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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.

CONSOLIDATED REPLY BRIEF OF PETITIONER TIPPINS-POLK CONSTRUCTION, INC.

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Petitioner Tippins-Polk Construction, Inc. ("Petitioner"), by and through its undersigned attorneys, hereby submits this consolidated brief in reply to Respondents Wildevco, LLC's ("Wildevco") and Fred's, Inc.'s ("Fred's") (collectively, "Respondents") respective final briefs pursuant to Rule 208 of the South Carolina Appellate Court Rules and this Court's Order dated July 30, 2021.

ARGUMENT IN REPLY

I. PETITIONER PRESERVED ITS ARGUMENTS ON APPEAL.

"Ordinarily, no point will be considered on appeal which is not set forth in the statement of the issues on appeal." Rule 208(b)(1)(B), SCACR; see also Rule 242(d)(2), SCACR; McCray v. State, 317 S.C. 557, 559 n1., 455 S.E.2d 686, 687 n.1 (1995). "Of course, a party is not required to use the exact name of a legal doctrine in order to preserve the issue." Herron v. Century BMW, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011) (citing State v. Russell, 345 S.C. 128, 132, 546 S.E.2d 202, 204 (Ct. App. 2001) (Although the defendant did not use the exact words of the legal doctrine in its directed verdict motion, "it is clear from the argument presented in the record that the motion was made on this ground."). "Nonetheless, the issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge." Herron, 395 S.C. at 466, 719 S.E.2d at 642 (citing Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)); see also S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 302, 641 S.E.2d 903, 907 (2007) (finding that although SCDOT did not phrase objection in the exact terms used in the issues on appeal, the objection was sufficiently specific to allow the trial court to rule on the issue)). "When an issue is not specifically set out in the statements of issues, the appellate court may nevertheless consider the issue if it is *reasonably clear* from an appellant's arguments." Herron, 395 S.C. at 466, 719 S.E.2d at 642 (emphasis in

original); see Eubank v. Eubank, 347 S.C. 367, 373 n.2, 555 S.E.2d 413, 416 n.2 (Ct. App. 2001) (finding the statement of issue, when read in conjunction with the argument, sufficiently raised the issue to the court). "However, every ground of appeal ought to be so distinctly stated that the reviewing court may at once see the point which it is called upon to decide without having to 'grope in the dark' to ascertain the precise point at issue." Herron, 395 S.C. at 466, 719 S.E.2d at 643 (citing Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010)).

As it did in its return to Petitioner's petition for writ of certiorari, Wildevco argues that Petitioner failed to preserve on appeal its argument "that the trial court erred in finding [Petitioner] solely at fault because [Plaintiffs] did not allege creation of a hazard as a theory of negligence[,]" and, rather, "raised this issue for the first time in its Petition for Rehearing to the Court of Appeals."[1] Brief of Wildevco at 9–10. Furthermore, Wildevco contends that Petitioner's argument that the Court of Appeals incorrectly relied upon contractual indemnity principles of law to support its decision that Respondents were "potentially liable" was likewise not preserved by Petitioner.[2] Id. at 12. Wildevco's contentions ignore the very argument that Petitioner has

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[1] Contrary to Wildevco's assertion, and as discussed in further detail below, Petitioner made this same argument in its brief to the South Carolina Court of Appeals:

> Respondents' duty to Plaintiffs and other patrons is separate and andryapart from any duty related to the construction of the Fred's store. Plaintiffs' lawsuit against Respondents was based on the allegation that Respondents breached this duty to discover risks and to warn or eliminate risks. The Plaintiffs' claims against Respondents were not based on creating an unsafe condition.

(App. p. 725).

[2] Wildevco is, again, mistaken in this regard. From Petitioner's brief to the Court of Appeals: "Conversely, if [Respondents] were 'potentially' liable under Plaintiffs' claims against Respondents, they are not free from fault (i.e., breached the duty of care as provided under shopkeeper liability, and, thus, cannot recover under a theory of equitable indemnification." (App. p. 723).

advanced throughout this litigation both at the trial and appellate court levels; that is, Respondents were sued for and, at the very least, were partially at fault in causing Plaintiffs' damages by breaching independent duties of care owed to Plaintiffs under common law premises liability. The sole cause of action being analyzed is one of equitable indemnity. Throughout this appeal, Petitioner has maintained that Respondents must be 100% free of fault. It should be reasonably clear from the arguments, briefs, and petition that principles of contractual indemnity have no bearing whatsoever on claims involving equitable indemnity. To find otherwise would be akin to comparing apples to oranges.[3]

The heart of Petitioner's argument with respect to the fault of Respondents lies in Section III of its Petition for Certiorari and Section III of Petitioner's brief, both of which outline the myriad ways in which Respondents breached independent duties of care owed to Plaintiffs under common law premises liability. In order to effectively present the Court with evidence of Respondents' various breaches of duty which preclude their equitable indemnity claim, it is necessary to provide context regarding why premises liability law and the Court of Appeals' determination that Respondents were "potentially liable" for breaching duties owed thereunder are relevant. Petitioner's analyses of the nature of Plaintiffs' cause of action against Respondents is relevant background and context for the Court to consider the claim of equitable indemnity against Petitioner.[4] Respondents were sued for breaching their duties of care owed by owners/occupiers

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[3] Not only is the argument regarding the inapplicability of contractual indemnity principles to the case at bar properly preserved for this Court's review, but Respondents do not even address the law cited by Petitioner in their briefs.

[4] Respondents also argue that "[t]he allegations of the complaint are not determinative of whether a party has the right to indemnity." Brief of Wildevco at 11; Brief of Fred's at 7; see also Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 64, 518 S.E.2d 301, 307 (Ct. App. 1999). Petitioner is not arguing, and has not argued, that review of Plaintiffs' underlying allegations begins and ends the inquiry; rather, the allegations serve as necessary background and context with which the Court should review the actions and omissions of Respondents. As

under common law premises liability. The Court of Appeals' finding that Respondents were "potentially liable" for breaching those duties provides the lens through which this Court should consider those actions/omissions to determine whether Respondents' conduct was perfect, or if they were .00001% at fault. See Goldman v. RBC, Inc., 369 S.C. 462, 465, 632 S.E.2d 850, 851 (2006) ("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."). Petitioner is arguing nothing new. It has always been Petitioner's position that Respondents were at least partially at fault (however minimal) and, while Petitioner may or may not have used the exact legal vernacular in discussing this appellate issue, Petitioner's position is, at the very least, "reasonably clear" from its arguments advanced throughout the duration of this litigation and appeal. Herron, 395 S.C. at 466, 719 S.E.2d at 642. Simply put, if Respondents were the slightest bit at fault their claims fail.

Throughout this appeal, Respondents have attempted to skirt their obligations as owners/occupiers of real property by arguing that they did not construct the premises and, therefore, are without fault of the existence of a dangerous condition thereon. However, during the approximately five years that the dangerous condition existed at the subject property, Respondents owed Plaintiffs and other patrons a duty to discover the dangerous condition and either warn of or eliminate the condition, which they did not do. See 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."). This is what Respondents were sued for by Plaintiffs. (App. pp. 147–149). Petitioner has argued time and time again that Respondents were sued for breaching,

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discussed throughout, South Carolina law does not permit recovery via an equitable indemnity claim when there is independent culpability on the part of the indemnitee. See Walterboro Cmty. Hosp. v. Meacher, 392 S.C. 479, 485, 709 S.E.2d 71, 74 (Ct. App. 2011).

and did breach, independent duties of care owed to Plaintiffs under common law premises liability and that they cannot now do an about-face and argue they are insulated from responsibility simply because they did not construct the building, thereby ignoring well-established duties of care which they owed to Plaintiffs.

For example, in its motion to reconsider the trial court's order, Petitioner argued as follows:

> Under South Carolina premises liability law, an owner/occupier owes patrons an independent, separate and distinct duty to exercise 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, and to discover risks and to warn of or eliminate foreseeable unreasonable risks. . . . Under these principles, there is no possibility, and no evidence, that Wildevco and Fred's have no fault in causing Plaintiff's injuries based on the testimony of the expert for Wildevco and Fred's, and the testimony of Tad Barber.

(App. p. 47). As set forth in Petitioner's brief to the Court of Appeals:

> Conversely, if [Respondents] were "potentially liable" under Plaintiffs' claims against Respondents, they are not free from fault[,] i.e., breached the duty of care as provided under shopkeeper liability in South Carolina, and, thus, cannot recover under a theory of equitable indemnification.
>
> . . .
>
> Respondents' duty to Plaintiffs and other patrons is separate and apart from any duty related to the construction of the Fred's store. Plaintiffs' lawsuit against Respondents was based on the allegation that Respondents breached this duty to discover risks and to warn or eliminate risks. The Plaintiffs' claims against Respondents were not based on creating an unsafe condition.
>
> . . .
>
> Applying the trial court's conclusion logically, it stands for the premise that despite a shopkeeper's admission that it has an obligation to inspect its premises to discover defects so as to avoid injury to its invitees, admittedly fails to perform that duty at any point in time, [and] is subsequently sued by a patron as a result of the condition which existed for years, [that] shopkeeper has no

> liability. Instead, the trial court's ruling mandates that the patron's sole recourse should lie against the builder (who was never sued by Plaintiffs). . . . Such a conclusion is counter to decades of premises liability jurisprudence.
>
> [and]
>
> Conversely, if [Respondents] were 'potentially' liable under Plaintiffs' claims against Respondents, they are not free from fault (i.e., breached the duty of care as provided under shopkeeper liability, and, thus, cannot recover under a theory of equitable indemnification.").

(App. at pp. 723, 725, and 726 n.6). Petitioner also made substantially similar arguments in its reply brief to the Court of Appeals[5] and during oral argument. In its petition for rehearing—which is where Wildevco incorrectly argues that Petitioner first raised the foregoing arguments—Petitioner argued as follows:

> The foregoing duties of care [of a shopkeeper] are independent duties owed by Fred's and Wildevco to Plaintiffs under common law premises liability; however, [Petitioner], who completed construction of the Fred's store approximately five years prior to the subject incident, did not owe any such duties to Plaintiffs. . . . Respondents' duty to Plaintiffs and other patrons is separate and apart from any duty related to the construction of the Fred's store. Plaintiffs' claims against Respondents were based upon the allegation that Respondents breached this duty to discovery and warn of or eliminate risks. However, Plaintiffs' claims against Respondents were not based on the creation of an unsafe condition.

(App. pp. 849–50).

It has always been Petitioner's position that the lower court's rulings run counter to well established precedent that a landowner owes an invitee a duty of care to discover risks and to warn of or eliminate foreseeable unreasonable risks (a principle which applies whether or not the shopkeeper constructed the premises) and that an equitable indemnitee must be 100% free of fault.

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[5] (App. p. 802).

Petitioner's arguments in this regard are subsumed within Petitioner's second issue on appeal submitted in its brief to the Court of Appeals[6], are reasonably clear from the arguments mounted by Petitioner, and do not require this Court to "grope in the dark" to ascertain Petitioner's points. See Herron, 395 S.C. at 466, 719 S.E.2d at 642. Petitioner's arguments are preserved on appeal.

II. RESPONDENTS WERE EXPOSED TO LIABILITY DUE TO THEIR OWN BREACHES OF DUTY ARISING UNDER COMMON LAW PREMISES LIABILITY.[7]

A. The Court of Appeals' reliance upon the "potential liability" standard is inapplicable to an equitable indemnity cause of action and is inherently in conflict with the requirement that the indemnitee seeking equitable indemnity be completely without fault.

The Court of Appeals relied 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.

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[6] Petitioner's second issue on appeal stated as follows: "Did the trial court err in finding that Respondents were without fault?" (App. 698).

[7] Petitioner would be remiss in not bringing to the Court's attention that Fred's affirmatively stated in its brief that it is not alleging that it was sued because of Petitioner's alleged misconduct. See Brief of Fred's at p. 4 ("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.") (internal citations omitted). With this admission in its brief, Fred's is judicially estopped from taking a contrary position. See Quinn v. Sharon Corp., 343 S.C. 411, 414, 540 S.E.2d 474, 476–77 (Ct. App. 2000). A right of equitable indemnity exists only where one party is exposed to liability by the wrongful act of another in which he does not join. See, e.g., Stuck v. Pioneer Logging Mach., Inc., 297 S.C. 22, 24, 301 S.E.2d 552, 553 (1983). If Fred's is not alleging that it was sued by Plaintiffs because of Petitioner's conduct, then the Court's analysis of the viability of Fred's equitable indemnity claim should begin and end there.

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 v. Van Norman, 302 S.C. 520, 523, 397 S.E.2d 378, 380 (Ct. App. 1990). 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.

The Court of Appeals erred in conflating the contractual indemnity principle of "potential liability" to an equitable indemnity claim. By doing so, the Court amplifies the error in its ultimate holding because to the extent the indemnitee proves its potential liability to support an equitable indemnity claim, then this, highlights the indemnitee's lack of clean hands. It is, perhaps the best evidence, that the indemnitee bears some responsibility. 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 completely "exonerated from any liability for [the plaintiff's] damages." Walterboro Cmty. Hosp., 392 S.C. at 485, 709 S.E.2d at 74. Respondents were sued for breaching independent duties of care owed to Plaintiffs under common law premises liability. (App. pp. 147–149). These are duties which Petitioner did not owe and could not have breached. Plaintiffs, as the masters of their complaint, specifically chose not to sue Petitioner for creating the alleged dangerous condition, or anything else, nor did Plaintiff sue Respondents for creating the condition itself. Id. If Respondents are "potentially liable" to Plaintiffs based upon their premises liability claims, then they are not free from fault. 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. 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.

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 100% free from fault.

B. Respondents were sued by Plaintiffs and 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 discover and remedy/warn of alleged dangerous conditions existing on the subject property. (App. p. 148). 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. at 485, 709 S.E.2d at 74. Respondents were exposed to liability to Plaintiffs for their own independent 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).

Wildevco refuses to acknowledge that it owed a duty to Plaintiffs and other patrons to discover and remedy/warn of alleged dangerous conditions existing at its property and, instead, argues in its brief that it was exposed to liability "based on the negligence of its servant, [Petitioner,] pursuant to the doctrine of *respondeat superior*." Brief of Wildevco at 14.

Wildevco's apparent basis for such an argument is that it owed a general nondelegable duty (to whom, it is not stated) to construct the premises in a safe manner. Id.; see also Rock Hill Tel. Co. v. Globe Commc'ns, Inc., 363 S.C. 385, 390–91, 611 S.E.2d 235, 238 (2005). As an initial matter, Petitioner denies that Wildevco owed such an absolute, nondelegable duty to third-party patrons present on its premises such that it would be vicariously liable for the acts of Petitioner, an independent contractor, pursuant to the doctrine of *respondeat superior*.[8] In any event, even if Wildevco would be vicariously liable for the alleged acts and omissions of Petitioner under *respondeat superior*, this would not relieve Wildevco of its own independent negligence for which it was sued by Plaintiffs. The law of South Carolina does not recognize a right to indemnification by one whose personal negligence, albeit "passive," contributed to the injury for which he has been held liable. Addy v. Bolton, 257 S.C. 28, 34, 183 S.E.2d 708, 710 (1971). The focus of this Court's inquiry should not be whether Petitioner was at fault— indeed, Petitioner has never denied that it was partially at fault in causing Plaintiffs' damages – but rather whether Respondents were 100% free from fault. The Court's inquiry should focus upon whether Respondents were also at fault, regardless of how minimal their percentage of fault may be. If they were even the slightest

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[8] The cases cited by Wildevco in support of its contention are inapplicable to the case at bar. In Rock Hill Telephone, this Court determined that a utility does not have a nondelegable duty to install underground utilities in a safe manner; rather, this Court determined that the duty was instead one of reasonable care. Id., 363 S.C. at 392, 611 S.E.2d at 238–39. Though the Durkin case was not cited by Wildevco in its brief, it stands for the proposition that a landlord owes *its tenant* a nondelegable duty to see that repairs or improvements undertaken to the leased premises are performed properly. Durkin v. Hansen, 313 S.C. 343, 349, 437 S.E.2d 550, 553–54 (Ct. App. 1993); see also Nedrow v. Pruitt, 336 S.C. 668, 677, 521 S.E.2d 755, 759 (1999) ("A landlord who employs an independent contractor to perform a duty *which the landlord owes to his tenant* to maintain the leased property in reasonably safe condition is subject to liability *to the tenant* for physical harm caused by the contractor's failure to exercise reasonable care to make the leased property reasonably safe.") (emphasis added). Upon information and belief, there is no authority in South Carolina which imposes upon an owner/developer a nondelegable duty to an invitee who enters the premises after completion of construction so as to give rise to *respondeat superior* as between the developer and contractor.

bit at fault for the accident, their claim fails.

Respondents were sued by Plaintiffs for their own independent negligence by breaching duties owed under common law premises liability. Respondents owed an absolute, nondelegable duty to their invitees, including Plaintiffs, to use reasonable care to keep the premises safe for invitees and to protect them from injury caused by an unreasonable risk which the invitees, by exercising ordinary care for their own safety, would not discover. See W. Page Keeton et al., *Prosser and Keeton on the Law of Torts § 71*, at 511–12 (5th ed. 1984) (courts generally agree that the duty of a possessor of land to keep the possessor's premises in a reasonably safe condition for business invitees is a nondelegable duty); Restatement (Second) of Torts § 425 ("One who employs an independent contractor to maintain in safe condition . . . land which he holds open to the entry of the public as his place of business . . . is subject to the same liability for bodily harm caused by the contractor's negligent failure to maintain the land . . . in a reasonably safe condition, as though he had retained its maintenance in his own hands."). Respondents owed Plaintiffs and other patrons a duty to discover the dangerous condition and either warn of or eliminate the condition, which they did not do.

Any fault on the part of Petitioner does not exonerate Respondents of their own independent or concurrent negligence.

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

A. Respondents breached independent duties of care owed to Plaintiffs under common law premises liability.

Respondents argue in their respective briefs that there is no evidence that they breached any duties of care arising under common law premises liability. See Brief of Wildevco at 16; Brief of Fred's at 8. Such a contention is false. It is undisputed 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 v. Hilton Head Plantation Prop. Owners Ass'n, 317 S.C. 200, 203, 42 S.E.2d 619, 621 (Ct. App. 1994). Respondents' own safety 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). When asked if Respondents should have conducted such inspections to look for tripping hazards in this case, Hunt testified: "Well, I think if they are in the area there, if they notice something, they have a duty to act on it if there is a change." (App. p. 364).[9] However, Hunt's testimony was that he had no information regarding whether Respondents did, in fact, ever conduct any such safety inspections. (App. pp. 361–62).

The only testimony in the record regarding whether Respondents complied with the safety standard testified to by their expert came from Tad Barber ("Barber") of Wildevco. Barber admitted that Wildevco failed to follow the standard of care opined by Hunt. (App. pp. 279, 303, 305–06). Wildevco specifically agreed in the Lease that it would "keep and repair the exterior of

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[9] Hunt also provided testimony to the effect that it did not matter what Respondents did because they "relied upon the contractor to build it properly . . . ." (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 Court's inquiry should focus not upon whether Petitioner was at fault, but whether Respondents proved that they were 100% without fault.

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 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 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."). 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.*

Thus, Respondents essentially argue that Petitioner did not prove that Respondents breached their mutual duty to inspect the premises and that the evidence establishes that Petitioner was at fault for creating the condition. However, proof of Petitioner's liability is but one element in an equitable indemnity claim. It is further required that Respondents prove that they are completely without fault. 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). Not only is there evidence in the record to establish that Respondents were at least partially at fault in causing Plaintiffs' damages, but Respondents'

position ignores the fact that they did not prove they were without fault for breaching the duties for which they were sued in some way by their failure to discover risks and to warn of or eliminate foreseeable unreasonable risks.

In accordance with its view of the preponderance of the evidence, this Court should, respectfully, find that Respondents breached duties owed under common law premises liability or, alternatively, that Respondents failed to prove that they did not breach such duties.

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.

In addition to breaching independent duties of care arising under common law premises liability, Wildevco acted negligently during the development and construction of the subject premises. To the extent Plaintiffs sued Wildevco for the creation of a dangerous condition, then Wildevco is undoubtedly a joint tortfeasor because it contributed to the creation of the condition by its own independent negligent acts or omissions. Specifically, it is undisputed that Wildevco supplied defective construction plans for the project and tasked an unqualified person to manage construction.

Wildevco was charged with supplying the architectural drawings and engineering plans to Petitioner to construct the subject property. (App. p. 482). By doing so, Wildevco warranted the sufficiency of these construction documents. Hill v. Polar Pantries, 219 S.C. 263, 271, 64 S.E.2d 885, 888 (1951) (citing C.J.S., *Contracts* § 329 at 781) ("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."); 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). At trial, the engineer, the general contractor, and the developer all testified separately that the discrepancies in the architectural plans and the site plans made them confusing. (App. pp. 263, 265, 283–84, and 410). Both lower court opinions concluded that there were areas of confusion between the architectural plans and site plan. (App. pp. 23, 828–29). Wildevco's only defense points the finger at Petitioner, arguing that that Petitioner *should* have notified the engineer if there were discrepancies in the plans. See Brief of Wildevco at p. 21. The real inquiry is whether Wildevco *should* have notified the engineer about the deficient plans. Again, this Court's inquiry should not be about whether Petitioner was at fault; but rather whether the omissions of Wildevco were a contributing factor to Plaintiff's claims and whether by providing deficient plans constitutes at least one iota of negligence under the Spearin doctrine. All who have looked at this issue—the engineer, the developer, the general contractor, the trial court, and the Court of Appeals—have determined that the plans are discrepant and could cause confusion. This evidence necessarily leads to the inescapable truth that Wildevco was at least .00001 percent at fault. For the Court of Appeals' decision to stand, this Court must overlook this glaring fact and also overrule the well-reasoned analysis in Polar Pantries and the Spearin doctrine.

Secondly, Wildevco seeks to blame Petitioner for the conditions which led to Plaintiff's injury, but ignores its own fault by hiring an inexperienced construction manager. This approach is contrary to equity and common sense. Additionally, it 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. It is undisputed that Barber, as construction manager,

negotiated the contracts for construction, engaged the architect and engineer, supplied the architectural and engineering drawings to Petitioner, and mandated Petitioner's project schedule, down to the very day, to complete the project. (App. pp. 275, 478). It is also undisputed that Barber lacked any qualification to oversee the project. The trial court specifically found (which the Court of Appeals adopted) that Barber "had no education or formal training in construction, engineering and/or architectural." (App. p. 22). Barber also admitted 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 complete 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.

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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.

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 partially at fault.

Accordingly, for the foregoing reasons, the Court of Appeals erred in holding that Wildevco was without fault in negligently overseeing the development and construction of the subject project.

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

The Court does not even reach the issue of Fred's fault, as discussed above, if there is no special relationship between Fred's and Petitioner. 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.

The relationship between Fred's and Petitioner is an attenuated and tangential one—that of general contractor and tenant who occupied the premises after construction—with the only commonality between the two being that they each entered into separate contracts with Wildevco

relating to the subject building. There is no contract between Fred's and Petitioner, and there is no evidence that these parties even interacted with each other during the subject project. In those cases where this Court has determined that a special relationship existed between two parties, not only were there contractual relationships between the parties, but there were direct relationships between the two that does not exist between Fred's and Petitioner. In opposition, Fred's argues nothing new; it relies upon two factors: (1) previous course of dealings unrelated to the subject project; and (2) that Petitioner knew it was constructing a Fred's store when it undertook construction. See Brief of Fred's at pp. 3–5. Each will be discussed in turn.

With respect to the first factor cited above, 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 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.

With respect to the second factor cited above, 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. Presumably, the vast majority of (if not all) general contractors know the purpose of the project which they building, especially in this case where the contract between Petitioner and Wildevco states that Petitioner is constructing a Fred's store. (App. p. 476). The hallmark of a relationship for two or more parties being connected or interrelated, is not a contractor's knowledge of the identity of the end user of the building and 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 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.

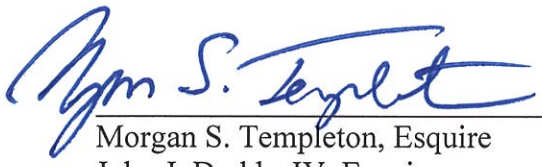
Again, the only commonality between Fred's and Petitioner is that they each entered into separate contracts with Wildevco relating to the construction of the subject building, and such a relationship is insufficient to support Fred's equitable indemnity claim against Appellant. Rather, Petitioner is 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 requests 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 enter judgment against Fred's.

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 August, 2021.

WALL TEMPLETON & HALDRUP, P.A.



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