

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

---

**RECEIVED**

**Aug 16 2021**

**S.C. SUPREME COURT**

APPEAL FROM BARNWELL COUNTY  
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

---

Appellate Case No. 2020-000651

---

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

v.

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

v.

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

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

---

BRIEF OF RESPONDENT FRED'S, INC.

---

Matthew C. LaFave  
CROWE LAFAVE, LLC  
Post Office Box 1149  
Columbia, South Carolina 29202  
(803) 724-5727  
[matt@crowelafave.com](mailto:matt@crowelafave.com)

*Attorney for Respondent Fred's, Inc.*

TABLE OF CONTENTS

Table of Authorities ..... ii-iii

Counter-Statement of Questions Presented ..... 1

Counter-Statement of the Case ..... 1-2

Standard of Review ..... 1-2

Arguments ..... 3-9

I. The Court of Appeals correctly concluded that there was the requisite special relationship between Fred’s and Petitioner sufficient to support a claim for equitable indemnification.

II. The Court of Appeals properly applied South Carolina law as to the issue of equitable indemnification.

III. The Court of Appeals correctly concluded that Respondent, Fred’s, Inc., was without fault.

Conclusion ..... 9

TABLE OF AUTHORITIES

CASES

*Anderson v. Racetrac Petroleum, Inc.*, 296 S.C. 204, 371 S.E.2d 530 (1988)..... 7

*Bob Hammond Const. Co., Inc. v. Banks Const. Co.*, 312 S.C. 422, 440 S.E.2d 890  
(Ct. App. 1994) ..... 5

*Cook v. Food Lion, Inc.*, 328 S.C. 324, 491 S.E.2d 690 (Ct. App. 1998)..... 7

*Cothran v. Rock Hill*, 211 S.C. 17, 43 S.E.2d 615 (1947)..... 5

*Denton v. Winn-Dixie Greenville, Inc.*, 312 S.C. 119, 439 S.E.2d 292 (Ct. App. 1993)..... 6

*Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 658 S.E.2d 80 (2008)..... 8

*First Gen. Servs. of Charleston, Inc. v. Miller*, 314 S.C. 439, 442, 445 S.E.2d 446, 448  
(1994)..... 3

*Fowler v. Hunter*, 388 S.C. 355, 697 S.E.2d 531 (2010)..... 5

*Garvin v. Bi-Lo, Inc.*, 343 S.C. 625, 541 S.E.2d 831 (2001)..... 6, 7

*Gavin v. City of Chicago*, 97 Ill. 66 (1880)..... 6

*Hunter v. Dixie Home Stores*, 232 S.C. 139, 101 S.E.2d 262 (1957)..... 7

*Jordan v. Holt*, 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005)..... 2

*Landry v. Hilton Head Plantation Property Owners Ass’n, Inc.*, 317 S.C. 200, 203,  
452 S.E.2d 619, 621 (Ct. App. 1994)..... 7

*Overton v. Wenatchee Beebe Orchard Co.*, 28 Wash.2d 377, 183 P.2d 473 (1947)..... 6

*O’Leary-Payne v. R.R. Hilton Head, II, Inc.*, 371 S.C. 240, 248, 638 S.E.2d 96, 100  
(Ct. App. 2006)..... 7

*Panoz v. Gulf & Bay Corporation*, 208 So2d 297 (Fla. App.), cert. denied 218 So.2d 166  
(Fla.1968)..... 6

*Pennington v. Zayre Corp*, 252 S.C. 176, 165 S.E.2d 695 (1969)..... 6, 7

*Rock Hill Telephone Co., Inc. v. Globe Communications, Inc.*, 363 S.C. 385, 611 S.E.2d 235  
(2005)..... 3, 5

*Stuck v. Pioneer Logging Machinery, Inc.*, 279 S.C. 22, 301 S.E.2d 552 (1983)..... 3

*Town of Winnsboro v. Wiedeman-Singleton, Inc. (Winnsboro I)*, 303 S.C. 52, 398 S.E.2d 500 (Ct. App. 1990) aff'd 307 S.C. 128, 414 S.E.2d 118 (1992) (Winnsboro II)..... 3, 6

*Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Co.*, 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999).....5, 6

*Walterboro Community Hosp. v. Meacher*, 392 S.C. 479, 709 S.E.2d 71, (Ct. App. 2011)...3

**OTHER**

*The Law of Indemnity in South Carolina*, 41 S.C. L.Rev. 603 (1990).....3

## **COUNTER-STATEMENT OF QUESTIONS PRESENTED**

- I. WHETHER OR NOT THE COURT OF APPEALS ERRED IN FINDING THAT A SPECIAL RELATIONSHIP EXISTED BETWEEN RESPONDENT, FRED'S, INC., AND PETITIONER AS REQUIRED TO SUPPORT A CLAIM FOR EQUITABLE INDEMNIFICATION.
- II. WHETHER OR NOT THE COURT OF APPEALS PROPERLY APPLIED SOUTH CAROLINA LAW ON EQUITABLE INDEMNIFICATION.
- III. WHETHER OR NOT THE COURT OF APPEALS CORRECTLY CONCLUDED RESPONDENT, FRED'S INC., WAS WITHOUT FAULT.

## **COUNTER-STATEMENT OF THE CASE**

This is an action was originally brought as one by Plaintiffs against Defendant's Fred's, Inc., and Wildevco, LLC, on May 12, 2010, stemming from a trip-and-fall incident. Specifically, Plaintiff, Martha Fountain alleged that on or about March 10, 2010, while she was attempting to enter Fred's store she tripped and fell over a raised sidewalk in front of the store. The incident resulted in Plaintiff stumbling forward striking her head on the glass doors and falling to the sidewalk leading to a laceration of the head along with a fractured arm. Plaintiffs specifically alleged the Respondents, Fred's and Wildevco, failed: (1) to keep and maintain the premises; (2) take reasonable precautions to avoid unsafe condition; (3) to warn customers of dangerous condition; to inspect the premises; (4) remedy the condition; and (5) to discover risks, to warn of or make safe unreasonable risks.

After approximately two (2) years of litigation, since the Complaint was filed, an Amended Answer was filed by Fred's and Wildevco, which included a Third-Party Complaint wherein claims were asserted against Petitioner. Prior to trial in the underlying suit Respondents reached a settlement agreement with Plaintiffs, which was later codified in an executed Settlement

Agreement. The only claim that survived the settlement was Respondents claim against Petitioner for equitable indemnification.

A trial was held over the course of April 6 and 7, 2016, before The Honorable Doyet A. Early, III. At the conclusion of the trial, Judge Early took the matter under advisement with an Order and Judgment later requested by Judge Early finding in favor of Respondents. The Order specifically concluded that “[Petitioner] breached its contractual obligations and its duty of care to in failing to construct the premises free from latent defects” and that those “construction defects, for which [Petitioner] is solely responsible, were the sole proximate cause of Mrs. Fountain’s injuries.” The trial court, in accordance with the foregoing findings, entered a judgment in favor of Respondent, Fred’s, Inc., in the amount of Seventy-Six Thousand Six Hundred Ninety-One and 82/100 (\$76,691.82) Dollars. The Order and Judgment was filed on August 3, 2016. Petitioner timely filed motions under Rule 52(b), SCRCF and Rule 59(e) to make additional findings and reconsider/amend. Petitioner’s motion was denied by the trial court. Following the denial of Petitioner’s Rule 52(b) and 59(e) motions they presented an appeal to the Court of Appeals. The Court of Appeals, as to the trial courts’ rulings pertaining to Respondent, Fred’s, Inc., ultimately affirmed the trial court’s ruling in part and reversed in part. The Court of Appeals remanded the issue of attorney’s fees awarded to Respondent, Fred’s, Inc., by the trial court. The Court of Appeals thereafter denied Petitioner’s Petition for Rehearing on March 30, 2020. Petitioner, thereafter, filed a Petition for Writ of Certiorari, which was granted.

### **STANDARD OF REVIEW**

“In an action in equity tried without a reference, the appellate court may find facts in accordance with its own view of the preponderance of the evidence.” *Jordan v. Holt*, 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005). “However, this broad scope of review does not require the

appellate court to disregard findings made below.” *Walterboro Community Hosp. v. Meacher*, 392 S.C. 479, 484, 709 S.E.2d 71, 73 (Ct. App. 2011).

## ARGUMENTS

### I. THE COURT OF APPEALS PROPERLY CONCLUDED THAT THERE WAS A SPECIAL RELATIONSHIP BETWEEN RESPONDENT FRED’S, INC., AND PETITIONER SUFFICIENT TO SUPPORT A CLAIM FOR EQUITABLE INDEMNIFICATION.

Petitioner has taken and maintained the position that there was no special relationship between them and Respondent Fred’s, Inc. In support of its position Petitioner cites *Rock Hill Telephone Co., Inc. v. Globe Communications, Inc.*, 363 S.C. 385, 611 S.E.2d 235 (2005). “Equitable indemnity ... ‘is based on the specific relation of the indemnitee to the indemnitor in dealing with a third-party.’” *Id.* 363 S.C. at 389, (quoting *James C. Gray, Jr. and Lisa D. Catt, The Law of Indemnity in South Carolina*, 41 S.C. L.Rev. 603, 604 (1990). “In other words,

a right of indemnity exists whenever the relation between the parties is such that either in law or in equity there is an obligation on one party to indemnify the other, as where one person is exposed to liability by the wrongful act of another in which he does not join.

*Id.*; (quoting *Stuck v. Pioneer Logging Mach., Inc.*, 279 S.C. 22, 24, 301 S.E.2d 552, 553 (1983).

Petitioner asserts that, in holding a special relationship existed between Respondent, Fred’s Inc. and Petitioner the Court of Appeals disregarded or otherwise overruled precedent established by this Court. It is certainly acknowledged that in *Rock Hill* this Court referenced prior situations where it has “held the relationship between a contractor and a subcontractor supports a claim for equitable indemnification.” *Id.*; (see also *First Gen. Servs. of Charleston, Inc. v. Miller*, 314 S.C. 439, 442, 445 S.E.2d 446, 448 (1994); *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 307 S.C. 128, 131, 414 S.E.2d 118, 120 (1992). In reliance on *Rock Hill* Petitioner attempts to place itself in a similar position to that of the subcontractor hired by the independent contractor hired by the

utility to contend the relationship between Respondent, Fred's, Inc., and Petitioner is too attenuated. To advance this argument Petitioner attempts to utilize Respondent Wildevco as a buffer to any relationship existing between itself and Respondent, Fred's, Inc. In so doing Petitioner contends "there are two separate and independent relationships among the parties - one between Fred's and Wildevco, and one between Wildevco and Petitioner." Petitioner further advances the fallacy that there is no relationship with Respondent Fred's beyond "[Fred's] alleging [it] was sued because of [Petitioner's wrongdoing]." Respondent Fred's, Inc., has never made any such allegation.

Respondent Fred's, Inc., asserted that its relationship with Petitioner satisfies the requirements to qualify as a special relationship where there is an obligation for Petitioner to indemnify Respondent Fred's, Inc. The record on appeal was replete with evidence of a special relationship between Petitioner and Respondent Fred's, Inc. Specifically, in presenting evidence of the special relationship at trial Respondent Fred's, Inc., elicited testimony of Wildevco reflecting the absence of any prior business dealings with Petitioner but noting that, for this specific project, they were recommended because of their past work in constructing other Fred's stores. Moreover, it was shown that Petitioner understood they were being hired to construct a Fred's store rather than a property for Wildevco that Fred's eventually came to lease in the future. The construction of this property occurred because Fred's solicited it to be built. Furthermore, Mr. Polk testified to Petitioner had built ten to fifteen stores for Respondent Fred's, Inc. (R. p. 410, lines 10-11), was in fact an owner of another location operated by Respondent Fred's, Inc. (R. p. 406, lines 13-14), and was even a preferred contractor for the construction of stores for Respondent, Fred's, Inc. Although Fred's was not a signer of the contract eventually entered into between Wildevco and Petitioner there was overwhelming evidence that Petitioner was the selected general contractor

for this specific project because of its relationship with Fred's. Therefore, the Court of Appeals properly concluded that the evidence in the record was sufficient to establish a relationship between Fred's and Petitioner such that there is an obligation for Petitioner to indemnify Respondent.

As it pertains directly to the contractual argument by Tippins-Polk, it is well settled that in a situation where "a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person." *Bob Hammond Const. Co., Inc. v. Banks Const. Co.*, 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct. App. 1994); (*See also Cothran v. Rock Hill*, 211 S.C. 17, 43 S.E.2d 615(1947)). It is indisputable that the contract entered into, though not executed by Respondent Fred's, Inc., was created for their direct benefit as it specifically referenced the construction of a Fred's store. (R. pp. 470-471). Moreover, Mr. Polk even testified to knowing the contract was for the building of a Fred's store thus it can be argued that this was a contract for an incidental or consequential benefit to Fred's thereby affording them the same relation to the parties of the contract thereby satisfying the special relationship requirement to pursue an equitable indemnification claim.

## II. THE COURT OF APPEALS APPROPRIATELY APPLIED SOUTH CAROLINA LAW ON EQUITABLE INDEMNIFICATION.

Respondent Fred's, Inc., presented a claim for equitable indemnification under the premise that it was "compelled to pay damages because of negligence imputed to him as the result of another parties tortious act." *Fowler v. Hunter*, 388 S.C. 355, 363, 697 S.E.2d 531, 535 (2010) (quoting *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Co.*, 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999)). A party who asserts a claim for equitable indemnification is entitled to recover damages if he proves "(1) the indemnitor was liable for causing the plaintiff's damages; (2) the

indemnitee was exonerated from any liability for those damages; and (3) the indemnitee suffered damages as a result of plaintiff's claims against it which were eventually proven to be the fault of the indemnitor." *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Co.*, 336 S.C. 53, 63, 518 S.E.2d 301, 307 (Ct. App. 1999). "Equitable indemnity cases involve a fact pattern in which the first party is at fault, but the second party is not. *Id.*, (See also *Town of Winnsboro v. Wiedman-Singleton, Inc. (Winnsboro I)*, 303 S.C. 52, 398 S.E.2d 500 (Ct. App. 1990), *aff'd*, 307 S.C. 128, 414 S.E.2d 118 (1992) (*Winnsboro II*)). "If the second party is also at fault, he comes to court without equity and has no right to indemnity. *Id.*

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

respondent which created the dangerous condition; or (2) that the respondent had actual or constructive knowledge of the dangerous condition and failed to remedy it.” *Garvin v. Bi-Lo, Inc.*, 343 S.C. at 625, (See also *Anderson v. Racetrac Petroleum Inc.*, 296 S.C. 204, 371 S.E.2d 530 (1988); *Pennington v. Zayre \*\*833 Corp.*, 252 S.C. 176, 165 S.E.2d 695 (1969); *Hunter v. Dixie Home Stores*, 232 S.C. 139, 101 S.E.2d 262 (1957); *Cook v. Food Lion, Inc.*, 328 S.C. 324, 491 S.E.2d 690 (Ct. App. 1998)).

Petitioner asserts that because Respondent Fred’s, Inc., was initially sued for breaching independent duties owed to Plaintiff and that in light thereof there can be no claim for equitable indemnification. However, Petitioner fails to cite to any South Carolina precedent supportive of its contention. It is not disputed that as a shopkeeper Respondent Fred’s, Inc., owes its customers a duty “to keep passageways, sidewalks and other such parts of the premises as are ordinarily used by the customers in transacting business in a reasonable 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). Furthermore, a duty exists of the landowner to discover risks and to warn of or eliminate foreseeable unreasonable risks.” *Landry v. Hilton Head Plantation Property Owners Ass’n, Inc.*, 317 S.C. 200, 203, 452 S.E.2d 619, 621 (Ct. App. 1994). Petitioner would have this Court hold that mere allegations of wrongdoing by Plaintiffs automatically equates to Respondent, Fred’s Inc., having been negligent thus defeating a claim for equitable indemnification.

The law of equitable indemnification does not require a showing of the same or similar duties owed. To prove its claim for equitable indemnification Respondent Fred’s, Inc., must show that Petitioner was responsible for Plaintiffs’ damages or, put differently, Plaintiffs’ claims were shown to be the fault of Petitioner. It is inarguable that the lawsuit Respondent Fred’s, Inc., was forced to defend arose out of a fall that was purportedly due to a dangerous condition that existed

on its premises. While the Complaint certainly sets forth allegations of duties breached by Respondent Fred's, Inc., the central component to each is the existence of a dangerous condition. The fall does not occur but for the dangerous condition. A general contractor "warrants that [a building] is fit for its intended use ... was constructed in a workmanlike manner, and ... is free of latent defects." *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 561, 658 S.E.2d 80, 88-89 (2008). In this matter the evidence plainly indicates Petitioner failed to construct the property free of latent defects and that these defects were not known to or discoverable by Respondent Fred's, Inc., but for Petitioner having breached its duty there would have been no fall. Therefore, it was properly determined that Plaintiffs' damages were the fault of Petitioner.

III. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT RESPONDENT FRED'S, INC., WAS WITHOUT FAULT.

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

establishing the shopkeeper knew of a danger inherent in the condition. In short, there was no evidence presented during the trial of the equitable indemnification claim that would support a finding that Respondent Fred's, Inc., had actual or constructive knowledge of the existence of a dangerous condition on its property such that there could be no liability on their behalf.

In fact, during the trial in this case Joseph Stephen Hunt was called on to testify regarding the condition created during the construction of the premises. Specifically, he referred to the issues with the curb ramp that caused Plaintiff's fall as a construction defect having been created by Petitioner. Under the analysis of a latent condition as defined above is noted as being one which an owner should have knowledge of and which the invitee is unaware. However, Mr. Hunt specifically testified the condition at issue was not one that Respondent Fred's, Inc., would reasonably have been aware of or able to identify through their inspections due to the training, experience, or education in construction necessary to discern and identify the construction defect. It is a direct result of the clear and undisputed testimony of Mr. Hunt that Respondent Fred's, Inc., maintains there was no evidence that it possessed actual nor constructive knowledge of a dangerous condition on its property.

#### CONCLUSION

For the reasons stated herein, this Court should affirm the ruling of the Court of Appeals.

*[SIGNATURE PAGE FOLLOWS]*

Respectfully submitted,

By: /s/Matthew C. LaFave  
Matthew C. LaFave  
CROWE LAFAVE, LLC  
Post Office Box 1149  
Columbia, South Carolina 29202  
(803) 724-5727  
matt@crowelafave.com

*Attorney for Respondent Fred's, Inc.*

This 16th Day of August 2021  
Columbia, South Carolina