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Equitable Indemnity Revisited and Reaffirmed

One of the most frequently asked questions by our clients who have been unfairly sued is who can they make pay. In some circumstances, our clients want to know whether they can force the party whom they deem truly culpable to cover the costs of litigation or even a judgment against them. South Carolina courts have historically set a very high bar for equitable indemnity, “a 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 recent South Carolina Supreme Court decision reinforces those obstacles.

In *Fountain v. Fred’s, Inc. and Wildevco, LLC v. Tippins-Polk Constr., Inc, et al*, 2022 WL 610265, a premises liability case involving a trip and fall, the Supreme Court found that Fred’s and Wildevco were not entitled to equitable indemnity from Tippins-Polk. The Fountains claimed that the Defendants failed to discover a dangerous condition and to warn of unreasonable risks associated with a ramp. Fred’s and Wildevco sued Tippins-Polk, the architect who designed the store, arguing that it was responsible for the condition that caused the fall. Fred’s and Wildevco settled with the Plaintiff; thereafter, they tried their equitable indemnity claim against Tippins-Polk.

At trial, Fred’s and Wildevco argued that the architect had caused the dangerous condition. The trial judge agreed, finding that the architect was required to indemnify Fred’s and Wildevco. The Supreme Court disagreed.

In its opinion, the Supreme Court reestablished the elements required for equitable indemnity. In order to recover, the party seeking indemnity must first establish that there exists a special relationship between the parties. Thereafter, one must prove: 1) the indemnity defendant is at fault in causing the damages to the third party; 2) the plaintiff has no fault for those damages; and 3) the plaintiff incurred expenses that were necessary to protect its interest in defending the third-party claim. The obstacle to many equitable indemnity claims is the second element- establishing that the party seeking indemnity has “clean hands” and zero culpability for the underlying injury or damages. In *Fountain*, the Supreme Court concluded that Fred’s and Wildevco had not met the burden of establishing their own clean hands, as there was evidence that they should have been aware of the dangerous condition and failed to remedy it. Thus, they could not prevail in an equitable indemnity claim against the architect, even if the architect also contributed to the dangerous condition.

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