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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM BARNWELL COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

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Appellate Case No. 2020-000651

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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 Petitioner.

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# BRIEF OF PETITIONER TIPPINS-POLK CONSTRUCTION, INC.

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II. THE COURT OF APPEALS' DECISION MISAPPLIES NEARLY A CENTURY OF PREMISES LIABILITY JURISPRUDENCE FROM THIS COURT REGARDING RESPONDENTS' INDEPENDENT DUTIES OWED TO PLAINTIFFS WHICH COULD NOT HAVE BEEN BREACHED BY PETITIONER.

III. THE COURT OF APPEALS ERRED IN OVERLOOKING THE BREACH OF INDEPENDENT DUTIES OWED TO PLAINTIFFS SO AS TO FIND RESPONDENTS FREE FROM FAULT SO AS TO ALLOW FOR AN EQUITABLE INDEMNITY CLAIM.

## STATEMENT OF THE CASE

The sole legal theory and cause of action presented in this case is equitable indemnity. In order for this Court to affirm the Court of Appeals' decision, it must expand the "special relationship" doctrine espoused in Rock Hill Telephone, *infra*, and it must find that both Respondents are 100% free from fault for the claims asserted against them by the Plaintiffs in the underlying action. If the Court does neither, then it must reverse the Court of Appeals and enter judgment in favor of Petitioner. If there is even the *slightest* bit of fault on the part of Respondents, their claim fails under South Carolina law. When considering these issues, it is paramount for the Court to consider the legal premise for which Respondents were sued and apply that premise to the notion of whether entities who breach independent duties owed to business invitees can, nonetheless, shirk their responsibility to those invitees by passing all of its liability to a third party who is never claimed by a plaintiff to have been harmed by the alleged act or omission of the third party. If the Court of Appeals' opinion stands, it marks a significant shift in South Carolina jurisprudence.

Originally, this matter arose out of a premises liability personal injury matter stemming from a trip-and-fall that occurred at a Fred's store in Williston, South Carolina. Respondent Fred's, Inc. ("Fred's") was the tenant of the subject building pursuant to a written lease (the "Lease") and Respondent Wildevco, LLC ("Wildevco") was the developer, owner, and landlord of the property and improvements located thereon. (App. p. 22). Petitioner Tippins-Polk Construction ("Petitioner") was the general contractor hired by Wildevco to construct the subject building pursuant to the architectural and site plans provided to it by Wildevco. (App. pp. 476–78).[1]

In 2005, Respondents entered into the Lease for the subject building, whereby Wildevco agreed to construct and lease the building to Fred's in which Fred's would operate one of its stores. (App. pp. 479–533). According to the Lease, Wildevco agreed to construct the building and other improvements in accordance with the "Plot Plan" and "Project Criteria" provided to it by Fred's. (App. pp. 481–82). Wildevco was required "to provide [Fred's] with construction plans from, or provided by [Wildevco's] builder," which plans were further required to "be approved, dated and initialed by [Fred's]." (App. p. 482). "All of said construction [was to] be done by [Wildevco] at its sole cost and expense . . . ." Id. The Lease also provided that Wildevco agreed to "keep and repair the exterior of the Demised Premises, including the parking lot, parking lot lights, entrance and exits, sidewalks, ramps, [and] curbs . . . ." (App. p. 485). The term of the Lease was for ten years to commence April 1, 2005. (App. pp. 482–85).

As part of its obligations under the Lease, Wildevco hired an architect to provide architectural plans and specifications for the building and hired engineers to provide site plans for the property. (App. p. 278). The site engineer for the subject project was Hass & Hilderbrand, Inc. (the "Engineer"). The Engineer prepared the site plans for the subject project, which set forth

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

"how [the] site will be graded, how the utilities are installed; basically everything on the property that's developed from the ground down, including pavement." (App. p. 240). The Engineer used the architectural plans as its basis for creating the site plans. (App. p. 249). However, the architectural plans that were provided to the Engineer were different from the final stamped architectural plans. (App. p. 263). It was later acknowledged by both the Engineer and the trial court that the sidewalk details in the architectural plans conflicted with the sidewalk details in the site plans. (App. p. 23; App. p. 256). Specifically, it was noted that the site plans did not include a handicap ramp and indicated a nine-foot sidewalk, while the architectural plans included a ramp and indicated a sidewalk in excess of ten feet. Id.

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

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

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

Construction proceeded and the Certificate of Occupancy was ultimately issued in October 2005. (App. p. 561).

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

> (a) In failing to keep and maintain the area of the premises as are ordinarily used by customers in transacting business in a reasonably safe condition;
> (b) In failing to take reasonable precautions to avoid an unsafe condition from existing at said store;
> (c) In failing to warn customers of the dangerous condition then and there existing;
> (d) In failing to inspect said premises;
> (e) In failing to remedy the condition as required by law;
> (f) In failing to discover risks and to warn of or make safe existing unreasonable risks; [and]
> (g) In such other particulars that the evidence may establish.

(App. p 148). Notably, Plaintiffs did not allege negligence based upon the creation of an unsafe condition. (App. pp. 147–49). At no point, did Plaintiffs assert any cause of action against Petitioner.

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

Respondents and that Respondents would be proceeding on its sole remaining claim of equitable indemnity against Petitioner. (App. pp. 170–77).

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

> Additionally, this agreement and the payment made by or on behalf of Wildevco and Fred's pursuant to Section 1 of this Agreement operate as a satisfaction of any claim by Plaintiffs against any and all such Joint Tortfeasors, including Tippins-Polk Construction, Inc., and will reduce any damages recoverable against any and all such Joint Tortfeasors, to the full extent of the relative pro-rata share, if any[,] of the common liability of Wildevco and Fred's. As such, this Agreement discharges any common liability of Wildevco and Fred's and any Joint Tortfeasors, including Tippins-Polk Construction, Inc.

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

At the conclusion of trial, the court took the matter under advisement and subsequently filed an Order and Judgment in favor of Respondents on August 1, 2016. (App. p. 422; App. p. 18). The Order concluded, in part, that Petitioner "breached its contractual obligation and its duty of care to [Respondents] in failing to construct the premises free from latent defects." (App. p. 27). The Order further stated that "[t]he construction defects, for which [Petitioner] was solely responsible, were the sole and proximate cause of Mrs. Fountain's injuries . . . ." (App. p. 28). The trial court determined that a special relationship existed between Fred's and Petitioner and Wildevco and Petitioner to support their respective equitable indemnity claims, and also ruled that

Respondents were without fault in causing Plaintiffs' damages. (App. pp. 10–11). Judgment was entered against Petitioner in favor of Wildevco for the sum of $305,418.30 and in favor of Fred's for the total sum of $76,691.82. (App. p. 29).

Petitioner filed timely post-trial motions, which were denied. (App. pp. 35–62). Petitioner thereafter timely filed an appeal to the South Carolina Court of Appeals. The appeal was argued on May 15, 2019, and an opinion was issued by the Court of Appeals on February 12, 2020, affirming in part and reversing in part the trial court's order. (App. pp. 817–838). In pertinent part, the Court of Appeals affirmed the existence of a special relationship between Fred's and Petitioner and affirmed the trial court's ruling that Respondents were without fault in causing Plaintiffs' damages. Id.

Petitioner timely filed a request for rehearing on February 26, 2020 (App. pp. 839–55), which was denied by the Court of Appeals on March 30, 2020 (App. p. 860). Petitioner filed a request for certiorari to the South Carolina Supreme Court on April 22, 2020, which was granted via order dated May 28, 2021.

## 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) (citing Verenes v. Alvanos, 387 S.C. 11, 18 n.6, 690 S.E.2d 771, 774 n.6 (2010) (noting a cause of action for equitable indemnity is necessarily equitable in nature)). "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.

## ARGUMENT

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

The right of indemnification may be created by contract or by operation of law "in cases of imputed fault or where some special relationship exists between the first and second parties." Town of Winnsboro v. Wiedman-Singleton, 303 S.C. 52, 56, 398 S.E.2d 500, 503 (Ct. App. 1990). In other words, "a right of indemnity exists wherever the relation between the parties is such that in either law or equity there is an obligation on one party to indemnify the other, as where one is exposed to liability by the wrongful act of another in which he does not join." Stuck v. Pioneer Logging Mach., Inc., 297 S.C. 22, 24, 301 S.E.2d 552, 553 (1983). However, "there must be some kind of relationship established 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. Co. v. Globe Commc'ns, Inc., 363 S.C. 385, 390 n.3, 611 S.E.2d 235, 237 n.3 (2011).

The sole basis for the Court of Appeals' determination that Fred's may maintain an action for equitable indemnity against Petitioner is that "a special relationship existed between Fred's and [Petitioner] for the purposes of equitable indemnification." (App. p. 824). This conclusion ignores the established and well-reasoned tenets of Rock Hill Telephone and its progeny.[2]

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

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

[2] If there is no "special relationship" between Fred's and Petitioner, the Court does not have to reach the issue of whether Fred's was free of fault so as to sustain an equitable indemnity cause of action.

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

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

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

Id. (emphasis added).

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

Fred's to lease the building from Wildevco as a Fred's store. (App. pp. 22–23). Pursuant to their contract, "[a]ll of said construction [was to] be done by [Wildevco] at its sole cost and expense . . . ." (App. p. 482). Wildevco, *in turn*, contracted with Petitioner pursuant to a separate contract[3] to construct the building pursuant to the architectural and site plans provided to it. (App. p. 476). Like the relationship between the utility and the subcontractor, the relationship between Fred's and Appellant is an attenuated and tangential one, with the only commonality between the two being that they each entered into separate contracts with Wildevco relating to the subject building.

It is also important to note that in explaining its decision in Rock Hill Telephone, the Court held that "[u]nlike the dissent, we find that there must be some kind of relationship between the parties beyond the relationship established by virtue of one party alleging that he was sued because of another party's wrongdoing." Id. at 390 n.3, 611 S.E.2d at 237 n.3. In so stating, the Court recognized that there were two separate and independent relationships among the parties—one between the utility and the independent contractor, and one between the independent contractor and the subcontractor—with the overlap between the defendants being that they each entered into separate contracts with the independent contractor relating to the installation of the underground cable. Here, similarly, there are two separate and independent relationships among the parties—one between Fred's and Wildevco, and one between Wildevco and Petitioner—with the commonality being that both Fred's and Petitioner entered into separate contracts with Wildevco relating to the construction of the subject building. However, there is no relationship between Fred's and Petitioner with respect to the subject project beyond which was "established by virtue

[3] It should be noted that the terms of the contract between Wildevco and Fred's were not referenced or incorporated by reference into the contract between Wildevco and Appellant. (App. p. 476) ("The Contract Documents consist of the Agreement and the Drawings with Specifications thereon, furnished by Chris Booker & Associates and the Site Plans, furnished by Hass & Hilderbrand, Inc.").

of [Fred's] alleging [it] was sued because of [Petitioner's] wrongdoing." See Rock Hill Tele., 363 S.C. at 390 n.3, 611 S.E.2d at 237 n.3. Further, Fred's was not sued for creating the alleged condition, but rather for failing to warn, discover, and correct the condition under a shopkeeper liability standard. (App. 148).

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

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

In its opinion, the Court of Appeals affirmed the trial court's finding of the existence of a special relationship between Fred's, a tenant of the subject building, and Petitioner, the general contractor hired by the owner, Wildevco, to construct the building. (App. p. 284). The existence of a special relationship between the two was premised upon the following findings of fact:

(a) Petitioner was purportedly recommended to Wildevco for the subject project because Petitioner had experience constructing other Fred's stores;
(b) The construction contract between Wildevco and Petitioner provided it was an agreement for the construction of "one Fred's store";
(c) Wildevco agreed in its lease with Fred's to "cause construction" of the store in accordance with conceptual plans Fred's provided as an attachment to the lease;
(d) The owner of Petitioner testified that he knew Petitioner was hired to build a Fred's store before construction began;
(e) Petitioner had previously constructed ten to fifteen other Fred's stores;
(f) Representatives of Fred's often visited the site during construction and examined every aspect of the building; and
(g) Petitioner owned a Fred's store in a neighboring county.

(App. pp. 823–24).

It is undisputed that Respondents entered into a contract with each other whereby Fred's agreed to lease the subject building from Wildevco following completion of construction by Wildevco, and that Wildevco hired Petitioner pursuant to a separate contract to construct the subject building. Fred's was not a party to the contract between Wildevco and Petitioner, Fred's did not provide Petitioner with the architectural or site plans, Fred's did not compensate Petitioner to construct the building, and Fred's did not monitor Petitioner or oversee the means and methods of construction. (App. pp. 470–528). The "relationship" between Fred's and Petitioner as it relates to this project is, therefore, that of a tenant and general contractor, with the only commonality between the two being that they each entered into separate contracts with Wildevco relating to the subject building. Throughout this case, Fred's has argued that "it was established that [Fred's] was exposed to liability solely as a result of the wrongful act of [Petitioner] in their negligent construction of [Respondents'] premises." (See Fred's Return to Pet'r's Pet. for Writ of Cert. at 3; see also App. p. 748). This is not true, because Fred's was sued for its own independent acts of negligence as discussed *infra*, Sec. II & III. However, as discussed above, "there must be some

kind of relationship established 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. Such a "special relationship" is not present between Fred's and Petitioner and the Court of Appeals' decision finding same is contrary to well-established law.

In looking to the string cite of cases on page seven of the Court of Appeals' opinion, it cited to several South Carolina appellate court decisions where a special relationship was recognized. However, in each of these cases there is a *direct* relationship between the indemnitor and indemnitee which does not exist between Fred's and Petitioner. See First Gen. Servs. of Charleston, Inc. v. Miller, 314 S.C. 439, 443, 445 S.E.2d 446, 448 (1994) (special relationship between contractor and subcontractor); but see Rock Hill Telephone, 363 S.C. at 390 611 S.E.2d at 237 (relationship between contractor and remote or distant independent contractor insufficient); see also Stuck, 279 S.C. at 24, 301 S.E.2d at 554 (special relationship between a purchaser of a defective vehicle and the seller of said vehicle); Addy v. Bolton, 257 S.C. 28, 33, 183 S.E.2d 708, 709 (1971) (special relationship between landlord and general contractor hired by landlord who damaged tenant's property); Griffin v. Van Norman, 302 S.C. 520, 527, 397 S.E.2d 378, 382 (Ct. App. 1990) (special relationship between the seller of a home and an exterminator hired by the seller); and McCoy v. Greenwave Ents., Inc., 408 S.C. 355, 360, 759 S.E.2d 136, 138 (2014) (special relationship between a property owner and a former owner of the same property by virtue of a purchase agreement between the two).

Not only are there direct contractual relationships between the indemnitors and indemnitees in each of the above-cited cases (with the exception of Rock Hill Telephone in which, coincidentally, this Court determined that a special relationship was not present), but there are also,

at the very least, *direct* relationships between the two which does not exist between Fred's and Petitioner with respect to the subject project. Mere knowledge of the identity of the end user of a building does not equate to a "special relationship." It should also be noted that in each of the cases where a special relationship was found to be present between the indemnitor and indemnitee, the special relationship existed by virtue of the indemnitor's negligence or breach of contract being directed at the indemnitee for which the indemnitee incurred attorney's fees and costs in defending itself against the indemnitor's conduct. See, e.g., Winnsboro, 307 S.C. at 132, 414 S.E.2d at 121 ("A sufficient special relationship exists when the at-fault party's negligence or breach of contract is *directed at the non-faulting party* and the non-faulting party incurs attorney fees and costs in defending itself against the other's conduct.") (emphasis added). In such cases, our appellate courts have recognized that parties in a special relationship must stand in such a relation with each other whereby duties are undertaken by the indemnitor and flow from the indemnitor to the indemnitee. Without such a direct and targeted relationship between the indemnitor and indemnitee which extends beyond the relationship established by virtue of one party getting sued for the other's wrongdoing, such as in Rock Hill Telephone, this Court has determined that a special relationship does not exist.

To support the existence of a special relationship, Fred's argued, and the Court of Appeals accepted, that previous unrelated course of dealings and prior construction projects give rise to a special relationship. (See App. p. 749; see also App. pp. 823–24).[4] While our courts typically determine the existence of a special relationship on a case by case basis, it does so by examining the facts and circumstances specific to the project, occurrence, or transaction underlying the

[4] These factors include Petitioner having experience constructing other Fred's stores and Petitioner owning a Fred's store in another location. The lower courts all, however, excluded evidence of other accidents related to construction conditions at another Fred's store. (App. 415).

equitable indemnity claim. There is no opinion of which Petitioner is aware which has considered, either expressly or implicitly, previous construction projects and/or previous course of dealings in determining whether a special relationship exists between parties related to the subject project, occurrence, or transaction. The Court of Appeals' decision not only introduces the concept that our courts can and should consider any and all facts and circumstances, including those with no nexus to the underlying claim itself, it also will have the effect of eradicating the decades-long requirement that a relationship between the purported indemnitor and indemnitee be "special." Again, in looking to this project underlying the equitable indemnity claim, the only "relationship" between Fred's and Petitioner is that they each entered into separate contracts with Wildevco relating to the subject building.

The remaining factors the Court of Appeals considered in finding a special relationship between Fred's and Petitioner all relate to Petitioner's knowledge that the building it was constructing would be a Fred's store. (App. p. 824).[5] Petitioner simply having knowledge that it was constructing a Fred's store does not, in and of itself, give rise to a special relationship between it and Fred's. If the hallmark of a relationship is two or more parties being connected or interrelated, a contractor's knowledge of the identity of the end user of the building is not tantamount to a "special relationship." Knowledge of use has not been held as synonymous with a "special relationship." This is especially so when the tenant is not the owner of the building to be constructed, did not enter into a contract with the contractor, did not provide the contractor with

[5] These factors include Petitioner having knowledge that it was hired to build a Fred's store before construction began; the contract between Wildevco and Petitioner (a contract to which Fred's was not a party) setting forth that the agreement required Petitioner to construct "one Fred's store;" and Fred's often visiting and examining the site during construction.

architectural or site plans to construct the building, did not compensate the contractor, and did not monitor the contractor or otherwise oversee the means and methods of construction.

Though the Court of Appeals stops short of holding that Fred's is a third-party beneficiary to the Wildevco-Petitioner contract, the Court's focus upon Petitioner's knowledge that it was constructing a Fred's store appears to stand for the proposition that Fred's status as beneficiary of using the building creates a special relationship between it and Petitioner. As an initial matter, Fred's was not a third-party beneficiary to the Wildevco-Petitioner contract. There is no evidence in the record that Wildevco and Petitioner intended to directly benefit Fred's; rather, Fred's expected benefit was merely incidental. See Touchberry v. City of Florence, 295 S.C. 47, 48–49, 367 S.E.2d 149, 150 (1988) (holding that a third-party beneficiary is a party that the contracting parties intend to *directly* benefit); see also Bob Hammond Constr. Co. v. Banks Constr. Co., 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct. App. 1994) ("[I]f a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than incident or consequential, benefit to such third person."). Rather, the parties directly benefiting from the Wildevco-Petitioner contract were the contracting parties themselves—Petitioner being paid for its work and Wildevco receiving a newly constructed building which it would, in turn, lease to Fred's pursuant to their separate agreement. Even assuming Fred's was a third-party beneficiary, which is denied, this status is still insufficient, in and of itself, to give rise to a special relationship between it and Petitioner. See Winnsboro, 303 S.C. at 56, 398 S.E.2d at 502 ("Unfortunately, indemnity is sometimes confused with other legal concepts such as suretyship, consequential damages, assignment, or third party beneficiary rights."); see also McPherson v. Mich. Mut. Ins. Co., 306 S.C. 456, 464, 412 S.E.2d 445, 450 (Ct. App. 1991) (rev'd on other grounds by McPherson, 310 S.C. 316, 426 S.E.2d 770 (1993)) ("The

right to indemnity is personal to the indemnitee and creates no legal or equitable interest in third party beneficiaries by contract or lien."). To the extent Fred's was a third-party beneficiary to the Wildevco-Petitioner contract, it would have the ability to enforce said contract; however, there is no special relationship created by virtue of Fred's status as a third-party beneficiary which would permit it to maintain an equitable indemnity claim against Petitioner.

Again, the only commonality between Fred's and Petitioner 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. Rather, Petitioner is merely a "remote or distant independent contractor" from the perspective of Fred's and the relationship between the two is "an attenuated one" pursuant to this Court's holding in Rock Hill Telephone. See id., 363 S.C. at 390, 611 S.E.2d at 237. Therefore, Petitioner respectfully request this Court reverse the Court of Appeals' determination that a special relationship existed between Fred's and Petitioner to support Fred's equitable indemnity claim and entered judgment against Fred's.

## II. RESPONDENTS WERE SUED BY PLAINTIFFS FOR BREACHING INDEPENDENT DUTIES OF CARE OWED BY RESPONDENTS TO PLAINTIFFS UNDER COMMON LAW PREMISES LIABILITY; AND, THUS, WERE EXPOSED TO LIABILITY DUE TO THEIR OWN BREACH OF DUTY.

### A. Respondents were exposed to liability due to their own actions and omissions.

In the underlying action, Plaintiffs sued Respondents for negligence sounding in common law premises liability, namely, failing to discovery and remedy/warn of alleged dangerous conditions existing on the subject property. Specifically, Plaintiffs' complaint alleged as follows:

> 7. That the direct and proximate cause of the injuries was the careless, negligent, recklessness, willfulness, wanton and grossly negligent, conduct of [Respondents] in the following particulars to wit:

(a) In failing to keep and maintain the area of the premises as are ordinarily used by customers in transacting business in a reasonably safe condition;
(b) In failing to take reasonable precautions to avoid an unsafe condition from existing at said store;
(c) In failing to warn customers of the dangerous condition then and there existing;
(d) In failing to inspect said premises;
(e) In failing to remedy the condition as required by law;
(f) In failing to discover risks and to warn of or make safe existing unreasonable risks;
(g) In such other particulars that the evidence may establish.

(App. p. 148). Plaintiffs, as the masters of their complaint, specifically chose not to sue Petitioner for the creating the alleged dangerous condition, or anything else, nor did Plaintiff sue Respondents for creating the condition itself. (App. pp. 147–149).

"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) damages 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 action, 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." LeFont v. City of Myrtle Beach, 430 S.C. 534, 542, 846 S.E.2d 355, 359 (Ct. App. 2020) (citing Sims v. Giles, 343 S.C. 708, 717, 541 S.E.2d 857, 862 (Ct. App. 2001)). "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, 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 other such 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, 248, 638 S.E.2d 96, 100 (Ct. App. 2006).

The foregoing duties of care are independent duties owed by Respondents to Plaintiffs under common law premises liability; however, Petitioner, who completed construction of the store approximately five years prior to the subject incident, did not owe any such duties of care 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."). Plaintiffs' claims against Respondents were based upon the allegation that Respondents breached their duty to discover and warn of or eliminate an unsafe condition. (App. p. 148). Plaintiffs' claims against Respondents were not based upon the creation of an unsafe condition. Id.

The essence of an equitable indemnity claim is that the indemnitor was liable for causing the plaintiff's damages and that the indemnitee was exposed to liability by the wrongful act of the indemnitor in which the indemnitee did not join. See Walterboro Cmty. Hosp., 392 S.C. 479, 485, 709 S.E.2d 71, 74 (Ct. App. 2011); see also Stuck, 279 S.C. at 24, 301 S.E.2d at 553. Respondents

were exposed to liability to Plaintiffs for their own negligence arising from a breach of their duty of care under premises liability law. What Respondents were sued for by Plaintiffs revolves completely around Respondents' duty to discover and remedy or warn of dangerous conditions existing at the property—they were not sued for the alleged negligence of Petitioner creating the condition (despite whether Petitioner was, in fact, also negligent in creating the condition). See Girard v. Great Am. Lines, Inc., 181 F.3d 101 (6th Cir. 1999) (unpublished) (applying Michigan law) ("[I]f the primary complaint alleges active negligence against a party, then that party is not entitled to indemnification."); Thompson v. UFP Eastern Div., Inc., 2012 WL 3686064, at *5 (D.S.C. Aug. 24, 2012) (J. Norton) (applying Michigan law and analyzing Girard); see also Heco v. Foster Mot., 114 A.3d 902, 905 (Vt. 2015) (holding that a party seeking equitable indemnity may recover only where its potential liability is vicariously derivative of the acts of the indemnitor and it is not independently culpable).

In Girard, the Sixth Circuit applying Michigan law in the context of equitable indemnity, made clear that if a Plaintiff is even ".01 percent" at fault then it cannot recover. This is true because, like South Carolina law, a party claiming equitable indemnity must be completely free from fault and operates as a bar to the claim. 181 F.3d 101. Here, the Plaintiffs complaint alleges active negligence by Respondents. In Heco, the Vermont Supreme Court, in the context of equitable indemnity, also held that no recovery can occur where there is "independent culpability" on the part of the entity seeking equitable indemnity. 114 A.3d at 905. This holding is consistent with South Carolina law on equitable indemnity requiring that the party seeking such relief must be completely without fault.

Here, Plaintiffs could have sued Respondents for creating an alleged defect or could have sued Petitioner, but chose not to do so. Equally true, at the time of settlement the statute of

limitations and statute of repose had already expired with respect to any potential claims by Plaintiffs against Petitioner. (App. pp. 147–49; App. p. 183). Respondents ultimately settled their own liability with Plaintiffs—liability which arose due to their breach of independent duties of care owed to Plaintiffs separate and apart from any duty owed by Petitioner. In reality, Respondents are attempting to re-plead/re-cast the allegations of Plaintiffs' complaint by arguing that they were exposed to liability due to the creation of a dangerous condition; however, Respondents were never faced with such liability in the underlying action. (App. p. 148).

Respondents were not exposed to liability solely arising from the alleged acts or omissions of Petitioner but, rather, were exposed to liability due to their own wrongdoing. Accordingly, Respondents' equitable indemnity action against Petitioner fails as a matter of law.

### B. The Court of Appeals conflated contractual indemnity principles of law with those of equitable indemnity regarding proof of "potential liability" as a prerequisite to recovering settlement costs.

Contractual indemnity claims are not synonymous with equitable indemnity claims in South Carolina by recognizing the two separate forms of indemnity. Rock Hill, *supra*. The Court of Appeals erred by conflating the contractual indemnity principle of "potential liability" to an equitable indemnity claim. By doing so, it amplifies the error in its holding because if there is "potential liability" on the part of the indemnitee, then the indemnitee is not free of fault. Here, as will be explained further, *infra*, there was more than just potential liability on the part of Respondents. In fact, there was evidence showing actual negligence on their part. See, Section III., *infra*.

In its opinion, the Court of Appeals cited to Otis Elevator, Inc. v. Hardin Constr. Grp., 316 S.C. 292, 297, 450 S.E.2d 41, 44 (1994), for the proposition that "[w]here . . . the indemnitee gave the indemnitor notice and an opportunity to participate in the litigation, the indemnitee is not

required to prove the plaintiff's actual ability to recover the amount paid in settlement so long as the indemnitee proves that he was potentially liable to the plaintiff." Id. (internal citations and emphasis omitted) (App. p. 825). First, Otis is a *contractual*, not equitable, indemnity case. Second, the Record devoid of any evidence of Respondents giving Petitioner notice and an opportunity to take over the litigation on their behalf which Petitioner rejected. There was no "tender" of the lawsuit under principals of contractual indemnity, nor was there a "tender" of the lawsuit under principals of equitable indemnity.

In Otis, a contractual indemnity action was brought by an elevator subcontractor against a general contractor for a commercial building project. The parties had previously entered into a written contract containing a provision of indemnity due and owing from the general contractor to the elevator subcontractor. An injury occurred during the course of construction, and the injured plaintiff brought a negligence, strict liability, and breach of warranty action against the elevator subcontractor. The elevator subcontractor sent a letter to the general contractor notifying it of the lawsuit and requesting it defend and indemnify the elevator subcontractor, which the general contractor refused. The elevator subcontractor ultimately settled the lawsuit and thereafter brought a contractual indemnity action against the general contractor pursuant to their contract. During the pendency of the indemnity action, the general contractor argued that the settlement amount was unreasonable. This Court disagreed and determined that the settlement met the three-part analysis set forth in Griffin. 316 S.C. at 297, 450 S.E.2d at 44; see also Griffin, 302 S.C. at 523, 397 S.E.2d at 380. Here, there is nothing in the Record supporting the notion that Petitioner was asked to indemnify or defend Respondents. The Court of Appeals' reliance on Otis is misplaced.

The Court of Appeals further analyzed the "potential liability" standard in considering two out-of-state cases: Trim v. Clark Equip. Co., 274 N.W.2d 33, 36 (Mich. Ct. App. 1978) and

Pennant Serv. Co. v. True Oil Co., 249 P.3d 698, 706 (Wyo. 2011). The Court of Appeals stated that "potential liability means nothing more than that the indemnitee acted reasonably in settling the underlying suit" and, "[t]herefore, we find [Respondents] were only required to present proof of potential liability to establish the reasonableness of their settlement with [Plaintiffs]." (App. p. 825) (internal citations omitted). It should be noted that, like Otis Elevator, Trim and Pennant cases involve *contractual*, not equitable, indemnity claims which are inapplicable to the case at bar. See Trim, 274 N.W.2d at 33 ("Upon receipt of the complaint, [the indemnitee] wrote to [the indemnitee] demanding that it assume the defense and indemnify [the indemnitee] *under the contract.*") (emphasis added); see also Pennant, 249 P.3d at 704 ("Under the potential liability standard, [the indemnitee] was only required to show that the settlement was reasonable and that the underlying factual situation was one covered by *the indemnity contract.*") (emphasis added). Furthermore, as set forth above, Michigan law does not allow for equitable indemnity if the party seeking indemnity was alleged in the complaint to be actively negligent further distinguishing it from the case at bar. Girard, 181 F.3d at 101 (citations omitted).

Jurisdictions adhering to this "potential liability" standard have also held that where the indemnitee was neither tendered defense of the claim nor informed of the settlement until after its conclusion, proof of actual liability is required. See Atl. Richfeld Co. v. Interstate Oil Transp. Co., 784 F.2d 106, 111 (2d Cir. 1986) ("In contrast, proof of actual liability has been required where the indemnitor was neither tendered defense of the claim nor informed of the settlement until after its conclusion . . . ."); see also Chevron Oronite Co. v. Jacobs Field Servs. N. Am., Inc., 951 F.3d 219, 226 (5th Cir. 2020) ("As a general rule, one seeking indemnity for a settlement must show actual liability to recover. An exception to the rule is that the indemnitee need only show potential, rather than actual, liability where the claim is based on a written contract. An indemnitee also need

show only potential liability if the defendant tenders the defense of the action to the indemnitor."). Again, the Record is devoid of any evidence of Respondents giving Petitioner notice and an opportunity to participate in the litigation and there is no contract. To the extent the Court of Appeals is relying upon Trim and Pennant in holding that Respondents need only show "potential liability," then the Court of Appeals misapplied the law set forth in these two cases and should have determined that Respondents prove actual liability. Respondents doing so, in and of itself, would demonstrate that they have unclean hands that would foreclose their equitable indemnity claim. Reliance upon these out-of-state cases establishes that they inherently conflict with South Carolina jurisprudence's requirement that the indemnitee seeking equitable indemnity must be *completely* without fault.

The Court of Appeals relies upon incorrect principles of law in determining that Respondents need only prove that they were potentially liable in order to recover the settlement amount paid to Plaintiffs, and this Court should correct this error. South Carolina law is clear that in order to recover on an equitable indemnity claim, the indemnitee must prove (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. See Walterboro Cmty. Hosp., 392 S.C. at 485, 709 S.E.2d at 74. Further, in order to recover settlement costs, the indemnitee must make an additional showing that: (1) 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 an extent of defendant's exposure if the case is tried. See Griffin, 302 S.C. at 523, 397 S.E.2d at 380. The "potential liability" standard

cited in the Court of Appeals' opinion, put simply, has nothing to do with an equitable indemnity claim under South Carolina law.

While it is true that Petitioner does not challenge the reasonableness of the settlement, Respondents' proof of potential liability underscores Petitioner's argument that Respondents are not free from fault which prohibits the claim all together. For all the reasons set forth in Section III, *infra*, Respondents are not free from fault because they were sued for breaching and the evidence established that they did breach independent duties of care owed to Plaintiffs under common law premises liability. Additionally, Wildevco has unclean hands resulting from supplying defective plans and tasking an unqualified person to oversee development, which led to the very condition over which Plaintiff Martha Fountain tripped and fell. If Respondents are "potentially liable" to Plaintiffs based upon their premises liability claims, then they are not free from fault. Respondents settled their own liability based upon their breaches of duty arising under premises liability law. This is not a contractual indemnity matter where concurrent negligence does not necessarily bar the claim; this is an equitable indemnity action where the indemnitee must prove that it was "exonerated from any liability for [the plaintiff's] damages." Walterboro Cmty. Hosp., 392 S.C. at 485, 709 S.E.2d at 74. Respondents' proof of potential liability is inherently contrary to being without fault in causing Plaintiffs' damages and amplifies the point of why they settled the matter with Plaintiffs and why they were responsible. Following settlement of this matter with Plaintiffs, Respondents had a remedy available to them pursuant to the South Carolina Contribution Among Tortfeasors Act, S.C. Code Ann. § 15–38–10 et seq., but Respondents failed to exercise this remedy in a timely fashion. (App. pp. 182–89). Having settled their own liability arising from common law premises liability, Respondents cannot now re-plead Plaintiffs' allegations against them to create the illusion that they were sued solely for the negligence of

Petitioner. If so, and if the Court of Appeals opinion is correct, why not defend the Plaintiffs claims and argue there is no duty owed to Plaintiff? The reason is simple: Respondents owed duties under South Carolina law to find and correct the condition and warn Plaintiff. They did not. That makes them at least .0000001 percent at fault. Any fault whatsoever serves as a bar to their claim against Petitioner.

The Court of Appeals' reliance upon contractual indemnity cases was error. Respondents' proof of potential liability at the trial of this matter further underscores Petitioner's argument that Respondents are not free from fault.

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

The law in South Carolina is clear: in order to prevail upon an equitable indemnity claim, the entity asserting the claim must be completely without fault. Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 63, 518 S.E.2d 301, 307 (Ct. App. 1999). Simply put, the party asserting the claim must not have been even the slightest bit at fault. If the party seeking equitable indemnity does not prove that it is completely without fault, the claim is barred. Id.

"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., 392 S.C. at 485, 709 S.E.2d at 74 (citing Vermeer, 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, 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, 371, 396 S.E.2d 354, 357–58 (1983) and Stuck, 297 S.C. at 24, 301 S.E.2d at 553). "If the second party is also at fault, he comes to court without equity and has no right to indemnity." Vermeer, 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.

As discussed above, 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. Landry, 317 S.C. at 203, 42 S.E.2d at 621; see also O'Leary-Payne, 371 S.C. at 248, 638 S.E.2d at 100 ("[T]he owner of the premises owes the customers the duty of exercising ordinary care to keep the passageways, sidewalks and other such parts of the premises as are ordinarily used by the customers in transacting business in a reasonably safe condition."). Respondents failed to comply with this independent duty of care.

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

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

Id. (emphasis added). Hunt continued to testify, however, that Respondents "relied upon the contractor to build it property . . . ." (App. p. 361). While that may be the case, such reliance in no way, shape, or form relieves Respondents of their duties of care as owners/occupiers of the

premises. Again, this is the very basis for why Respondents were sued in the first place. The Court of Appeals also noted in its opinion that Respondents' reliance upon Petitioner to construct the premises in accordance with the architectural drawings and site plans seemingly relieved Respondents from this duty of care, stating that "[w]e agree with the circuit court that [Respondents] reasonably relied upon [Petitioner], as general contractor, to construct the premises in accordance with the architectural drawings and site plans and, therefore, free from any latent defects." (App. pp. 826–27). Such a conclusion runs contrary to almost a hundred years of jurisprudence in this State that a landowner owes an invitee a duty of due care to discover risks and to warn of or eliminate them. See, e.g., Bradford v. F.W. Woolworth Co., 141 S.C. 453, 140 S.E. 105, 108 (1927) (Blease, J., concurring) ("The authorities are entirely agreed upon the proposition that an owner or occupant of lands or buildings who directly or by implication invites or induces others to go thereon or therein owes to such persons a duty to have his premises in a reasonably safe condition and to give warning of latent or concealed perils.").

Barber, Wildevco's representative, admitted that Wildevco failed to follow the standard of

care opined by Respondents' expert. (App. pp. 279,[6] 303,[7] 305–06[8]). Furthermore, and as cited above, Wildevco specifically agreed in the Lease that it would "keep and repair the exterior of the Demised Premises, including the parking lot, parking lot lights, entrance and exits, *sidewalks, ramps, [and] curbs* . . . ." (App. p. 485) (emphasis added).

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

> Barber also testified that he did not conduct an inspection for tripping hazards at the Fred's store. However, the lease agreement

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[6] Barber testified at trial:

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

[7] Barber continued:

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

[8] Barber testified as follows:

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

> between Fred's and Wildevco provided that Wildevco was only responsible for "keeping and maintain[ing]" the exterior of the premises while Fred's was responsible for the interior of the store.

(App. p. 827 n.17). Even assuming Wildevco's obligation under the lease to "keep and maintain" the sidewalks and curbs does not include inspecting them for defects and thereafter warning of or eliminating said defects, then this duty to do so falls squarely on Fred's as the occupier in control of the premises. See Miller, 329 S.C. at 314, 494 S.E.2d at 815 ("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."). It is undisputed that Fred's never discovered and remedied/warned of the alleged defective condition. The theory of liability against Fred's from Plaintiff was that *it should have discovered it.*

Applying the Court of Appeals' decision logically, holding that Respondents were without fault in causing Plaintiffs' damages stands for the premise that despite a shopkeeper's obligation to discover hazardous conditions and remedy/warn of said conditions, and despite a shopkeeper's failure to do so, that such shopkeeper is insulated from negligence because it did not construct the building. Should the Court of Appeals' decision stand, not only will shopkeeper's be unaccountable for their inactions or omissions, but an injured plaintiff may potentially be without recourse at all if he or she is injured at a premises constructed after the applicable limitations or repose period expires. Not only is this contrary to sound public policy, but such a conclusion is counter to well-established precedent that a "landowner owes an invitee a duty of due care to discover risks and to warn of or eliminate foreseeable unreasonable risks." See Landry, 317 S.C. at 203, 42 S.E.2d at 621. Taken to conclusion, the Court of Appeals opinion can stand for the proposition that a shopkeeper cannot be liable for a construction defect which causes a patron injury. The existing principal of well-established law regarding a duty to discover and warn and correct conditions applies whether or not the shopkeeper constructed the building or merely is

leasing the building. There is, simply put, at least *some* liability on the part of Respondents which serves as a bar to an equitable indemnity claim.

**B. Wildevco negligently oversaw development and construction of the subject project and, therefore, is a joint tortfeasor precluded from maintaining a claim for equitable indemnity.**

1. Wildevco supplied defective construction plans for the project, making it at least partially culpable in causing Plaintiffs' damages.

Wildevco was the developer for the subject project and was tasked with overseeing construction of the subject building. (App. p. 481–82) ("The Lessor agrees to cause construction of said Demised Premises and other improvements . . . at its own cost and expense, in a good and workmanlike manner, using first quality materials in full compliance with all laws, rules and regulations of all governmental authorities having jurisdiction thereof."). Included with the foregoing was Wildevco's obligation to procure construction plans. (App. p. 482).

The trial court's order specifically noted that the testimony at trial indicated that there may have been areas of confusion in the drawings and plans, including a possible discrepancy between the architectural drawings and the site plans. (App. p. 23). The Court of Appeals' order likewise noted that the testimony indicated "possible confusion as a result of the discrepancies between the architectural drawings and the site plans," but that Petitioner "did not present any expert testimony to stand for the proposition that confusion in the site plans or architectural drawings can render them defective." (App. pp. 828–29). The testimony at trial was that the architectural plans called for 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. (App. pp. 260–63). The Engineer testified that the architectural drawings and site plans "appear to be different" (App. p. 265) and that this discrepancy could be confusing (App. p. 253). Furthermore, Barber agreed that there were differences between the architectural drawings and

engineering site plans:

> 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 have them to [Petitioner]; correct?
> A: Correct.

(App. pp. 283–84). This discrepancy between the architectural plans and the site plans involved the very issue that caused Plaintiff Martha Fountain to trip and fall. Both the trial court and the Court of Appeals held, essentially, that Petitioner was at fault in failing to contact the engineer and/or architect for review if discrepancies were discovered or to request clarification of the plans. (App. pp. 27–28); (App. pp. 828–29). It does not matter if Petitioner was negligent in this regard, because it does not relieve Wildevco's concurrent negligence in supplying defective and discrepant plans in the first instance. While the Court of Appeals noted that Petitioner 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. To ignore this conclusion, eviscerates the "*Spearin* Doctrine" which has been the law for more than a century.

"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); see also U.S. v. Spearin, 248 U.S. 132, 136 (1918) ("[I]f the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications."); Robert E. Lee & Co. v. Comm'n of Pub. Works of City of Greenville, 248 S.C. 84, 90, 149 S.E.2d 55, 58 (1966) (holding that contractor was entitled

to rely upon representation in plans provided by owner). Here, Wildevco was required pursuant to its contract with Petitioner to provide the architectural drawings and site plans to Petitioner. (App. p. 284; App. p. 470). In doing so, Wildevco warranted the sufficiency of these design documents pursuant to this Court's holding in Polar Pantries. The testimony and evidence at trial, as well as the trial court's findings, were that there were discrepancies between the architectural drawings and site plans that could cause confusion. (App. pp. 283–84). Likewise, Brett Polk ("Polk") testified on behalf of Petitioner at trial that he believed Petitioner constructed the subject sidewalk in accordance with the plans and containing an elevated sidewalk curb and curb ramp. (App. p. 410). This evidence necessarily leads to the inescapable truth that Wildevco was at least .00001 percent at fault.

Contrary to the holding in Polar Pantries, the Court of Appeals' opinion states that "an architect or engineer"[9] warrants the sufficiency of the plans, but in this case, "the developer, Wildevco, was responsible for providing the allegedly defective plans even though the site plans and architectural plans were prepared by the site engineer and architect, respectively, without any input from Wildevco." (App. p. 829). Therefore, the Court of Appeals reasons, "we find Wildevco did not provide [Petitioner with defective plans]." Id. Such a result is wholly contradictory to the holding of Polar Pantries, which clearly holds that a "party" furnishing the plans and specifications warrants their sufficiency, regardless of whether that party had input in their creation. Wildevco is a "party" and is the entity that supplied the drawings. Not only would the present result insulate

[9] The Court of Appeals' replaces the word "party" with "architect or engineer," thereby constricting the breadth of the holding in Polar Pantries to only design professional who prepared the plans and not to the developer or owner who supplied them. (App. p. 829); see Polar Pantries, 219 S.C. at 271, 64 S.E.2d at 888 ("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.") (emphasis added).

all virtually developers in this state from providing defective plans, but the Court of Appeals also lacks the authority to rule against prior published precedent from the Supreme Court. It is, instead, bound by the decisions of the Supreme Court, including Polar Pantries. See S.C. Const. art. V, § 9 ("The decisions of the Supreme Court shall bind the Court of Appeal as precedents."); see also Campbell, 398 S.C. at 18, 726 S.E.2d at 225 (stating the Court of Appeals may not overrule Supreme Court precedent).

To the extent the holding of Polar Pantries is not reversed, then Wildevco is, at the very least, partially at fault in providing defective and discrepant architectural drawings and site plans. Whether Petitioner should have alerted the engineer/architect and failed to do so is of no consequence, as the relevant inquiry here is not whether Petitioner was at fault in creating the condition or failing to seek clarification of the discrepant plans. Rather, the relevant inquiry is whether Wildevco was concurrently at fault for providing such discrepant plans. Vermeer Carolina's, 336 S.C. at 63, 518 S.E.2d at 307 ("The most important requirement for the finding of equitable indemnity is that the party seeking to be indemnified is adjudged without fault and the indemnifying party is the one at fault."). At the very least, Wildevco is one hundredth of a percent at fault in causing the condition over which Plaintiff Martha Fountain tripped and fell.

2. Wildevco tasked an unqualified person to oversee development and construction of the subject building, making it at least partially culpable in causing Plaintiffs' damage.

Wildevco is also partially at fault in tasking Barber, an admittedly unqualified person, to oversee the construction of the subject store. Wildevco knew or should have known that Barber was unqualified to oversee the project and that doing so created an undue risk of harm to the general public, including Plaintiffs.

The Court of Appeals states in its opinion that Appellant has cited no authority that an

owner of property has a duty to hire a qualified person to oversee construction. (App. p. 829). The Court of Appeals continued, stating as follows:

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

Id. (internal citations omitted) (emphasis added). This conclusion implicitly sanctifies the notion that the law allows for a property owner to hire an unqualified construction manager and be insulated from liability. That is not logical. It also runs afoul of the general notion that a party can assume a duty, and if a duty is assumed, it must be exercised reasonably and with due care. Miller, 329 S.C. at 314, 494 S.E.2d at 815. Barber oversaw the project and, as a result, had to exercise that obligation with due care.

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

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

(App. p. 476). Also included in the contract between Wildevco and Appellant was a project schedule which specifically provided dates by which time Appellant was required to complete the

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

Wildevco is not only the owner of the subject property but was also the developer of the subject property. Under South Carolina law, developers can be held liable for their own negligent construction. See Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co., 425 S.C. 276, 288, 821 S.E.2d 509, 515 (Ct. App. 2018). The trial court specifically concluded that "Thaddeus 'Tad' Barber is a partner in Wildevco and was responsible for overseeing the project"—a finding of fact which was not disturbed on appeal. (App. p. 22). However, the trial court also found (a finding which the Court of Appeals adopted) that Barber "had no education or formal training in construction, engineering and/or architectural." Id. Barber also testified that he is "not qualified" to read architectural and site plans, and, of course, the discrepancy between the two led to the very defect that caused Plaintiffs' injuries. (App. p. 294). Lastly, Barber testified that he is "not qualified" to conduct inspections of the subject project to determine whether or not the building met building codes and industry standards and whether or not the building was constructed in accordance with the applicable plans and specifications. (App. p. 279). The Court of Appeals faults Petitioner for failing to consult the architect or engineer about potential discrepancies in the plans (App. pp. 828–29) but gives a pass to Wildevco for not doing the same. Wildevco never consulted with the architect or engineer and this renders Wildevco equally at

fault.[10] (App. p. 297). Wildevco, as developer, should not be held to a different standard and, indeed, given Barber's lack of qualifications, Wildevco should have consulted with these parties. Again, any fault whatsoever on the part of Wildevco is a complete bar to Wildevco's equitable indemnity claim.

This Court determined that Wildevco was developer for the project and that Barber was responsible for overseeing the project. However, Barber had no education, training, or experience in construction; was not qualified to read architectural and site plans (App. p. 294); and was not qualified to conduct inspections of the subject project to determine whether or not the building met building codes and industry standards (App. p. 279). Aware of his lack of knowledge, it would have been reasonable for Barber to hire the architect and/or site engineer to inspect the property and ensure it was built in accordance with the architectural plans and site plans secured from them by Wildevco. (App. p. 297), or at least conduct a final inspection (which Barber does not recall doing) (App. p. 298). Barber's lack of knowledge was, at the very least, a link in the causal chain of Plaintiffs' injuries which renders Wildevco to be at least partially at fault.

Accordingly, for the foregoing reasons, the Court of Appeals erred in holding that Wildevco did not negligently oversee development and construction of the subject project. For all of these reasons, it was error for the trial court and Court of Appeals to find Respondents 100% free from fault. As they had some fault, South Carolina law bars their ability to seek equitable indemnity from Petitioner.

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

## CONCLUSION

For the forgoing reasons, Petitioner respectfully requests this Court reverse the Court of Appeals' decision affirming the trial court's order granting judgment in favor of Respondents on their claims for equitable indemnity against Petitioner and to enter judgment in favor of Petitioner.

Dated this 25th day of June, 2021.

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