691.82 as indemnification for the portion of the settlement paid by Fred's.⁹ Tippins-Polk subsequently filed a motion for reconsideration, which the circuit court denied. This appeal followed.

ISSUES ON APPEAL

- I. Did the circuit court err in finding there was a sufficient special relationship between Fred's and Tippins-Polk to support a claim for equitable indemnification?

⁷ Neither party presented testimony from the architect.

⁸ The circuit court arrived at this figure by adding the \$250,000 Wildevco paid in the settlement with the Fountains and the \$55,418.30 Wildevco claimed in legal fees and costs in defending the Fountains' claims.

⁹ The circuit court arrived at this figure by adding the \$40,000 Fred's paid in the settlement with the Fountains and the \$36,691.82 Fred's claimed in legal fees and costs in defending the Fountains' claims and in establishing its right to indemnity.

- II. Did the circuit court err in finding Fred's and Wildevco were without fault?
- III. Did the circuit court err in failing to find that Fred's and Wildevco were estopped from recovering damages not requested within the complaint?
- IV. Did the circuit court err in awarding Fred's and Wildevco attorney's fees and costs?
- V. Did the circuit court err in refusing to consider a similar incident at a Fred's store in a neighboring county?

STANDARD OF REVIEW

"Equitable indemnity is an action in equity." *Walterboro Cmty. Hosp. v. Meacher*, 392 S.C. 479, 484, 709 S.E.2d 71, 73 (Ct. App. 2011). "In an action in equity tried by a judge alone, the appellate court may find facts in accordance with its view of the preponderance of the evidence." *Goldman v. RBC, Inc.*, 369 S.C. 462, 465, 632 S.E.2d 850, 851 (2006). "However, this broad scope of review does not require the appellate court to disregard the findings made below." *Id.*

LAW/ANALYSIS

I. Special Relationship

Tippins-Polk argues the circuit court erred in finding it had a special relationship with Fred's to support a claim for equitable indemnification. We disagree.

"There are two forms of indemnity: contractual indemnity and indemnity implied in law or 'equitable indemnity.'" *Rock Hill Tel. Co. v. Globe Commc'ns., Inc.*, 363 S.C. 385, 389, 611 S.E.2d 235, 237 (2005). "Equitable indemnity . . . 'is based upon the specific relation of the indemnitee to the indemnitor in dealing with a third party.'" *Id.* (quoting James C. Gray, Jr. & Lisa D. Catt, *The Law of Indemnity in South Carolina*, 41 S.C. L. Rev. 603, 604 (1990)). Our courts "have allowed equitable indemnity in cases of imputed fault or where some special relationship exists between the first and second parties." *Inglese v. Beal*, 403 S.C. 290, 299, 742 S.E.2d 687, 691 (Ct. App. 2013) (quoting *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 57, 398 S.E.2d 500, 503 (Ct. App. 1990)).

In *Stuck v. Pioneer Logging Machinery, Inc.*, our supreme court discussed the existence of a special relationship stating, "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" 279 S.C. 22, 24, 301 S.E.2d 552, 553 (1983). However, our courts have specified 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." *Rock Hill Tel.*, 363 S.C. at 390 n.3, 611 S.E.2d at 237 n.3. Our courts have found a special relationship existed for the purposes of equitable indemnification between a contractor and subcontractor;¹⁰ a purchaser of a defective vehicle and a seller;¹¹ a landlord and a general contractor who damaged a tenant's property;¹² a home seller and an exterminator who were both sued by a home buyer for falsely representing that the purchased home was free of termites and moisture;¹³ and two former property owners who were both sued by a subsequent property owner for damage to the property.¹⁴ Conversely, in *Rock Hill Telephone*, our supreme court found the relationship between a utility company and a general contractor's distant subcontractor was too attenuated for the purposes of an equitable indemnification claim. 363 S.C. at 390, 611 S.E.2d at 237.

This case involves the relationship between Fred's, a retail tenant, and Tippins-Polk, a general contractor who constructed the leased commercial property, the Williston Fred's store. We find Fred's presented ample evidence of a special relationship with Tippins-Polk that extended beyond Fred's mere allegation that it was sued because of Tippins-Polk's wrongdoing. Although Barber, Wildevco's construction manager for the Fred's project, testified he had never done business with Tippins-Polk before the Fred's project, he stated Tippins-Polk was recommended to Wildevco for the Fred's project because Tippins-Polk had

¹⁰ *First Gen. Servs. of Charleston, Inc. v. Miller*, 314 S.C. 439, 443, 445 S.E.2d 446, 448 (1994).

¹¹ *Stuck*, 279 S.C. at 22, 24, 301 S.E.2d at 552–53.

¹² *Addy v. Bolton*, 257 S.C. 28, 31, 34, 183 S.E.2d 708, 708, 710 (1971).

¹³ *Griffin v. Van Norman*, 302 S.C. 520, 521, 527, 397 S.E.2d 378, 378–79, 382 (Ct. App. 1990).

¹⁴ *McCoy v. Greenwave Enters., Inc.*, 408 S.C. 355, 357–58, 361, 759 S.E.2d 136, 137, 139 (2014).

experience constructing other Fred's stores. The construction contract between Wildevco and Tippins-Polk provided it was an agreement for the construction of "one Fred's Store." 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.

Further, Polk, the owner of Tippins-Polk, testified he knew his company was hired to build a Fred's store before construction began, and he stated his company had previously constructed ten to fifteen different Fred's stores. Polk asserted that representatives from Fred's often visited the site during construction and examined every aspect of the building. Polk also revealed that Tippins-Polk owned a Fred's location in a neighboring county. Based on these facts, we find the circuit court did not err in finding a special relationship existed between Fred's and Tippins-Polk for the purposes of equitable indemnification. Therefore, we affirm the circuit court's finding as to this issue.

II. Fault

Tippins-Polk argues the circuit court erred in finding Fred's and Wildevco were without fault in the underlying action. We disagree.

"Equitable indemnity cases involve a fact pattern in which the first party is at fault, but the second party is not." *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 63, 518 S.E.2d 301, 307 (Ct. App. 1999). "If the second party is also at fault, he comes to court without equity and has no right to indemnity." *Id.* Therefore,

For [Fred's and Wildevco] to recover under a theory of equitable indemnification, three things must be proven: (1) [Tippins-Polk] was liable for causing the [Fountains'] damages; (2) [Fred's and Wildevco were] exonerated from any liability for those damages; and (3) [Fred's and Wildevco] suffered damages as a result of the [Fountains'] claims against [them] which were eventually proven to be the fault of [Tippins-Polk].

Id.

A. Potential Liability

First, Tippins-Polk argues Fred's and Wildevco failed to prove they were without fault in the underlying suit because the circuit court's order noted Fred's and Wildevco were required to prove they were potentially liable to the Fountains. Tippins-Polk contends Fred's and Wildevco failed to make this showing, and even if they did, their potential liability is equivalent to fault.

Because Fred's and Wildevco sought the recovery of settlement costs from Tippins-Polk, they were also required to make an additional showing that (1) the settlement with the Fountains was bona fide, with no fraud or collusion by the parties; (2) the decision to settle with the Fountains was a reasonable means of protecting Fred's and Wildevco's interests; and (3) the amount of the settlement was reasonable in light of the Fountains' estimated damages and the risk of Fred's and Wildevco's exposure if the case was tried. *See Griffin*, 302 S.C. at 523, 397 S.E.2d at 380; *see also Otis Elevator, Inc. v. Hardin Constr. Grp., Inc.*, 316 S.C. 292, 297, 450 S.E.2d 41, 44 (1994) ("Whe[n], as here, [Fred's and Wildevco] gave [Tippins-Polk] notice and an opportunity to participate in the litigation, [Fred's and Wildevco were] not 'required to prove the plaintiff's *actual* ability to recover the amount paid in settlement so long as [Fred's and Wildevco] prov[ed] that [they were] *potentially* liable to the [Fountains].'" (quoting 42 C.J.S. *Indemnity* § 24 (1991))).

The potential liability standard only requires the non-negligent party seeking indemnification to show that its settlement with the original plaintiffs was reasonable in means and amount in light of the original plaintiff's estimated damages and the non-negligent party's risk of loss and exposure should the case be tried. Courts that have adopted the potential liability standard have found that "[p]otential liability actually means nothing more than that the indemnitee acted reasonably in settling the underlying suit." *Trim v. Clark Equip. Co.*, 274 N.W.2d 33, 36 (Mich. Ct. App. 1978); *Pennant Serv. Co. v. True Oil Co.*, 249 P.3d 698, 706 (Wyo. 2011). Therefore, we find Fred's and Wildevco were only required to present proof of potential liability to establish the reasonableness of their settlement with the Fountains. Because Tippins-Polk did not challenge the reasonableness of the settlement between Fred's, Wildevco, and the Fountains on appeal, any finding by the circuit court related to the reasonableness of the settlement—including Wildevco and Fred's potential liability—is the law of the case.¹⁵ *See In re Morrison*, 321 S.C. 370, 372 n.2, 468 S.E.2d 651, 652 n.2 (1996)

¹⁵ We note that we are not aware of any requirement that the circuit court make a specific finding on potential liability. The circuit court made specific findings on

(noting an unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal).¹⁶

B. Latent Defect

Tippins-Polk argues the circuit court's finding that a "latent defect" caused Martha's injuries indicates the circuit court erred in not finding Fred's and Wildevco at fault. The circuit court found Fred's and Wildevco relied on Tippins-Polk to ensure the premises was built in accordance with the architectural drawings and site plans, free from latent defects. The circuit court also determined Tippins-Polk breached its contractual obligations and its duty of care to Wildevco and Fred's in failing to construct the premises free of latent defects. The circuit court found these defects were the sole proximate cause of Martha's injuries.

We find the circuit court only used the term "latent" for its literal definition of hidden, not to find that Fred's and Wildevco had knowledge of or should have had knowledge of the defect. *See Larimore v. Carolina Power & Light*, 340 S.C. 438, 445, 531 S.E.2d 535, 538 (Ct. App. 2000) ("The landowner has a duty to warn an invitee only of latent or hidden dangers of which the landowner has knowledge or should have knowledge."). An interpretation that the circuit court used the term "latent defect" to imply Fred's and Wildevco had knowledge or should have had knowledge of the defect in this case is inconsistent with the testimony presented and the circuit court's other findings. Hunt testified neither Fred's nor Wildevco had the specialized knowledge to discern the construction defect in the curb ramp, and the circuit court found in its order that neither Fred's nor Wildevco could have discovered the defect through inspection or maintenance. The circuit court also determined neither Fred's nor Wildevco breached any duty to the Fountains in regards to the construction, inspection, or maintenance of the premises. We agree with the circuit court that Fred's and Wildevco reasonably relied on Tippins-Polk, as general contractor, to construct the premises in accordance with the architectural

the reasonableness of the settlement that we believe encompass the meaning of potential liability as defined above.

¹⁶ Tippins-Polk also argues an alleged underlying inconsistency exists in requiring a party to prove both absence of fault, to establish a right to indemnity, and potential liability, to recover settlement costs. We disagree. As explained above, potential liability means nothing more than that the indemnitee acted reasonably in settling the underlying lawsuit. A potential liability showing is not associated with a finding of fault.

drawings and site plans and, therefore, free from any latent defects. The construction defect in this case involved a specific issue with the dimensions and grading of a curb ramp, compliance with building codes, compliance with the Americans with Disabilities Act (ADA), and compliance with the prepared architectural drawings and site plans. A store owner or property manager could not have discerned the defects in the curb ramp without background or experience in construction. Therefore, based on the circuit court's findings as a whole as well as the testimony presented in this case, we find the circuit court used the term "latent" for its literal definition of hidden, not to imply that Fred's or Wildevco had knowledge of the defect. Accordingly, we find the circuit court did not make inconsistent findings as to the nature of the defect and as to fault between the parties.

C. Breach of Standard of Care

Tippins-Polk argues Wildevco was at fault because it admitted that it breached a standard of care owed to the Fountains. Based on the following evidence and testimony, we find Wildevco did not breach a standard of care owed to the Fountains. Hunt stated owners and occupants of buildings have a duty to the public to do inspections and look for tripping hazards. The circuit court also recognized this safety standard. Hunt clarified that the defect in this case was a design defect that had not changed since its construction and that Wildevco relied upon Tippins-Polk to build the curb properly. The circuit court agreed with Hunt that this safety standard did not include "looking for latent defects which [were] not in [Fred's and Wildevco's] ordinary capacity to know about." Hunt testified Wildevco's representative did not have the specialized knowledge to be able to discern the construction defect in the ramp. Hunt also explained an "ordinary person at a store level" conducting an inspection would not be able to identify the curb ramp as a tripping hazard. Barber testified he conducted regular safety inspections of the exterior of the premises to observe, for example, the condition of the parking lot, and to check whether the lights were working.¹⁷ Tippins-Polk did not present any testimony to establish that an owner's duty to inspect the premises included inspecting for hidden design and construction defects. The circuit court ultimately found neither Fred's nor Wildevco breached any duty to the Fountains through the construction, inspection, or maintenance of the Fred's store. Based on

¹⁷ Barber also testified 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 "keep[ing] and maintain[ing]" the exterior of the premises while Fred's was responsible for the interior of the store.

this evidence, we find Wildevco did not admit that it breached a standard of care owed to the Fountains.

D. Defective Plans

Tippins-Polk contends Wildevco was at fault for the Fountains' injuries because it provided defective plans. Based on the testimony and the circuit court's findings below, we find Wildevco did not provide defective plans to Tippins-Polk.

Wildevco hired an architect to create the architectural drawings for the premises and a civil engineer to create the site plans for the premises. Hilderbrand testified the site plans called for the building's front sidewalk to be one-tenth of a foot lower than the finished floor of the building. Hilderbrand asserted the site plans did not call for the construction of a handicap curb ramp and that the site plans, not the architectural drawings, governed the height of sidewalk curbs. Hilderbrand explained the site plans included a handicap ramp detail in the margins, but he testified this was a standard detail commonly put on site plans regardless of whether a ramp was actually constructed. He stated the inclusion of the handicap ramp detail in the margins did not indicate the site plans called for the construction of a handicap ramp. The site plans provided that the contractor should contact the engineer regarding any discrepancies discovered at the site or on the architectural drawings. Hilderbrand testified the contractor never contacted him to discuss any discrepancies or deviations from the site plans. Hunt testified a contractor would have the specialized knowledge and skill to read a site plan or architectural drawing and know what was called to be constructed.

Polk testified the site plans and architectural drawings clearly called for the construction of a handicap curb ramp based on the detail on the plans with notated elevations. Polk stated the "black lines" on the sidewalk in the site plans called for a handicap ramp because they "would not be there for any other purpose." He explained the constructed handicap ramp complied with both the site plans and the architectural drawings. However, Polk admitted on cross-examination that the architectural drawings called for handrails to be installed but Tippins-Polk never constructed handrails at the premises. Polk also admitted he never contacted Hilderbrand about any deviations or discrepancies from the site plans.

The circuit court found the testimony indicated possible confusion as a result of the discrepancies between the architectural drawings and the site plans. However, the circuit court noted it was the contractor's responsibility to contact the engineer for review if any discrepancies were discovered or to request clarification of the plans.

Tippins-Polk also did not present any expert testimony to stand for the proposition that confusion in site plans or architectural drawings can render them defective. Based on this testimony and the circuit court's superior position to judge the witnesses' credibility, we find the plans Wildevco provided to Tippins-Polk were not defective. *See Goldman*, 369 S.C. at 465, 632 S.E.2d at 851 (explaining the appellate court is not required to disregard the circuit court's findings despite a broad scope of review); *Gowdy v. Gibson*, 381 S.C. 225, 233, 672 S.E.2d 794, 798 (Ct. App. 2008) (noting a circuit court's better position to judge witness credibility because it saw and heard the witnesses).

Moreover, even if we assume the plans were defective, our courts have repeatedly held that when a party, such as an architect or engineer, "furnishes specifications and plans for a contractor to follow in a construction job, [the architect or engineer] thereby impliedly warrants their sufficiency for the purpose in view." *See Hill v. Polar Pantries*, 219 S.C. 263, 271, 64 S.E.2d 885, 888 (1951) (quoting 17 C.J.S. *Contracts* § 329); *see also Beachwalk Villas Condo. Ass'n, Inc. v. Martin*, 305 S.C. 144, 146, 406 S.E.2d 372, 374 (1991). In this case, however, Tippins-Polk alleges the developer, Wildevco, was responsible for providing the allegedly defective plans even though the site plans and architectural drawings were prepared by the site engineer and architect, respectively, without any input from Wildevco. Accordingly, we find Wildevco did not provide Tippins-Polk with defective plans.

E. Barber's Qualifications

Tippins-Polk argues Wildevco was at fault because Wildevco negligently tasked Barber, who was unqualified, to oversee the construction of the Fred's store location. Tippins-Polk contends Wildevco failed to comply with the standard of care required from a developer by not hiring someone qualified to oversee the construction process.

We find Wildevco was not at fault because it appointed Barber to manage the construction of the Fred's store. Tippins-Polk 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." *See Durkin v. Hansen*, 313 S.C. 343, 347, 437 S.E.2d 550, 552 (Ct. App. 1993) (quoting *Conlin v. City Council of Charleston*, 49 S.C.L. (15 Rich.) 201, 211 (1868)).

Indeed, our examination of the evidence in the record shows Tippins-Polk, as general contractor, had the duty to oversee and manage the construction of the premises, as opposed to Barber and Wildevco. Polk stated his company was responsible for ensuring the premises was constructed in accordance with the site plans, architectural drawings, and building codes. Barber explained that Wildevco hired Tippins-Polk because of its expertise and specific knowledge from constructing other Fred's locations. The circuit court found Barber had no education or formal training in construction, engineering, or architecture. Barber testified his management of the premises' construction included hiring the architect, site engineer, and general contractor. He stated Wildevco did not take part in the preparation of the architectural drawings or site plans, nor did it have any input in how Tippins-Polk would construct the premises. Polk explained Tippins-Polk, as the construction manager and general contractor, would "go behind" the subcontractors to ensure the architectural drawings and site plans were followed. Polk stated the county building inspectors often came out during the construction process to inspect the premises, and Barber would visit the site during these inspections to "check for completion and verify pay requests." Barber testified Tippins-Polk requested the final inspection and certificate of occupancy from the county building inspector. Based on this evidence and testimony, we find Wildevco was not at fault for hiring Barber to manage the construction of the Fred's location because Wildevco had no duty to hire a qualified construction overseer in addition to a general contractor.

Based on the foregoing, we affirm the circuit court's finding that neither Fred's nor Wildevco were at fault in the underlying action.¹⁸

III. Bound by Relief Sought in Pleadings

¹⁸ Tippins-Polk also argues the settlement agreement between Wildevco, Fred's, and the Fountains acknowledged that Fred's and Wildevco were liable for the Fountains' injuries. On November 29, 2017, this court issued an order striking the settlement agreement from the record on appeal in this case based on Rule 210(c), SCACR because the settlement agreement was never presented to the circuit court. Because the parties failed to present the settlement agreement to the circuit court and the settlement agreement is not part of the record on appeal, we find this argument is not preserved for this court's review. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779–80 (2004) ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the [circuit] court.").

Tippins-Polk argues the circuit court erred in awarding Fred's and Wildevco relief not requested in their pleadings. We disagree.

Rule 8, SCRCP outlines the required contents for pleadings and states in subsection (f) that "[a]ll pleadings shall be so construed as to do substantial justice to all parties." In order to achieve substantial justice for all parties, our courts have determined that pleadings should be construed liberally. See *Russell v. City of Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991). This court has also explained that "[i]t is the substance of the requested relief that matters 'regardless of the form in which the request for relief was framed.'" *Richland County v. Kaiser*, 351 S.C. 89, 94, 567 S.E.2d 260, 262 (Ct. App. 2002) (quoting *Standard Fed. Sav. & Loan Ass'n v. Mungo*, 306 S.C. 22, 26, 410 S.E.2d 18, 20 (Ct. App. 1991)). Indeed, our supreme court has "repeatedly held that the plaintiff may obtain any relief appropriate to the case made by the pleadings and the evidence, without regard to the *form* of the prayer for relief" *Beaty v. Mass. Protective Ass'n*, 160 S.C. 205, 207, 158 S.E. 206, 207 (1931). "Especially is this true in an equity case." *Id.*

In this case, Fred's made the following prayer for relief in its third-party complaint against Tippins-Polk:

judgment over and against [Tippins-Polk] for all or part of any verdict or judgment which may be recovered by the [Fountains] directly or indirectly against [Fred's], together with its costs and disbursements herein. Further in the alternative [Fred's] pray[s] that [Tippins-Polk] be ordered to contribute toward the satisfaction of any verdict or judgment obtained by the [Fountains] under their [c]omplaint, and for such other and further relief as the [c]ourt would deem just and proper.

Wildevco made the following prayer for relief in its third-party complaint against Tippins-Polk:

judgment over and against [Tippins-Polk] for all or part of any verdict or judgment that may be recovered by the [Fountains] 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 [c]ourt would deem just and proper.

Tippins-Polk contends Fred's and Wildevco only sought an award of a "judgment or verdict" but not the settlement costs from their settlement with the Fountains. Tippins-Polk has failed to provide authority for its position that Fred's and Wildevco were required to explicitly request payment of settlement costs as part of their relief sought against Tippins-Polk.

Construing Fred's and Wildevco's pleadings liberally, we find the circuit court did not award relief to Fred's and Wildevco that fell outside the relief sought in their respective complaints. *See id.* ("[T]he plaintiff may obtain any relief appropriate to the case made by the pleadings and the evidence . . ."). Fred's prayed for a judgment against Tippins-Polk for all or part of any verdict or judgment that may be recovered by the Fountains against Fred's. The circuit court issued a Form 4 order on March 21, 2016, granting Fred's and Wildevco's motion for a continuance that included the following statement of judgment: "The main case settled with [the Fountains]." We find this order can be liberally construed as a statement of judgment for the Fountains from which Fred's can recover against Tippins-Polk. Fred's stated in its complaint that it was entitled to full and complete indemnity from Tippins-Polk "including being indemnified for the costs and attorneys' fees associated with defending this civil action [brought by the Fountains]." We find "costs . . . associated with defending this civil action" included the costs of a potential settlement. Fred's also included the statement in its prayer for relief "and for such other and further relief as the [c]ourt would deem just and proper." We find a liberal construction of this sentence in Fred's prayer supports the circuit court's award. Similarly, Wildevco's prayer for relief included requests for "all damages sustained" and "for such other and further relief as the [c]ourt would deem just and proper." We find a liberal construction of these requests in Wildevco's prayer supports the circuit court's award. *See Griffin*, 302 S.C. at 521–22, 397 S.E.2d at 379 (awarding a non-negligent party settlement costs in an equitable indemnification action when the party requested in its prayer for relief that the at-fault party be held responsible for any damages suffered by the non-negligent party); *Kaiser*, 351 S.C. at 94, 567 S.E.2d at 262 ("It is the substance of the requested relief that matters 'regardless of the form in which the request for relief was framed.'" (quoting *Mungo*, 306 S.C. at 26, 410 S.E.2d at 20)); *Russell*, 305 S.C. at 89, 406 S.E.2d at 339 (finding pleadings must be construed liberally to do substantial justice to all parties). Therefore, we affirm the circuit court's decision as to this issue.

IV. Attorney's Fees

Alternatively, Tippins-Polk argues the circuit court erred in awarding attorney's fees to Fred's and Wildevco. Specifically, Tippins-Polk asserts a difference exists between awarding attorney's fees to Fred's and Wildevco for fees incurred in defending the Fountains' underlying claim and fees incurred in establishing their right to equitable indemnification against Tippins-Polk. We agree.

In an equitable indemnification action, attorney's fees and costs proximately resulting from the at-fault party's breach of contract or negligence are treated as the legal consequences of the at-fault party's original wrongful act and may be recovered as damages. See *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 307 S.C. 128, 130, 414 S.E.2d 118, 120 (1992); *Addy*, 257 S.C. at 33, 183 S.E.2d at 710.

In order to recover attorneys' fees under this principle, [Fred's and Wildevco] must show: (1) that [Fred's and Wildevco became] involved in a legal dispute . . . because of [Tippins-Polk]'s tortious conduct; (2) that the dispute was with a third party—not with [Tippins-Polk]; and (3) that [Fred's and Wildevco] incurred attorneys' fees connected with that dispute.

Addy, 257 S.C. at 33, 183 S.E.2d at 709–10 (quoting 22 Am. Jur. (2d), *Damages*, § 166). Our courts have also determined that in equitable indemnification actions, attorney's fees that are "the natural and necessary consequence of the [at-fault party's] act" and attributable solely to the negligence of the at-fault party are only recoverable "when there is a sufficient relationship between the [at-fault party and the non-negligent party]." *Town of Winnsboro*, 307 S.C. at 132, 414 S.E.2d at 121. "A sufficient relationship exists when the at-fault party's negligence . . . is directed at the non-[negligent] party and the non-[negligent] party incurs attorney fees and costs in defending itself against the [at-fault party]'s conduct." *Id.*

In this case, both Fred's and Wildevco presented attorney's fees and cost affidavits for the circuit court's review. Fred's presented an invoice requesting \$36,691.82 in litigation fees, costs, and expenses but did not break down its bills to distinguish between actions undertaken in the defense of the Fountains' suit and actions undertaken to advance the third-party claim Fred's brought against Tippins-Polk. The circuit court awarded Fred's \$76,691.82 as to its equitable indemnification claim, which included the \$40,000 settlement it paid to the Fountains and the

\$36,691.82 it requested in attorney's fees. Conversely, Wildevco presented an invoice requesting \$55,418.30 in litigation fees, costs, and expenses. Wildevco's invoice reflected that it omitted all fees that it incurred in pursuit of its third-party claim against Tippins-Polk. Wildevco also reduced the amount of fees and costs it incurred that involved both the defense of the Fountains' claims and the prosecution of its third-party action against Tippins-Polk by fifty percent. The circuit court awarded Wildevco \$305,418.30 as to its equitable indemnification claim, which included the \$250,000 settlement it paid to the Fountains and the \$55,418.30 it requested in attorney's fees.

Initially, we note Tippins-Polk does not challenge Fred's and Wildevco's right to recover attorney's fees under the requirements in *Addy*; rather, Tippins-Polk solely asserts the circuit court erred in awarding Fred's and Wildevco fees incurred from both defending the Fountains' underlying lawsuit and from establishing Fred's and Wildevco's right to equitable indemnification against Tippins-Polk when only attorney's fees for defending an equitable indemnification claim were recoverable. Although our courts have not yet recognized this distinction in equitable indemnification claims, we do so here.

Our courts have repeatedly awarded attorney's fees as part of a non-negligent party's damages against an at-fault party in an equitable indemnification action. *See McCoy*, 408 S.C. at 361, 759 S.E.2d at 139 ("Appellants are entitled to equitable indemnification for the attorney's fees and costs that they incurred in defending the lawsuit brought by the [third party]."); *Town of Winnsboro*, 307 S.C. at 131, 414 S.E.2d at 120 (affirming the court of appeals decision allowing equitable indemnification for attorney's fees and costs expended in "defending the negligence of [the sub-contractor]"); *Addy*, 257 S.C. at 33, 183 S.E.2d at 710 (finding reasonable attorney's fees incurred in "resisting the claim indemnified against" may be recovered as damages). In these cases, our courts have awarded attorney's fees as damages only when a non-negligent party incurred necessary expenses in *defending* its interests in a lawsuit brought by a third-party. *See Town of Winnsboro*, 307 S.C. at 131, 414 S.E.2d at 120.

The majority of jurisdictions around the country have adopted the rule that the right of indemnity includes the right to attorney's fees and litigation costs incurred in defending the underlying claim, but it does not extend to fees and costs incurred in establishing the right of indemnity.¹⁹ In other words, a non-negligent party can

¹⁹ *See Peter Fabrics, Inc. v. S.S. Hermes*, 765 F.2d 306, 315 (2nd Cir. 1985); *Simko v. C & C Marine Maint. Co.*, 594 F.2d 960, 969 (3rd Cir. 1979); *Am. Exp. Lines v.*

recover as damages the fees and costs it incurred in defending against a plaintiff's claims, but it cannot recover the fees and costs it incurred in pursuing a third-party equitable indemnification claim against the at-fault party. Requiring an at-fault party to hold a non-negligent party harmless for the costs associated with defending a plaintiff's claims "gives effect to the very nature of indemnity, which is to make the party whole." *E.C. Ernst, Inc. v. Manhattan Constr. Co. of Tex.*, 551 F.2d 1026, 1037 (5th Cir. 1977). However, the same reasoning does not support a party's recovery of the fees and costs incurred in establishing a right to indemnity because these fees and costs are not coupled with the claim indemnified against. Rather, these are fees and costs incurred as a result of a non-negligent party's decision to bring a separate claim to establish the right to indemnity. Therefore, we find the fees and costs incurred in establishing an indemnity obligation fall within the standard "American" rule, which requires a party to bear his own expenses of litigation. See *Layman v. State*, 376 S.C. 434, 451, 658 S.E.2d 320, 329 (2008). This court has defined "expenses" under the *Addy* rule as "any costs which are reasonably necessary to *defend* litigation or otherwise protect the innocent party's interest." *Griffin*, 302 S.C. at 523, 397 S.E.2d at 380 (emphasis added). We also find this rule is in accordance with South Carolina's rule that, with limited exceptions, "[a]ttorney's fees are not recoverable unless authorized by contract or statute." *Jackson v. Speed*, 326 S.C. 289, 307, 486 S.E.2d 750, 759 (1997). This rule also squares with our current equitable indemnification jurisprudence that has only permitted recovery for attorney's fees and costs incurred in "defending" or "resisting" the claim indemnified against. See *McCoy*, 408 S.C. at 361, 759 S.E.2d at 139; *Town of Winnsboro*, 307 S.C. at 131, 414 S.E.2d at 120; *Addy*, 257 S.C. at 33–34, 183 S.E.2d at 709–10. Therefore, we adopt the rule that the right of indemnity in *equitable indemnification cases* includes the right to attorney's fees and litigation costs incurred in defending the

Norfolk Shipbuilding & Drydock Corp., 336 F.2d 525, 527 (4th Cir. 1964) (allowing a non-negligent party to be indemnified for the costs of defending the plaintiff's lawsuit but not the costs of defending the at-fault party's appeal); *Lusich v. Bloomfield S.S. Co.*, 355 F.2d 770, 776 (5th Cir. 1966); *Bagby v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 491 F.2d 192, 198 n.9 (8th Cir. 1974); *Vallejos v. C.E. Glass Co.*, 583 F.2d 507, 510 (10th Cir. 1978); *Ins. Co. of N. Am. v. M/V Ocean Lynx*, 901 F.2d 934, 941 (11th Cir. 1990) ("[T]he indemnitee can recover attorneys' fees from his indemnitor as part of the reasonable expenses of *defending* a claim." (emphasis added)); 42 C.J.S. *Indemnity* § 44 (2019); *but cf. Dillingham Shipyard v. Associated Insulation Co.*, 649 F.2d 1322, 1328 (9th Cir. 1981).

underlying claim, but it does not extend to fees and costs incurred in establishing the right of indemnity.

Therefore, we reverse the circuit court's decision to award attorney's fees to Fred's for both defending the Fountains' underlying claims and establishing its right to indemnity from Tippins-Polk. We remand this case to the circuit court to (1) order Fred's to reasonably apportion its invoice to only seek as damages those fees and costs associated with its defense of the Fountains' underlying claims and (2) award Fred's fees and costs that reflect this reasonable apportionment.

Because Wildevco only sought those fees and costs related to its defense of the Fountains' underlying claims, we affirm the circuit court's \$55,418.30 award of fees and costs to Wildevco.

V. Evidence of Similar Incidents

Tippins-Polk argues the circuit court abused its discretion in failing to admit evidence of a prior similar accident that occurred at a Fred's store in a neighboring county. We disagree.

"A ruling on the admission of evidence is within the sound discretion of the [circuit court] and will not be disturbed absent an abuse of discretion and a showing of prejudice." *Oconee Roller Mills, Inc. v. Spitzer*, 300 S.C. 358, 360, 387 S.E.2d 718, 719 (Ct. App. 1990). "Evidence of similar accidents, transactions, or happenings is admissible in South Carolina whe[n] there is some special relation between them tending to prove or disprove some fact in dispute." *Whaley v. CSX Transp., Inc.*, 362 S.C. 456, 483, 609 S.E.2d 286, 300 (2005). "This rule is based on relevancy, logic, and common sense." *Watson v. Ford Motor Co.*, 389 S.C. 434, 453, 699 S.E.2d 169, 179 (2010). "Because evidence of other accidents may be highly prejudicial, '[a party] must present a factual foundation for the court to determine that the other accidents were substantially similar to the accident at issue.'" *Whaley*, 362 S.C. at 483, 609 S.E.2d at 300 (quoting *Buckman v. Bombardier Corp.*, 893 F. Supp. 547, 552 (E.D.N.C. 1995)).

In *Pope v. Heritage Communities, Inc.*, this court addressed whether the circuit court erred in admitting evidence of construction defects at a development company's other condominium properties similar to the defects at the condominium at issue in the lawsuit. 395 S.C. 404, 426–28, 717 S.E.2d 765, 777–78 (Ct. App. 2011). In *Pope*, the architect hired to develop the plans for the condominium at issue testified he used the same basic plans in the company's other

developments that were experiencing defects. *Id.* at 427, 717 S.E.2d at 777. The development company's president testified the company's other properties were experiencing defects similar to the problems at the subject condominium. *Id.* The general contractor expert for the development company stated he had been involved in "four or five" cases involving the company's condominium properties. *Id.* at 428, 717 S.E.2d at 777–78. The engineering and construction defect expert for the subject condominium testified he prepared reports on the scope of work at the company's other condominium properties. *Id.* at 428, 717 S.E.2d at 778. Finally, the development company's expert witness stated he was hired to investigate the company's other properties and found similar defects. *Id.* at 428, 717 S.E.2d at 777. This court ultimately found the defects at the development company's other properties were substantially similar to the defects at the subject property and affirmed the circuit court's decision to admit the evidence. *Id.* at 428, 717 S.E.2d at 778.

Unlike the ample proof in *Pope*, we find the evidence in this case failed to show the other accident was substantially similar to Martha's accident. In this case, Tippins-Polk sought to show that Fred's had notice of the potential tripping hazard. Specifically, Tippins-Polk sought to admit evidence that the Fred's store in Varnville put up bollards, a warning sign, and painted the curb outside the store because of a similar accident that occurred approximately three months prior to Martha's fall. The only similarities Tippins-Polk presented between the accident at the Varnville store and the accident in this case are the manner of the fall—tripping on a curb—and the location of the fall—outside of a Fred's store. Tippins-Polk did not attempt to admit or proffer any evidence about the construction of the curb ramp at the Varnville store, the type of curb ramp, or the ramp's measurements and slope. Although Tippins-Polk sought to admit that Fred's had prior knowledge of the curb defect, Tippins-Polk also never attempted to admit or proffer any evidence of who actually installed the additional safety features at the Varnville store or why they were installed. The lease agreement between Fred's and Wildevco also provided that Wildevco—not Fred's—would maintain the exterior of the premises, including the curbs. Therefore, even if Fred's was on notice of this potential hazard from the fall at the Varnville store, it had no obligation to repair what the parties delineated in the lease as Wildevco's responsibility. Most importantly, the Varnville store was constructed using a different architect with different architectural drawings and a different engineer with different site plans. Therefore, we find Tippins-Polk failed to present evidence of *substantial* similarity between the two accidents to overcome the highly prejudicial effect of admitting such evidence. *See Whaley*, 362 S.C. at 483, 609 S.E.2d at 300 ("Because evidence of other accidents may be highly prejudicial, '[a party] must present a factual

foundation for the court to determine that the other accidents were substantially similar to the accident at issue." (quoting *Buckman*, 893 F. Supp. at 552)). Accordingly, we affirm the circuit court's decision on this issue. See *Spitzer*, 300 S.C. at 360, 387 S.E.2d at 719 ("A ruling on the admission of evidence is within the sound discretion of the [circuit court] and will not be disturbed absent an abuse of discretion and a showing of prejudice.").

CONCLUSION

Based on the foregoing, we **AFFIRM** the circuit court's order as to all issues except the award of attorney's fees and costs to Fred's. We **REVERSE** the circuit court's award of attorney's fees and costs to Fred's only and **REMAND** this case to the circuit court for further proceedings solely on the issue of Fred's award of attorney's fees and costs.

GEATHERS and HILL, JJ., concur.

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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.

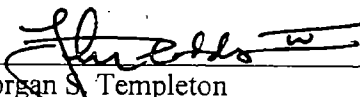
Accordingly, for the foregoing reasons, Appellant respectfully requests the Court grant its petition for rehearing on this basis.

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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Attorneys for the Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BARNWELL COUNTY
Court of Common Pleas

RECEIVED

Doyet A. Early, III, Circuit Court Judge

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.

PROOF OF SERVICE

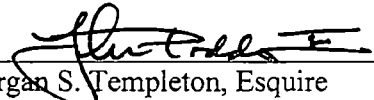
I, John J. Dodds, IV, of Wall Templeton & Haldrup, do hereby certify that I have served the Appellant's Petition for Rehearing, by depositing the same in the United States Mail, properly posted on February 25th, 2020 addressed as follows to counsel of record:

Lee Ellen Bagley, Esq.
Regina Hollins Lewis, Esq.
Gaffney Lewis & Edwards
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SIGNATURE INTENTIONALLY ON FOLLOWING PAGE

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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
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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*)

ORIGIN ID:RBWA (843) 329-9500
SARAH SCHRODETZKI
WALL TEMPLETON & HALDRUP, P.A
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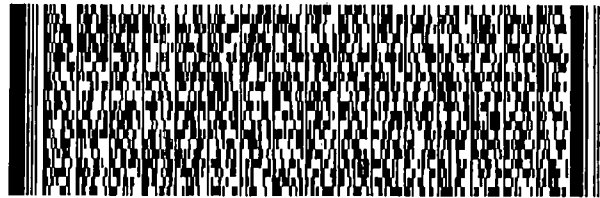
TO **JERRY ABBOTT KITCHINGS**
SOUTH CAROLINA COURT OF APPEALS
1220 SENATE STREET

COLUMBIA SC 29201

(803) 734-1890
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PO:

REF: WESTFIELD/TIPPINS-POLK

DEPT:



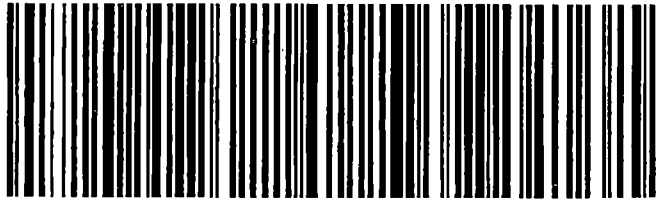
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SC Court of Appeals

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The South Carolina 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.

Appellate Case No. 2017-000688

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 J.

 J.

 J.

Columbia, South Carolina

FILED

March 30, 2020

cc:

Morgan S. Templeton, Esquire
Matthew Clark LaFave, Esquire
Regina Hollins Lewis, Esquire
Lee Ellen Bagley, Esquire
John Joseph Dodds, IV, Esquire