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S.C. SUPREME COURT

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BARNWELL COUNTY
Court of Common Pleas
Doyet A. Early, III, Circuit Court Judge

Appellate Case No. 2020-000651

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 Petitioner.

RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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COUNTER STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

- I. Whether the Court of Appeals correctly held that a special relationship existed between Respondent, Fred's, Inc., and Appellant sufficient to support Respondent's entitlement to equitable indemnification.
- II. Whether the Court of Appeals correctly held that Appellant was liable for Plaintiffs' damages despite owing a different duty than Respondent, Fred's, Inc.
- III. Whether the Court of Appeals correctly held that Respondent, Fred's, Inc., was free from fault thereby entitling them to equitable indemnification from Appellant.

COUNTER STATEMENT OF THE CASE

This is an action was originally brought as one by Plaintiffs against Respondents 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 Respondent Fred's, Inc.'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 Respondents 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 Respondents, which included a Third-Party Complaint wherein claims for equitable indemnification were asserted against Appellant. 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.

Unable to resolve the claims for equitable indemnification 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. Following due consideration of the facts and evidence presented Judge Early requested an Order and Judgment 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), SCRCF and Rule 59(e) to make additional findings and reconsider/amend. Appellant’s motion was eventually denied by the trial court; thereafter Appellant filed their notice of appeal.

The appeal was eventually argued on May 15, 2019, and the Court of Appeals issued their opinion on February 12, 2020, which affirmed the trial court’s Order in part and reversed in part. Particularly relevant to Appellant’s Petition for Writ of Certiorari the Court of Appeals held that a special relationship, sufficient to entitle Respondent Fred’s, Inc., to equitable indemnification from Appellant existed. The Court of Appeals also held Respondent Fred’s, Inc., was without fault. After the Court of Appeals’ Order was filed, Appellant filed its Petition for Rehearing, which was denied on March 30, 2020. Appellant, thereafter, filed its Petition for Writ of Certiorari.

ARGUMENTS

I. THE COURT OF APPEALS CORRECTLY HELD THAT A SPECIAL RELATIONSHIP EXISTED BETWEEN RESPONDENT FRED'S, INC., AND APPELLANT SUFFICIENT 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 subsequently retained a subcontractor to perform only a portion of the work. During the completion of the project an accident occurred wherein a car struck the backhoe of the subcontractor. The claim for the foregoing accident was eventually settled by Rock Hill who later brought an action for indemnity 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 subcontractor with whom a contract was made for services rendered to knowingly benefit Respondent Fred's, Inc. Appellant attempts to insulate itself from an equitable indemnification claim by Respondent Fred's, Inc., by likening itself to a remote or distant subcontractor. To further this misconception Appellant likens the relationship between Respondents to that of Rock Hill Telephone and the independent contractor hired to complete the work. However, Appellant's argument blindly ignores that they were in fact the independent contractor hired to complete the work rather than some remote independent subcontractor hired to complete only a portion of the work. This is not a claim for equitable indemnification by Respondent Fred's, Inc., against some distant subcontractor retained by Appellant, the independent contractor hired to complete the entire project, to complete only a portion of the work such as the defective sidewalk and curb ramp.

In its Order the Court of Appeals found the relationship with Respondent Fred's, Inc., and Appellant was not comparable to the attenuated relationship as existed in *Rock Hill*. The Court analyzed the entirety of the evidence presented during the trial in support of its well-reasoned conclusion that the relationship between Appellant and Respondent Fred's, Inc., was not so attenuated as to not support a claim for equitable indemnification. It was noted in the Order that evidence was presented, particular to this project, creating a direct and inextricable connection

between Appellant and Respondent Fred's, Inc. Specifically, evidence was entered into the record that Appellant was recommended for this specific job on account of their experience constructing other Fred's stores. Moreover, in agreeing to be the general contractor for this project, Appellant acknowledged, through execution of a contract, that it would cause to be built "one Fred's store." In fact, Appellant admitted to interaction, during the construction of this store, with representatives from Respondent Fred's, Inc., as they examined every aspect of the building.

Appellant now contends that in evaluating the entire record the decision rendered by the Court of Appeals is in conflict with *Rock Hill*, which it is not. There is nothing about the holding in *Rock Hill* such that it was improper for the Court of Appeals to have examined all of the evidence presented to determine if a special relationship in fact existed between Appellant and Respondent Fred's, Inc. In *Rock Hill*, the Court, much the same as was properly done by the Court of Appeals, analyzed the facts presented and determined "the relationship between the utility and the subcontractor is an attenuated one." 363 S.C. 385 at 389. In the instant case there were sufficient facts relative to Appellant's involvement in this project to determine their relationship with Respondent Fred's, Inc., was not comparable to that of "a remote or distant independent contractor." *Id.* Moreover, there is nothing in *Rock Hill* precluding a Court from looking, as Appellant seems to imply, to prior courses of dealing to evaluate the existence of a special relationship sufficient to allow a party to pursue a claim for equitable indemnification. There was more than ample evidence presented to show that Appellant was not "in turn" selected by Respondent Wildevco but rather was selected specifically because of their relationship with Respondent Fred's, Inc. It was this evidence that the Court of Appeals appropriately examined to arrive at its holding that there existed a special relationship between Appellant and Respondent Fred's, Inc., that was sufficient to support entitlement to a claim for equitable indemnification.

II. THE EXISTENCE OF SEPARATE DUTIES OWED TO PLAINTIFFS DOES NOT ALLEVIATE APPELLANT FROM LIABILITY FOR PLAINTIFFS' DAMAGES.

Appellant's second argument is that Respondents owed Plaintiffs a duty under common law premises liability negligence independent of any duty owed by them; thus, they could not be liable for Plaintiffs' damages as required to sustain an equitable indemnification claim. Appellant thoroughly and accurately sets forth the duties owed by Respondent Fred's, Inc., to an invitee in a misguided attempt to argue that because it did not owe the same duty it could not have been liable to Plaintiffs for their damages. In furtherance of their position Appellant notes that Plaintiffs chose not to sue Respondents under the theory that they created of a dangerous condition.

It is clear and well settled that a party "asserting an equitable indemnification cause of action may recover damages if he proves: (1) *the indemnitor was liable for causing the plaintiff's damages....*" *Walterboro Cmty. Hosp. v. Meacher*, 392 S.C. 479, 485, 709 S.E.2d 71, 74 (Ct. App. 2011) (emphasis added). Appellant would have this Court hold that the only means by which they could be liable for Plaintiffs' damages if they shared the same duty as Respondents. In this case, Appellant submits that they can only be liable for Plaintiffs' damages if they sued under a theory under which they themselves could be responsible. The holding in *Meacher* only requires that the indemnitor be liable for the plaintiff's damages. The Court of Appeals, in *Meacher*, did not opine that the indemnitor *must* be liable for a plaintiff's damages under the same theory as was pursued against the indemnitee as Appellant contends.

Respondent must, and did, establish through sufficient evidence that Appellant was liable for Plaintiffs' damages. 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. It was established through testimony of the expert witnesses that the project Appellant oversaw contained a latent defect and it was that latent defect that led to Plaintiff Martha Fountain’s fall and the Plaintiffs’ injuries. Respondent Fred’s, Inc., presented ample evidence that it was the latent defect created by Appellant that resulted in the Plaintiffs’ injuries such that they may assert an equitable indemnification cause of action.

III. THE COURT OF APPEALS 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) (*emphasis added*). “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 Petition 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 exists 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 by Appellant that would support a finding that Respondent Fred's, Inc., 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. Appellant seeks to insulate itself from a claim for equitable indemnification where they created a dangerous condition by contending Respondent, untrained in construction, did not discover the latent defect that occurred during their construction. Moreover, as was opined by the Court of Appeals, the fall caused by the latent defect created by Appellant was located outside Respondent Fred's, Inc.'s, store and was an area they were not, pursuant to a lease agreement, responsible for maintaining. Therefore, the Court of Appeals correctly concluded Respondent's Fred's, Inc., was without fault.

CONCLUSION

For the reasons stated herein, this Court should deny the Petition for Writ of Certiorari in this matter.

RESPECTFULLY SUBMITTED,

June 11, 2020

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