THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

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

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 WILDEVCO, LLC'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

I. Did the Court of Appeals properly find that the evidence presented at trial supported the trial court's ruling that Tippins-Polk was at fault and that Wildevco was without fault in causing the Plaintiffs' damages?

STANDARD OF REVIEW

A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. *See generally Ellison v. State*, 382 S.C. 189, 676 S.E.2d 671 (2009); *In re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases*, 321 S.C. 563, 564, 471 S.E.2d 454 (1990) (holding that this Court reviews decisions of the court of appeals by way of writ of certiorari only where special reasons justify exercise of that power). In determining whether special reasons for review exist, this Court considers the following five criteria: (1) where there are novel questions of law; (2) where there is a dissent in the decision of the court of appeals; (3) where the decision of the court of appeals is in conflict with a prior decision of the Supreme Court; (4) where substantial constitutional issues are directly involved; and (5) where a federal question is included and the decision of the court of appeals conflicts with a decision of the United States Supreme Court. *Haggins v. State*, 377 S.C. 135, 137 n.2, 659 S.E.2d 170, 170 n.2 (2008); Rule 242(b) SCACR. As the subject Petition does not meet any of the criteria for review as set forth more fully below, the Petition should be denied.

COUNTER-STATEMENT OF THE CASE

This appeal arises from the entry of a judgment in favor of Respondents Wildevco, LLC (hereinafter "Wildevco") and Fred's, Inc. ("Fred's") (collectively, hereinafter "Respondents") on their respective third-party claims for equitable indemnification against Petitioner 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 the underlying action was filed on May 12, 2010, Plaintiffs Martha and Curtis Fountain (the "Fountains") sued Fred's and Wildevco, the owner and developer of the premises, alleging negligence and loss of consortium.[1] 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 the Fountains, 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, Wildevco and Fred's settled the action with the Fountains. 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

[1] The Fountains 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 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 filed a Motion to Make Additional Findings and Motion to Reconsider and/or Amend the judgment pursuant to Rules 52(b) and 59(e), SCRCP. 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 Tippins-Polk's Motion to Make Additional Findings and Motion to Reconsider and/or Amend the judgment pursuant to Rules 52(b) and 59(e), SCRCP by Order entered November 22, 2016.

Tippins-Polk filed an appeal with the Court of Appeals, and on February 12, 2020, the South Court of Appeals affirmed in part and reversed in part the decision of the trial court. Pertinent to Wildevco in the present appeal, the Court of Appeals affirmed the trial court's ruling in whole and upheld the judgment entered on behalf of Wildevco and the trial court's determination that Wildevco was without fault in the underlying action. The Court of Appeals then denied Tippins-Polk's Petition for Rehearing on March 30, 2020. Thereafter, Tippins-Polk filed its Petition for Writ of Certiorari.

ARGUMENTS

I. Tippins-Polk failed to properly argue on appeal to the Court of Appeals that the trial court erred in finding Tippins-Polk solely at fault because the Fountains did not allege creation of a hazard as a theory of negligence, and, thus, Tippins-Polk failed to preserve this issue for review.

Tippins-Polk asks the Court to grant certiorari to consider whether the trial court erred in finding it was solely at fault in the underlying action. However, Tippins-Polk's Statement of Issues on Appeal to the Court of Appeals Court did not raise the issue of fault by Tippins-Polk and only included the following issues:

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 trial 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?

(App. 698).

Further, in the argument section that corresponded with Tippins-Polk's issue II, Tippins-Polk argued as follows: "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 Plaintiff's injuries." (App. 716). As reflected in its brief and issues on appeal submitted to the

Court of Appeals, Tippins-Polk failed to argue that the Fountains did not assert a duty in their Complaint under which Tippins-Polk would be liable and thus, Respondents could not establish that Tippins-Polk was an indemnitor liable for causing the Fountains' damages. Instead, Tippins-Polk raised this argument for the first time in its Petition for Rehearing to the Court of Appeals. (App. 847).

Tippins-Polk may not raise an issue for the first time in a petition for rehearing, and, its attempt to do so in this appeal was untimely and improper. *See Herron v. Century BMW*, 395 S.C. 461, 469, 719 S.E.2d 640, 644 (2011) ("'The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time.'" (quoting *Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001)). Accordingly, this Court should deny the petition for writ of certiorari because Tippins-Polk did not preserve this particular issue for appeal, and, thus, the trial court's ruling is the law of the case. *See In re Morrison*, 321 S.C. 370, 372 n.2, 468 S.E.2d 651, 652 n.2 (1996) (noting an unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal).

II. To the extent that Tippins-Polk properly preserved its argument, the trial court properly found that Tippins-Polk was solely liable for Plaintiff's damages, and Tippins-Polk fails to present any novel issues of law.

Even if Tippins-Polk properly preserved the issue, and it did not, the trial court properly concluded that Tippins-Polk was solely liable for Plaintiff's damages and Tippins-Polk has failed to present any novel issues of law and accordingly, the petition should be denied. Tippins-Polk argues that because the Fountains did not allege creation of a hazard in their Complaint but rather alleged duties to warn and inspect, Tippins-Polk was not liable to the Fountains in the underlying

action, and thus, the trial court erred in finding that Wildevco was entitled to equitable indemnification. Wildevco disagrees and further submits that Tippins-Polk does not present any novel issue of law, and thus, Tippins-Polk's Petition should be denied.

"The allegations of the complaint are not determinative of whether a party has the right to indemnity. *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 64, 518 S.E.2d 301, 307 (Ct. App. 1999) (citing *Griffin v. Van Norman*, 302 S.C. 520, 522, 397 S.E.2d 378, 379 (Ct. App. 1990) ("The Complaint serves merely as a background to this [indemnification] litigation. Allegations in a Complaint denied in answer are evidence of nothing."); *First General Servs. v. Miller*, 314 S.C. 439, 445 S.E.2d 446 (1994) (defendant's mere allegations in counterclaim as to negligence of plaintiff may not defeat plaintiff's right to claim derivative liability); *Jourdan v. Boggs/Vaughn Contracting, Inc.*, 324 S.C. 309, 476 S.E.2d 708 (Ct. App. 1996) (allegations of complaint are not determinative of right to indemnity; rather, such determination is based on evidence and facts found by fact finder)).

The law of equitable indemnification in South Carolina is well-established. The party seeking equitable indemnification must prove three things: (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. *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 63, 518 S.E.2d 301, 307 (Ct. App. 1999). Tippins-Polk's duty, as the general contractor for the premises at issue in this appeal, is set forth in *Fields v. J. Haynes Waters Builders, Inc.*, which states that "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). Thus, the trial court correctly found that Tippins-Polk breached its aforementioned duty by failing to construct the premises free of latent defects, and said defects were the sole proximate cause of the injuries sustained by the Fountains in the underlying action. Accordingly, Tippins-Polk fails to present any novel questions of law and fails to meet any other criteria for review as it pertains to this argument; thus, Tippins-Polk's Petition should be denied.

III. The Court of Appeals properly applied South Carolina law in affirming the trial court's finding that Wildevco was without fault in the underlying action and Tippins-Polk fails to present any novel issues of law to this Court.

Tippins-Polk argues that the Court of Appeals erred in affirming the trial court's finding that Wildevco was without fault in the underlying action. 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 Court of Appeals properly affirmed the trial court's finding that Fred's and Wildevco were without any fault for the Fountains' damages and Tippins-Polk fails to submit any novel issue of law. Accordingly, Tippins-Polk's Petition should be denied.

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. (App p. 243, line 5 – p. 250, line 24; App. p. 267, 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. (App. p. 249, lines 10-18; App. p. 269, 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. (App. p. 250, line 6 – p. 251, line 5; p. 253, lines 2-9; p. 270, line 24 – p. 271, 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. (App. p. 251, line 21 – p. 252, line 8).

Tad Barber testified that Wildevco hired Tippins-Polk, in part, because it constructed Fred's stores in the past. (App. p. 278, 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. (App. p. 281, 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. (App. p. 281, lines 4-11; p. 282, 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. (App. p. 274, lines 12-20; p. 282, 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. (App. p. 330, lines 9-22; p. 332, lines 8-16; p. 333, 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. (App. p. 336, line 21 – p. 339, 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. (App. p. 338, line 19 – p. 339, 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.*) 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. (App. p. 343, lines 13-20; p. 363, lines 14-22). Finally, Mr. Hunt testified that the foregoing construction defects directly caused Martha Fountains' fall. (App. p. 343, line 21 – p. 344, 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. There is no evidence that Wildevco breached the standard of care it owed to the Fountains.

Tippins-Polk's argument that Wildevco bears at least some 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 Petition for Writ at 17). Tippins-Polk fails to raise any novel issue of the law and its argument 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. (App. p. 361, line 24 – p. 362, line 13; p. 400, line 18 – p. 402, 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 v. Carolina Power & Light*, 340 S.C. 438, 445, 531 S.E.2d 535, 538 (Ct. App. 2000). 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. (App. p. 376, 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. (App. p. 343, lines 13-20; p. 363, lines 14-22).

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. (App. p. 343, lines 6-12; p. 363, lines 14-22; p. 377, lines 18-21; p. 400, line 18 – p. 402, line 17). Unquestionably, expert testimony is required 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. (App. p. 343, lines 6-12; p. 361, line 24 – p. 362, line 13; p. 363, 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." (App. p. 396, line 14 – p. 397, 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." (App. p. 401, lines 1-6). Tippins-Polk's attempt to create a duty where none exists is futile. As such, the Court of Appeals properly affirmed the trial court's ruling, and Tippins-Polk's Petition should be denied.

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

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. (App. p. 253, 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. (App. p. 251, line 6 – p. 252, line 8). Notably, Rett Polk testified that he never called the engineer in regard to the site plans. (App. p. 423, 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. (App. p. 249, 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. (App. p. 246, line 5 – p. 247, line 24; p. 267, 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. (App. p. 249, lines 10-18).

Tad Barber testified that he "suppose[d]" the differences between the architectural plans and the site plans "could cause" some confusion. (App. p. 283, line 24 – p. 284, 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. (App. p. 274, lines 12-20; p. 282, lines 10-23; p. 293, lines 16-19; p. 343, lines 6-20; p. 361, line 24 – p. 362, line 13; p. 363, lines 14-22; p. 423, 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"). (App. p. 408, line 19 – p. 409, line 5; p. 415, lines 6-8; p. 423, 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. (App. p. 436, line 23 – p. 437, 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, the Court of Appeals properly affirmed the trial court's ruling, and Tippins-Polk's Petition should be denied.

C. 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. (App. p. 397, 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, the Court of Appeals properly affirmed 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. Accordingly, this Court should deny Tippins-Polk's Petition.

CONCLUSION

The Court of Appeals relied upon well-established case law for equitable indemnification. and correctly affirmed the trial court's finding that Wildevco was without fault in the underlying action and was entitled to equitable indemnification by Tippins-Polk. Based upon the foregoing, Tippins-Polk fails to present any novel questions of law and fails to meet any other criteria for review; thus, Tippins-Polk's Petition should be denied.

Respectfully submitted,

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