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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

Appellate Case No. 2020-000651

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

v.

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

v.

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

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

RESPONDENT WILDEVCO, LLC’S BRIEF

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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?

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, which 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

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.

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 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, which was granted.

STATEMENT OF FACTS

In or about 2005, Wildevco entered into a Lease Agreement with Fred's for the development and construction of a shopping center to be leased by Fred's for a period of ten years, from 2005 until 2015. (App. p. 275, lines 1-9). As the owner of the property, Wildevco managed the construction process, including engaging architects, engineers, and the general contractor. (App. p. 275, lines 16-23).

On April 28, 2005 Wildevco and Tippins-Polk entered into a Construction Agreement pursuant to which Tippins-Polk was to construct the premises located in Williston, South Carolina to be leased by Fred's. (App. p. 276, line 5 – p. 277, line 11). The Agreement provided that Tippins-Polk was to conduct all site work, including asphalt paving, in accordance with the site plans for the premises. (App. p. 476). The site plans provided, *inter alia*, that “[t]he contractor should notify the engineer for a review should discrepancies be discovered at the site or on the drawings.” (App. p. 472, “General Notes – Sitework,” para. 3). Tippins-Polk was selected by Wildevco for the project based in part on its past experience in having constructed Fred's facilities. (App. p. 278, lines 18-23).

Thereafter, Wildevco hired Christopher Booker Architects to draft architectural plans and engineering firm Hass & Hilderbrand, Inc. to prepare a survey and site plans for the construction of the Fred's store. (App. p. 242, lines 15-25, p. 243, line 24 – p. 244, line 13). The site plans governed the construction and superseded the architect's plans in relation to the manner in which the premises were to be constructed outside the limits of the building, including the sidewalk and parking lot. (App. p. 269, lines 3-24). The site plans provided, *inter alia*, that the sidewalk was to be constructed such that it was flush or even with the asphalt pavement at the area of the front

entrance to the Fred's store. (App. p. 246, lines 2-22). Although the site plans indicated that the area between the asphalt and sidewalk were to be flush, Tippins-Polk constructed the sidewalk with a handicap curb ramp and, further, such that the elevation of the sidewalk was only approximately two and one-half inches between the asphalt and the sidewalk in the area in front of the store. (App. p. 253, lines 2-9; p. 332, lines 8-16). Fred's and Wildevco's safety expert, J. Steven Hunt, testified that the ramp should never have been constructed as the site plans did not call for it but, rather, provided that the front edge of the sidewalk between the parking lot and sidewalk was to be flush. (App. p. 337, lines 13-24). Additionally, Hunt testified that, as constructed, the sidewalk elevation was approximately two and one-half inches high when it should have been a minimum of four inches high. Hunt explained that the reason for the minimum height is that small changes in elevation are difficult for people to see and perceive and, as a result, they catch their toe on the small elevation and fall. (*Id.*)

Once construction was commenced, Thaddeus ("Tad") Barber, one of the principals of Wildevco, monitored the construction by going to the property periodically to ensure that work was being conducted. (App. p. 279, lines 2-9). Barber is a real estate broker specializing in commercial real estate but has no education or work experience involving construction, architecture, or engineering. (App. p. 274, lines 12-20). Accordingly, Barber was not qualified to conduct any inspections to determine whether or not the building or premises met building codes or applicable standards. (App. p. 279, lines 10-16).

After completion of construction, Tippins-Polk sought and obtained a Certificate of Occupancy from Barnwell County and Fred's subsequently opened for business. Wildevco was not involved in obtaining the Certificate of Occupancy or with the building inspection conducted by the County. (App. p. 280, line 15 – p. 291, line 3). Wildevco did not hire a third party to inspect

the site to determine whether the property was constructed in accordance with the plans as it relied on Tippins-Polk as the general contractor along with the engineer as experts to properly design and construct the premises. (App. p. 281, lines 4-11).

The Fred's store opened for business in September 2005. (App. p. 281, lines 18-20). Pursuant to the Lease Agreement between Wildevco and Fred's, Wildevco was responsible for maintaining the curbs and sidewalks, which entailed keeping the parking lot free of debris and trash, removing obstructions and making repairs. (App. p. 281, line 21 – p. 282, line 9). Wildevco maintained the curbs and sidewalks in accordance with the Lease Agreement. (*Id.*)

On March 10, 2010, Martha Fountain visited the Fred's store to shop. (App. p. 213, line 6 – p. 214, line 4). As she went to enter the store, she caught her toe on a raised area of concrete in the transition from the asphalt pavement of the parking lot to the sidewalk and fell. (App. p. 214, lines 5-15). She fell forward hitting her head against the door of the store and injured her head and right hand/wrist. (App. p. 214, lines 16-21; App. p. 219, lines 2-8). Mrs. Fountain testified that she could not perceive the raised area of the transition and did not notice that there was any change in elevation. (App. p. 227, lines 11-23).

As a result of the fall, Mrs. Fountain underwent four surgical procedures to repair damage to her right hand/wrist and elbow that involved the use of cadaver bones. (App. p. 219, line 4 – p. 220, line 21). She also sustained nerve damage in her shoulder and neck as a result of hitting her head. (*Id.*) Mrs. Fountain testified that, as of the time of trial, she continued to experience numbness in her right hand and was limited in her ability to lift and grip objects. She is no longer able to play the piano or sew due to the injuries sustained in the fall. (App. p. 220, line 22 – p. 222, line 3).

Mrs. Fountain further testified that she was out of work for approximately four months

following the accident and was unable to return to her job as a Zone Manager at Walmart because she was unable to perform the lifting duties of the job. (App. p. 222, line 4 – p. 223, line 16). Mrs. Fountain incurred lost wages of approximately Twenty-One Thousand Dollars (\$21,000.00) and medical expenses of approximately Seventy-Thousand Dollars (\$70,000.00). (App. p. 224, lines 2-9).

The injury caused a financial strain on Martha Fountain and her husband Curtis, who had to work extra hours as a truck driver in order to earn income to compensate for Mrs. Fountain's lost wages. (App. p. 236, lines 2-16). Prior to the accident, Mr. Fountain was planning to stop driving the truck as a result of a promotion Mrs. Fountain received while at Walmart. As a result of the accident, he was unable to stop driving the truck as planned. He testified that they "lost cars and everything else" due to the loss of Mrs. Fountain's income. (App. p. 240, line 10 – p. 238, line 4). In addition, Mr. Fountain had to assist with Mrs. Fountain's care when he was not working given her surgeries and her inability to perform certain tasks for herself. (App. p. 234, line 21 – p. 236, line 25). The underlying litigation followed.

STANDARD OF REVIEW

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

ARGUMENT²

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

“The damages which can be claimed under equitable indemnity may include the amount the innocent party must pay to a third party because of the at-fault party’s breach of contract or negligence as well as attorney fees and costs which proximately result from the at-fault party’s breach of contract or negligence.” *Winnsboro II*, 307 S.C. at 131, 414 S.E.2d at 120. To recover on its equitable indemnification claims against Tippins-Polk, Wildevco was required to show that: 1) Tippins-Polk was at fault in causing the Fountains’ damages; 2) Wildevco had no fault for the Fountains’ damages; and 3) Wildevco incurred expenses that were necessary to protect its interest in defending against the Fountains’ claims. *Stoneledge at Lake Keowee Owners' Ass'n v. Clear View Constr., LLC*, 413 S.C. 615, 625, 776 S.E.2d 426 (Ct. App. 2015) (citing *Inglese v. Beal*, 403

² Section I, to include subsections A-B, of Tippins-Polk's Brief does not pertain to Wildevco, LLC; thus, Wildevco, LLC does not address those arguments in this Brief.

S.C. 290, 299, 742 S.E.2d 687, 692 (Ct. App. 2013); *Walterboro Cmty. Hosp. v. Meacher*, 392 S.C. 479, 485, 709 S.E.2d 71, 74 (Ct. App. 2011)).

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

I. The trial court's ruling that Tippins-Polk breached certain duties to the Fountains should be affirmed.

A. Tippins-Polk failed to preserve for appeal its claim 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, because Tippins-Polk failed to present this argument to the Court of Appeals for consideration.

As a preliminary matter, Tippins-Polk seeks to have this Court make a determination on an issue that is not properly preserved for review. The Court should decline its invitation to do so.

Specifically, in its Petition for Certiorari, Tippins-Polk initially framed its argument for Section II as follows: "Respondents were sued by Plaintiffs for breaching independent duties of care owed to Plaintiffs under common law premises liability, duties which Appellant did not owe and, thus, could not have been breached by Appellant." *See* Petition for Writ of Certiorari, p. 13. In contrast, in its subsequently filed Brief, Tippins-Polk framed the argument of Section II differently, as follows: "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." *See* Br. of Pet. Tippins-Polk, p. 16. Despite the aforementioned revision to the framing of Section II, Tippins-Polk continues to argue 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. As set forth more fully below, Tippins-Polk failed to preserve this argument for this Court's review; thus, it is not properly before this Court.

Tippins-Polk's Statement of Issues on appeal to the Court of Appeals failed to raise or address the issue of Tippins-Polk's fault 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).

In the argument section of its Final Brief that corresponded with Tippins-Polk's Issue on Appeal 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. p. 698, 716). Thus, as reflected in its brief and issues on appeal filed with the South Carolina Court of Appeals, Tippins-Polk failed to raise the argument that the Tippins-Polk cannot be held liable because the Fountains did not allege creation of a hazardous condition in their complaint in the underlying lawsuit. Instead, Tippins-Polk raised this argument for the first time in its Petition for Rehearing to the Court of Appeals. (App. p. 839, 847-51).

Tippins-Polk may not raise an issue for the first time in a petition for rehearing, and, its attempt to do so in the present 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, Tippins-Polk did not preserve this issue for review by this Honorable Court. *See* Rule 226(d)(2), SCACR (only questions raised in the Court of Appeals **and** in the petition for rehearing shall be included in the petition for a writ of certiorari (emphasis added)); *see Video Gaming Consultants, Inc. v. South Carolina Dep't of Revenue*, 342 S.C. 34, 535 S.E.2d 642 (2000) (issue not argued in brief is deemed abandoned and precludes consideration on appeal).

B. To the extent that Tippins-Polk preserved its argument 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, the trial court properly found that Tippins-Polk was solely liable for Plaintiff's damages.

Even if Tippins-Polk properly preserved the argument 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, the trial court properly concluded that Tippins-Polk was solely liable for Plaintiff's damages and the decision by the Court of Appeals should be affirmed. 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. This argument without merit as Wildevco is not bound by the theories of liability asserted by the Fountains in pursuing its claim against Tippins-Polk.

"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)).

As set forth above, the law of equitable indemnification in South Carolina is well-established. 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). 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. It was not required that the Fountains allege the creation of a hazardous condition in their complaint. Simply put, the issue was not preserved and even if so, does not compel reversal as alleged by Tippins-Polk.

II. 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.

A. Potential liability is insufficient as a matter of law to show that Wildevco was at fault and thus, Tippins-Polk’s argument in this regard is wholly without merit.

In its Brief to this Honorable Court, Tippins-Polk raises, for the first time, the proposition that 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." *See* Br. of Pet. Tippins-Polk, pg. 20. This issue was not raised in its petition for rehearing to the Court of Appeals, or in its Petition for Writ of Certiorari to this Court and, accordingly, is not preserved for review. *See McCray v. State*, 317 S.C. 557, 455 S.E.2d 686 (1995) (issue not raised in petition for a writ of certiorari but presented in brief is not preserved for appeal). Of significance, despite arguing in its present Brief that the Court of Appeals improperly relied upon *Otis Elevator v. Hardin Constr. Co. Group*, 316 S.C. 292 (1994) because it only applies to claims of contractual indemnification, Tippins-Polk cited *Otis* in its Final Brief to the Court of Appeals without any argument that it was inapplicable. (App. p. 717, 723). Based on the foregoing, Tippins-Polk failed

to preserve the issue for review by this Court. *See* Rule 242(d)(2), SCACR ("Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari" (emphasis added)); *Camp v. Springs Mortgage Corp.*, 310 S.C. 514, 516, 426 S.E.2d 304, 305 (1993) (declining to address issue not addressed by the court of appeals and not raised in petition for rehearing); *Holly Hill Lumber Co. v. McCoy*, 210 S.C. 440, 442, 43 S.E.2d 143, 144 (1947) (holding issue not raised in petition for rehearing is the law of the case).

Beyond Tippins-Polk's failure to preserve the aforementioned issue, its argument is yet without merit as the controlling case law in this matter as cited by the trial court and the South Carolina Court of Appeals confirms that the very purpose of a claim for equitable indemnification is to permit a party such as Wildevco, who is forced to defend against claims due to the fault of a third-party, to recover in equity from the third-party. Tippins-Polk's claim that a finding of "potential liability" under the aforementioned controlling case law equates to fault is patently erroneous and should be rejected by this Court.

In South Carolina, "[o]ne who operates a shopping center where stores are leased to merchants and the owner retains possession and control of the parking area and sidewalks, is not an insurer of the safety of those who use the parking lot and sidewalks as customers of the merchants leasing the stores...' However, 'the owner of the premises owes the customers the duty of exercising ordinary care to keep the passageways, sidewalks and such other parts of the premises as are ordinarily used by the customers in transacting business in a reasonably safe condition.'" *O'Leary-Payne v. R.R. Hilton Head, II, Inc.*, 371 S.C. 340, 348, 638 S.E.2d 96, 100 (Ct. App. 2006) (quoting *Bruno v. Pendleton Realty Co.*, 240 S.C. 46, 50–51, 124 S.E.2d 580, 582 (1962)). Additionally, to recover damages for injuries caused by a dangerous or defective condition on a storekeeper's premises, a plaintiff must show either (1) that the injury

was caused by a specific act of the defendant which created the dangerous condition; or (2) that the defendant had actual or constructive knowledge of the dangerous condition and failed to remedy it. *Wintersteen v. Food Lion, Inc.*, 344 S.C. 32, 35, 542 S.E.2d 728, 729 (2001) (internal citations omitted).

The Fountains alleged in their underlying negligence claims, *inter alia*, that Wildevco was negligent “in failing to take reasonable precautions to avoid an unsafe condition from existing at said store” and “in such other particulars that the evidence may establish.” (Plaintiffs’ Complaint, App. p. 148). In support of their claims, Plaintiffs retained an expert witness, Bryan Durig, Ph.D., P.E., to testify that the curb ramp on which Martha Fountain tripped was defective and that the defect was the proximate cause of the Fountains’ injuries. (Griffith Depo., App. p. 463, lines 2-16). Thus, the Fountains essentially argued that Wildevco, through its agent Tippins-Polk created a hazardous condition that caused Ms. Fountain’s injuries. Based in part on Durig’s opinion, as well as the opinion of Fred’s and Wildevco’s safety expert, Mr. Hunt, expert E. Mitchell (“Mitch”) Griffith concluded that it was reasonable for Fred’s and Wildevco “to try and protect their interest...from getting an adverse verdict against them” by reaching a settlement with the Fountains. (*Id.* at App. p. 462, lines 7-11).

Wildevco hired Tippins-Polk to construct the premises and, as such Tippins-Polk was Wildevco’s servant as it relates to the construction and thereby Wildevco was potentially liable for the negligence of Tippins-Polk. Thus, contrary to Tippins-Polk’s contention that the only potential liability of Wildevco was whether it had actual or constructive notice of the defect, Wildevco could also have been found to be liable based on the negligence of its servant, Tippins-Polk pursuant to the doctrine of *respondeat superior*. See *Rock Hill Telephone Co., Inc. v. Globe Comms., Inc.*, 363 S.C. 385, 391, 611 S.E.2d 235, 238 (2005) (“A person who delegates to an independent

contractor an absolute duty owed to another person remains liable for the negligence of the independent contractor just as if the independent contractor were an employee...’ A landlord who undertakes repair of his property by use of a contractor has a nondelegable duty to see that the repair is done properly.”) (internal citations omitted). *See also Winnsboro I*, 303 S.C. 52, 57, 398 S.E.2d 500, 503 (Ct. App. 1990), *aff’d*, 307 S.C. 128, 414 S.E.2d 118 (1992).

In *Otis Elevator v. Hardin Constr. Co. Group*, Hardin Construction argued that its subcontractor Otis Elevator was not entitled to indemnity because “the only basis of [the plaintiff’s] claims were . . . the alleged acts and omissions of Otis [Elevator] alone.” The Supreme Court of South Carolina correctly rejected this argument because the plaintiff’s allegations against Otis Elevator were not determinative of whether Hardin Construction was required to indemnify Otis Elevator; “rather, such a determination was based on the evidence and the facts found by the fact finder.” 316 S.C. 292, 295-296, 450 S.E.2d 41, 43 (1994) (quoting *Griffin v. Van Norman*, 302 S.C. 520, 524, 397 S.E.2d 378, 380 (Ct. App. 1990)). Further, although the plaintiff in *Otis Elevator* alleged, among other things, that Otis Elevator was negligent in “failing to provide an attendant or someone to oversee the use of the elevator,” the evidence showed that Hardin Construction, not Otis Elevator, had the duty under their agreement to “provide a competent operator” for the elevator and Hardin Construction failed to provide one. *Id.* at 296, 450 S.E.2d at 43.

Similarly, in the present case, Tippins-Polk had a duty to construct the premises in accordance with the applicable plans and standards, and free of latent defects, and its breach of that duty was the sole and proximate cause of the Fountains’ injuries, as correctly determined by the trial court and affirmed by the South Carolina Court of Appeals. (App. p. 433, line 18 – p. 434, line 10; p. 435, line 14 – p. 436, line 6; p. 439, lines 7-11; Order of Judgment, App. pp. 27-

28). Because the Fountains sued only Fred's and Wildevco, and not Tippins-Polk, Wildevco was potentially liable to the Fountains for the fault of its servant, Tippins-Polk. Therefore, the trial court properly found that Wildevco, which was without fault in causing the Fountains' injuries, is entitled to equitable indemnity from Tippins-Polk, including indemnity for the amount paid to the Fountains in settlement as the settlement was "reasonable in light of the risk and extent of Wildevco and Fred's exposure if the Plaintiffs' underlying claims proceeded to trial." (App. p. 27-28). Further, the trial court's findings in this regard clearly evidence its proper analysis under the rubric of South Carolina premises liability law. *Id.* Based upon the foregoing, there is no question that Wildevco met its burden of proving that it was *potentially* liable to the Fountains for the negligence of Tippins-Polk in failing to construct the premises in accordance with the applicable drawings and plans and for Tippins-Polk's "[breach of] its contractual obligation and duty of care to construct the premises free of latent defects," all of which caused the Fountains injuries. (App. p. 27).

Based on the foregoing, it is clear that Wildevco made the required showing of proving potential liability to the Fountains. Upon Wildevco's satisfaction of that element, Tippins-Polk cannot then argue that such potential liability in and of itself renders Wildevco at fault. To adopt Tippins-Polk's circular logic would effectively destroy the well-established right in South Carolina to recover equitable indemnity from the at-fault party and would undermine decades of South Carolina jurisprudence. Thus, the Court should reject Tippins-Polk's argument and affirm the ruling of the South Carolina Court of Appeals.

B. There is no evidence that Wildevco breached an independent duty of care owed to Plaintiffs under common law premises liability.

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, arguing 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. P. See Br. of Pet. Tippins-Polk, p. 26. Wildevco disagrees.

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.

Mr. 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 construct the 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 as constructed 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). Mr. Hunt opined that the defective construction of the curb ramp 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 Fountain’s 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.

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 to establish that the scope of such a duty included inspecting the premises for the latent 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) (emphasis added). 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. Simply put, the Court of Appeals properly affirmed the trial court's finding that Fred's and Wildevco were without any fault for the Fountains' damages.

C. 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 express instructions included 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). Mr. Hilderbrand also testified 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 or any confusion regarding 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 and, again, failed to establish that Tippins-Polk ever raised any question regarding the plans.

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 this Honorable Court should affirm the ruling of the Court of Appeals.

D. 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. The trial court was correct in declining to impose such a duty on Wildevco.³

³ Tippins-Polk's summary reliance on *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co.*, 425 S.C. 276, 821 S.E.2d 509 (Ct. App. 2018) is misplaced. First, the portion of *Stoneledge* identified by the Tippins-Polk's pincite only involves the issue of whether the trial court erred in its jury charge of the liability of subsequent builders making repairs. *Stoneledge*, 425 S.C. at 288, 821 S.E.2d at 515. Notwithstanding, in a subsequent portion of the opinion, the Court of Appeals discussed whether the trial court erred in its jury charge pertaining to the cause of action of breach of fiduciary duty, and noted that "the developer of a planned unit development (PUD) owes a fiduciary duty to the property owners association (POA) and its members, much like that owed by promoters of a corporation to investors. As such, the developer has a responsibility to ensure that the common areas are in good repair at the time they are conveyed to the property owners association or to provide the association with funds sufficient to effectuate any needed repairs to those areas. The developer of a PUD owes a duty to the POA to turn over common areas that are not substandard and that are in good repair. Failure to do so subjects the developer to liability for

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; 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.

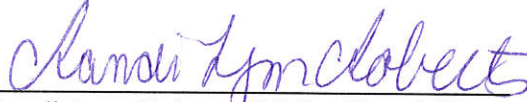
In short, Tippins-Polk cannot spontaneously create a duty where none exists, particularly when it presented no evidence of any kind to support such a conclusion. Based upon the foregoing, the Court of Appeals properly affirmed the trial court's finding that Wildevco was without fault and reasonably relied 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 affirm the ruling of the Court of Appeals.

bringing the common areas up to standard." *Id.* at 292-93, 821 S.E.2d at 517 (quoting *Concerned Dunes West Residents v. Georgia-Pacific Corporation*, 349 S.C. 251, 256-57, 562 S.E.2d 633, 636-37 (2002)). However, the present case sounds in premises liability and does not involve a cause of action for fiduciary duty against Wildevco or a conveyance of a planned unit development to a property owners association. As such, *Stoneledge* is inapplicable as to the duty of Wildevco in the present matter, and the law of premises liability applies and dictates the applicable duty, which, as set forth herein above, the trial court properly found was met by Wildevco.

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, this Honorable Court should affirm the decision of the Court of Appeals.

Respectfully submitted,



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