THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2023-000146

Koffi Thomas,..... Appellant,

v.

The TJX Companies, Inc., d/b/a TJ Maxx #399,..... Respondent.

INITIAL BRIEF OF APPELLANT

Paige B. George
Barry B. George
Law Office of Barry B. George
1419 Bull Street
Columbia, South Carolina 29201
(803) 254-7222
Attorney(s) for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 1

FACTS 2

STANDARD OF REVIEW 2

Arguments

I. THE LOWER COURT IMPROPERLY GRANTED RESPONDENT'S MOTION FOR SUMMARY JUDGMENT. APPELLANT ESTABLISHED A MERE SCINTILLA OF EVIDENCE OF THE EXISTENCE OF A GENUINE ISSUE OF MATERIAL FACT INCLUDING THAT THE CHAIR ITSELF WAS A DANGEROUS AND HAZARDOUS CONDITION……5

Conclusion 13

TABLE OF AUTHORITIES

CASES

Baughman v. American Tel. And Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1990) 4

Bramlette v. Charter-Med.-Columbia, 302 S.C. 68, 393 S.E.2d 914 (1990) 11

Burnett v. Family Kingdom, Inc., 387 S.C. 183, 691 S.E.2d 170 (Ct. App. 2010) 7

Caldwell v. K-Mart Corp., 410 S.E. 2d 21, 306 S.C. 27 (Ct. App. 1991) 10

Clary v. Borrell, 398 S.C. 287, 727 S.E.2d 773 (Ct. App. 2012) 7, 10

Companion Prop. & Cas. Ins. Co. v. Airborne Exp., Inc., 369 S.C. 388, 631 S.E.2d. 915 (Ct. App. 2006) 2

Crolley v. Hutchins, 300 S.C. 355, 387 S.E.2d. 716 (Ct. App. 1989) 3

David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 626 S.E.2d 1 (2006) 7

Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003) 3, 4

Duck v. Wallace Associates, Inc., 313 S.C. 448, 438 S.E.2d 269 (Ct. App. 1993) 3

Eastern Brick and Tile Co. v. United States, 281 F. Supp 216 (D.S.C. 1986) 10

Felder v. K-Mart Corp., 297 S.C. 446, 377 S.E.2d 332 (1989) 12, 13

Gadson v. Hembree, 364 S.C. 316, 613 S.E.2d 196, 203 (2005) 3

Graham v. Whitaker, 282 S.C. 393, 321 S.E.2d 40 (1984) 13

Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 673 S.E.2d 801 (2009) 4, 5, 8, 9, 13

Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004) 3

Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 594 S.E.2d 455 (2004) 3

Hiers by Hiers v. Mullens, 425 S.E.2d 57, 310 S.C. 63 (Ct. App. 1992) 7, 10

Holst v. KCI Konecranes Intl. Corp., 390 S.C.. 29, 699 S.E.2d 915 (Ct. App. 2010) 2

Hook v. Rothstein, 275 S.C. 187, 268 S.E. 2d 288 (1980) 3

Howard v. K-Mart Discount Stores, 293 S.C. 134, 359 S.E.2d 81 (Ct. App. 1987 13

Huffman v. Sunshine Recycling, LLC, 417 S.C. 514, 790 S.E.2d 410 (Ct. App. 2016) 4, 10

Koester v. Carolina Rental Ctr., 313 S.C. 490, 443 S.E.2d 392 (1994).....4

Lanham v. Blue Cross & Blue Shield of S.C. , Inc. 349 S.C. 356, 563 S.E2d 331 (2002).....4

Legette v. Piggly Wiggly, Inc., 368 S.C. 576, 629 S.E.2d 375 (Ct. App. 2006).....8, 9

Madison ex rel. Bryant v. Babcock Center, 638 S.E.2d 650, 371 S.C. 123 (S.C. 2006).....11

Montgomery v. CSX Transp., Inc., 362 S.C. 529, 608 S.E.2d 440 (Ct. App. 2004).....3

O'Leary-Payne v. R.R. Hilton Head, II, Inc., 638 S.E.2d 96, 371 S.C. 340 (Ct. App. 2006).....11

Padgett v. Colleton County, 383 S.C. 431, 679 S.E.2d 533 (Ct. App. 2009).....9, 10

Ray v. City of Rock Hill, S.C., 428 S.C. 358, 372, 834 S.E.2d 464, 471 *(*Ct. App. 2019*)*.....7

Roundtree Villas Assn. v. 4701 Kings Corp., 282 S.C. 415, 321 S.E.2d 46 (1984).....11

Shea v. State Department of Mental Retardation, 279 S.C. 604, 310 S.E.2d 819, (Ct. App.1983) ...7

Sherer v. James, 290 S.C. 404, 351 S.E.2d 148 (1986).....11

Singleton v. Sherer, 377 S.C. 185, 659 S.E.2d. 196, 203 (Ct. App. 2008).....3, 10, 14

South Carolina Insurance Company v. James C. Greene & Co., 290 S.C. 171, 348 S.E.2d 617 (Ct. App. 1986). 3

Tucker v. Albert Rice Furniture Sales, 295 S.C. 119, 367 S.E.2d 427 (Ct. App.1988) 13

Wilson v. Moseley, 327 S.C. 144, 488 S.E.2d. 862 (1997).....2

OTHER AUTHORITIES

South Carolina Rules of Civil Procedure, Rule 56(c) 2, 4

STATEMENT OF ISSUES ON APPEAL

1. DID THE LOWER COURT ERR IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT BECAUSE APPELLANT HAD ESTABLISHED A MERE SCINTILLA OF EVIDENCE AS TO THE NEGLIGENCE OF RESPONDENT AND AS TO THE EXISTENCE OF A HAZARDOUS AND DANGEROUS CONDITION?

STATEMENT OF THE CASE

On May 27, 2021, Koffi Thomas (Thomas) filed a complaint against The TJX Companies, Inc., d/b/a TJ Maxx #399 (TJ Maxx). (Complaint). The sole cause of action was negligence. (Complaint) TJ Maxx filed an answer generally denying the allegation and alleging comparative negligence. (Answer). The deposition of Appellant was held on March 23, 2022. Respondent filed its Motion for Summary Judgment on August 12, 2022. (Motion for Summary Judgment) Respondent's Motion for Summary Judgment was heard by the Honorable Donald B. Hocker on October 19, 2022.(Hearing Transcript) Before the lower court were the memorandums of both parties, Appellant's deposition transcript, video from Respondent's surveillance camera (Video) and Respondent's Health and Safety Guidelines (Guidelines). During the motion hearing, counsel for Respondent played for the court video of Thomas' fall. (Hearing Transcript) In an order dated November 7, 2022, the court granted Respondent's Motion for Summary Judgment. (November 7, 2022 Order)

Appellant subsequently filed a Motion to Reconsider on November 17, 2022 which was denied by Judge Hocker without a hearing on December 28, 2022. (Motion to Reconsider; December 28, 2022 Order). The lower court's orders are the basis of this appeal. On January 27,

2022, Thomas served the Notice of Appeal on Respondent TJ Maxx (Notice Of Appeal)

FACTS

On November 29, 2018, Koffi Thomas and a friend went shopping at TJ Maxx for clothes. (Plaintiff's deposition p. 19, ll. 17-23). Koffi Thomas' friend had picked out some clothing to try on in the dressing room. (Plaintiff's deposition p. 19, ll. 23-25). While Appellant's friend tried on clothes in a dressing room, Appellant was going to sit on a "chair" outside the dressing rooms. (Plaintiff's deposition p. 20, ll. 1-5). When Appellant went to sit, the "chair" slipped up from underneath her causing her to fall. (Plaintiff's deposition p. 20, ll. 7-9; 21-22). The fall caused Appellant to injure her right shoulder and right knee. (Plaintiff's deposition p. 39 ll. 22-25; p. 40, ll. 17-20)

STANDARD OF REVIEW

"When reviewing the grant of a summary judgment motion, the appellate court applies the same standard of review as the trial court under Rule 56(c), [South Carolina Rules of Civil Procedure]." *Holst v. KCI Konecranes Intl. Corp.*, 390 S.C. 29, 35, 699 S.E.2d 915, 916 (Ct. App. 2010) (citing *Companion Prop. & Cas. Ins. Co. v. Airborne Exp., Inc.*, 369 S.C. 388, 390, 631 S.E.2d. 915, 916 (Ct. App. 2006) "Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." *Id.* (citing *Wilson v. Moseley*, 327 S.C. 144, 146, 488 S.E.2d. 862, 863 (1997) "In ruling on a motion for summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the non-moving party." *Id.*

"Summary judgment is not appropriate where further inquiry into the facts of the case is

desirable to clarify the application of the law." *Singleton v. Sherer*, 377 S.C. 185, 659 S.E.2d. 196, 203 (Ct. App. 2008) (citing *Gadson v. Hembree*, 364 S.C. 316, 613 S.E.2d 196, 203 (2005) and *Montgomery v. CSX Transp., Inc.*, 362 S.C. 529, 608 S.E.2d 440 (Ct. App. 2004)). "Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." *Montgomery v. CSX Transp., Inc.*, 376 S.C. 37, 656 S.E.2d 20, 29 (2008). "The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact." *Singleton*, 659 S.E.2d at 202.

"Summary judgment is a drastic remedy and should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues." *Id.* at 203. (citing *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 594 S.E.2d 455 (2004); *Hawkins v. City of Greenville*, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004)).

"In order to recover in a negligence action, the plaintiff must show (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach." *Crolley v. Hutchins*, 300 S.C. 355, 356, 387 S.E.2d. 716, 717 (Ct. App. 1989) (citing *South Carolina Insurance Company v. James C. Greene & Co.*, 290 S.C. 171, 348 S.E.2d 617 (Ct. App. 1986)).

"Summary judgment is appropriate only when it is **perfectly clear** that no genuine issue of material fact is involved and **further inquiry into the facts is not desirable** to clarify the application of the law." *Duck v. Wallace Associates, Inc.*, 313 S.C. 448, 451, 438 S.E.2d 269, 270 (Ct. App. 1993) (citing *Hook v. Rothstein*, 275 S.C. 187, 268 S.E. 2d 288 (1980) (emphasis added). "Summary judgment is a drastic remedy and must not be granted until the opposing party has had a full and fair opportunity to complete discovery. " *Dawkins v. Fields*, 354 S.C. 58, 580

S.E.2d 433 (2003) (citing *Baughman v. American Tel. And Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1990)). "[T]he non-moving party must demonstrate the likelihood that further discovery will uncover additional relevant evidence . . . " *Id.*, 354 S.C. at 69. "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence **must be viewed in the light most favorable to the nonmoving party**." Id. (citing *Koester v. Carolina Rental Ctr.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994) (emphasis added). "The judgment sought shall be rendered forthwith if the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material facts and that the moving party is entitled to judgment as a matter of law." South Carolina Rules of Civil Procedure, Rule 56(c).

The Supreme Court has held that "in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a **mere scintilla** of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Management Co.*, Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009) (emphasis added). "Summary judgment should not be granted even when there is no dispute at to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts." *Huffman v. Sunshine Recycling, LLC*, 417 S.C. 514, 790 S.E.2d 410 (Ct. App. 2016) (quoting *Lanham v. Blue Cross & Blue Shield of S.C. , Inc.* 349 S.C. 356, 362, 563 S.E2d 331, 333 (2002))

ARGUMENTS

I. THE LOWER COURT IMPROPERLY GRANTED RESPONDENT'S MOTION FOR SUMMARY JUDGMENT. APPELLANT ESTABLISHED A MERE SCINTILLA OF EVIDENCE OF THE EXISTENCE OF A GENUINE ISSUE OF MATERIAL FACT INCLUDING THAT THE CHAIR ITSELF WAS A DANGEROUS AND HAZARDOUS CONDITION.

Appellant's Complaint contained one cause of action for negligence (Complaint). The Supreme Court in *Hancock* established that only a mere scintilla of evidence is required to get past summary judgment. *Id*. 673 S.E.2d at 803. *Hancock* was a premises liability case as is the one at hand. *Id*. In *Hancock*, the plaintiff was injured when she tripped and fell in a parking lot in disrepair. *Id*. at 802. The deposition testimony of the plaintiff in *Hancock* was that the plaintiff had "tripped on a rock or something to that effect." *Id*. The lower court in *Hancock* granted summary judgment "finding that the change in elevation of the parking lot caused [plaintiff's] fall, that the change in elevation was not a dangerous condition, and that even if it was a dangerous condition, [defendant] had no duty to warn since the elevation change was an open and obvious condition." *Id*. The Court of Appeals affirmed the lower court. *Id*. The Supreme Court in *Hancock* reversed the Court of Appeals finding "Respondent knew or should have known that a dangerous condition existed" and that "Respondent should have anticipated the harm." *Id*. The Supreme Court in *Hancock* also concluded that a mere scintilla of evidence is all that is needed to survive summary judgment. *Id.* at 803.

The following is an excerpt from the deposition of Koffi Thomas:

> **Q. All right. We'll get to that in a moment. But let's just talk about the day of the incident, November The 29th, 2018.· Can you tell me in your own words sort of the story of how you got to the store, who you were with, you know, what your day was looking like?**
>
> A: …So me and her went to the dressing room.· She went inside of the dressing room.· I stayed out because I didn't want to, you know, I wasn't buying anything and I wasn't, you know, trying on anything. So I sat outside where they had a chair

that was sitting outside of the dressing room.· I sat in that chair -- when I got ready to -- well, when I was going to sit in the chair and went to the side of the chair, the chair slipped from up under me.

Q: Okay. So as you were sitting down in the chair - -

A. I wasn't in the chair yet.

Q. Okay.

A. When she was in the dressing room, that's when I grabbed her pocketbook, got ready to sit down in the chair. As I got ready to sit down in the chair, the chair slipped up under from up under me.

Q. I gotcha.

A. Yes.

Q. Which direction did it move in?

A. Um -- I want to say the right side cause that's the side that I fell on.

Q. Do you think the chair that you went to sit in, did it slide to the left or did it slide to the right?

A. To the right.

(Dep. Thomas pp. 19-20, p.21)

Q. So tell me, in your own words, Ms. Thomas, what you think the store did wrong to cause or contribute to the accident?

A. The chair wasn't secure at all.· It didn't have no back.· If they was saying that the chair was secure, it wasn't, because the back was actually holding the chair up.· It had no sides or any of that.

Q. When you say the back was holding the chair up, you

mean the wall?

A. The wall.· Correct.· Yes.

Q. Do you think you had any contribution in causing the accident?

A. I don't.

(Dep. Thomas p. 38, ll. 9-22)

The Court when considering a motion for summary judgment or when considering a directed verdict motion does not have the authority to decide credibility. **"[M]atters of credibility should not be determined at the summary judgment stage. '**All ambiguities, conclusions, and inferences arising in and from evidence must be construed **most strongly against the movant for summary judgment.**'" *Hiers by Hiers v. Mullens*, 425 S.E.2d 57, 61, 310 S.C. 63, 68 (Ct. App. 1992) (quoting *Shea v. State Department of Mental Retardation*, 279 S.C. 604, 610, 310 S.E.2d 819, 822 (Ct.App.1983)) (emphasis added) "When considering a directed verdict motion, neither the [circuit] court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence." *Ray v. City of Rock Hill, S.C.*, 428 S.C. 358, 372, 834 S.E.2d 464, 471 (Ct. App. 2019) (citing *Burnett v. Family Kingdom, Inc.*, 387 S.C. 183, 188-89, 691 S.E.2d 170, 173 (Ct. App. 2010)). "A court considering summary judgment neither makes factual determinations **nor considers the merits of competing testimony**; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." *Clary v. Borrell*, 398 S.C. 287, 296 727 S.E.2d 773, 777-778 (Ct. App. 2012) (citing *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006)) (emphasis added).

Here, the lower court improperly weighed competing evidence. That evidence being Appellant's deposition testimony and the surveillance video produced by Respondent. In doing so, the lower court decided Appellant's testimony was not credible which was improper.

The lower court relied on *Legette v. Piggly Wiggly, Inc.*, 368 S.C. 576, 629 S.E.2d 375, (Ct. App. 2006) in both granting Respondent's Motion for Summary Judgment and denying Appellant's Motion to Reconsider. First, it is worth nothing that the opinion in *Legette* was published approximately three years prior to the opinion in *Hancock* being published and the mere scintilla standard being established.

In *Legette*, a slip and fall case, the appellant went to the grocery store on a rainy day. *Id*. 629 S.E.2d at 376. As she was exiting the store, she slipped and fell on moisture at the exit. *Id*. The employees of the grocery store picked her up off the ground then immediately took photographs of the incident scene. *Id*. "Legette sued Piggly Wiggly, Inc., claiming that the store knew or should have known of the dangerous condition and did nothing to remedy it and that the store failed to provide a safe shopping environment for invitees." *Id*. The sole issue for the Court of Appeals was "whether Piggly Wiggly should have known of the dangerous condition and failed to take reasonable steps to remedy it." *Id*. at 377

Photographs taken immediately after Legette's fall "show large mats and warning signs in the area." *Id*. When Legette was initially asked her in deposition about the presence of mats and warning signs she claimed they were not at the door. *Id*. When the photographs of the scene were shown to her, "she could only be certain that she did not remember seeing them; they might have been there or they might not have been there." *Id*. at 377-378. The Court of Appeals in its opinion in *Legette* (pre-*Hancock*), found (1) that "[t]estimony that contradicts undisputed physical evidence

generally lacks probative value" (2) Legette's testimony to be "vacillating" when presented with physical evidence and (3) could not "conclude there was a genuine issue of material fact." *Id*.

In the instant case, Appellant argues that the opinion in *Legette* is distinguishable and that this Court should look at the Court of Appeals post-*Hancock* opinion in *Padgett v. Colleton County*, 383 S.C. 431, 679 S.E.2d 533 (Ct. App. 2009). Padgett fell at the Colleton County courthouse when he went to check on a deed. *Id*. 679 S.E.2d at 534. He took a worn path created over time by other visitors of the courthouse. *Id*. Padgett "fell when he suddenly stepped into a hole that was about eight inches deep." *Id*. Padgett filed suit for the injuries he sustained. *Id*. At trial, Colleton County moved for a directed verdict which was granted by the circuit court. *Id* at 536. The circuit court in granting the County's motion for directed verdict noted what it observed from the photographs presented to the court. *Id*.

The first issue on appeal in *Padgett* was "[d]id Padgett present sufficient evidence to create a jury issue as to whether the condition causing him to fall was open and obvious?" *Id*. On appeal, "Padgett argue[d] that the trial judge, in finding the hole was an open and obvious hazard, improperly weighed competing evidence on the issue." *Id*. The appellate court agreed with Padgett. *Id*. Colleton County on appeal argued that "no reasonable juror could dispute the physical evidence presented, namely a photograph taken shortly after the accident occurred." *Id*. Colleton County in its brief to the appellate court cited *Legette* "for the proposition that [t]estimony that contradicts undisputed physical evidence generally lacks probative value." *Padgett*, 679 S.E.2d at 537. The lower court in the instant case used *Legette* for the same purpose.

Appellant in the instant case argues that *Legette* is distinguishable from *Padgett* for the same reasons the Court of Appeals in *Padgett* finds that *Legette* is distinguishable. The Court of

Appeals in *Padgett* found *Legette* distinguishable because "testimony from the plaintiff in *Legette* as to whether she had seen mats and warning signs about moisture on the floor of the defendant's store was equivocal at best, Padgett never wavered in his statements that the ground on which he fell was smooth and the sidewalk was unavailable for pedestrian traffic." *Padgett*, 679 S.E.2d at 537.

In the instant case, Appellant (Thomas) never wavered in her statements about what caused her to fall. The lower court improperly weighed competing evidence. Thomas testified that the "the chair slipped from up under me" (Plaintiff's Deposition) Thomas further stated that the chair wasn't secure and did not have a back or sides (Plaintiff's Deposition) Plaintiff's testimony created a conflict between it and the other evidence presented creating an issue for the trier of fact. The lower court did not have the authority to resolve that conflict. *Clary*, 727 S.E.2d at 777-778. Additionally, the lower court did not take the evidence in the light most favorable to the Plaintiff. *Singleton*, 377 S.C. 185. Nor did the lower court construe the evidence most strongly against the moving party. *Hiers by Hiers*, 425 S.E.2d 57. Here, there is a disagreement concerning the conclusions to be drawn from the facts making summary judgment improper. *Huffman*, 417 S.C. at 514. Appellant states that the chair moved underneath her. Nothing in the record impeaches Appellant's credibility. A reasonable jury could believe her testimony and what the surveillance video shows is a question of fact for a jury. A reasonable jury could conclude that the chair moved underneath Appellant causing her to fall to the ground and become injured.

"In negligence cases, internal policies or self-imposed rules are often admissible as relevant on the issue of failure to exercise due care." *Caldwell v. K-Mart Corp*., 410 S.E. 2d 21, 306 S.C. 27 (Ct. App. 1991) (citing *Eastern Brick and Tile Co. v. United States*, 281 F. Supp 216 (D.S.C.

1986)). "Expert testimony is not required to prove proximate cause if the common knowledge or experience of a layperson is extensive enough." *O'Leary-Payne v. R.R. Hilton Head, II, Inc*., 638 S.E.2d 96, 371 S.C. 340 (Ct. App. 2006) (citing *Bramlette v. Charter-Med.-Columbia*, 302 S.C. 68, 72-73, 393 S.E.2d 914, 916 (1990)) "[W]here the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from lack of care." *Id.* "Moreover, it has long been the law that one who assumes to act, even though under no obligation to do so, thereby becomes obligated to act with due care." *Madison ex rel. Bryant v. Babcock Center*, 638 S.E.2d 650, 371 S.C. 123 (2006) (citing *Sherer v. James*, 290 S.C. 404, 406, 351 S.E.2d 148, 150 (1986); *Roundtree Villas Assn. v. 4701 Kings Corp.*, 282 S.C. 415, 423, 321 S.E.2d 46, 50-51 (1984))"

The following are excerpts from Respondent's Health and Safety Guidelines:

"Management is responsible for:

…

- Conducting monthly safety inspection of the premises, reporting findings and executing the corrections as directed.

…

- Correcting unsafe and unhealthy conditions." (Defendant's Health and Safety Guidelines, Bates Defendant_00015)

"Associates are responsible for:

…

- Reporting the following to Management:

- Unsafe conditions." (Defendant's Health and Safety Guidelines, Bates Defendant_00016)

> "Every Associate has the responsibility to continuously identify, fix, or if the unsafe conditions cannot be fixed by the Associate, report the unsafe conditions to Management immediately. Identifying potential unsafe conditions is done through recovery continuously throughout the day. Unsafe conditions including, but are not limited to the following:
>
> - Loose mats or rugs
> - Defective carpets or floor tile
> - Sharp edges
> - Congested aisles
> - Blocked exits
> - Wet floors
> - Tripping hazards (loose tickets or hang tags on floor, etc.)
> - Defective carts, racks, equipment, etc.
> - Unstable displays or fixtures
> - Missing face plates on electrical outlets" (Defendant's Health and Safety Guidelines, Bates Defendant_00021-00022)

These Guidelines create a jury question as to whether the Defendant took on a duty to continuously identify, fix and report unsafe conditions. A reasonable jury could find that Defendant knew or should have known that a dangerous condition existed and that Defendant should have anticipated the harm. Additionally, expert testimony is not needed to show that the bench was deficient.

"[N]egligence [is a] question[] of fact for the jury and only rarely become[s] [a] question[]

of law for the court to decide. If more than one reasonable inference can be drawn from the evidence, the trial judge is required to submit the issues to the jury." *Felder v. K-Mart Corp.*, 297 S.C. 446, 377 S.E.2d 332 (1989) (citing *Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984); *Tucker v. Albert Rice Furniture Sales*, 295 S.C. 119, 367 S.E.2d 427 (Ct. App.1988))..."It is established in South Carolina that a merchant is not an insurer of the safety of its customers but rather owes its customers the duty to exercise ordinary care to keep the premises in a reasonably safe condition." *Felder*, 297 S.C. at 450. (citing *Howard v. K-Mart Discount Stores*, 293 S.C. 134, 359 S.E.2d 81 (Ct. App. 1987)) . "[H]owever, whether a defendant has provided reasonably safe premises is normally a question for the jury." *Id*.

The Appellant has established a mere scintilla of evidence that Respondent had a duty of care to Appellant as a customer of the store and that Respondent breached that duty by having a unsecured chair without sides.

CONCLUSION

The instant case is one based in negligence; and, therefore, the burden of proof placed on the Appellant is a "preponderance of the evidence." According to the Court in *Hancock*, Appellant need only show a **mere scintilla** of evidence that there is a genuine issue existing for trial to survive a motion for summary judgment.

Appellant testified that the seat slipped up from underneath her and was unsecure creating a material issue of fact for a jury. The evidence provided herein, between the Appellant's deposition and Respondent's policies and procedures, creates genuine issues of fact. A reasonable jury could determine that the Respondent failed to adhere to its policies and procedures and was negligent in not discovering an unsafe condition. Additionally, Appellant testified that the seat moved

underneath her and was unsecure. This testimony, in itself, creates a conflict with other presented evidence creating a question for the trier of fact. It is only proper for a jury to determine the credibility and weight of Appellant's unwavering testimony. While the video shows a general view of the scene, it is a jury question as to what specifically the video shows. Viewing the evidence in a light most favorable to the Appellant, Appellant provided the lower court more than a mere scintilla of evidence that could lead a reasonable jury to conclude that the seat moved underneath the Appellant; that the Respondent did not adhere to its own policies; that the injury to the Appellant was foreseeable; that the Respondent was negligent; and, that, Respondent's negligence was a proximate cause of Appellant's injuries. Therefore, lower court's granting of summary judgment was improper in this case. To hold otherwise, would deprive Appellant of a trial on disputed facts. *Singleton*, 377 S.C. 185.

Respectfully submitted,

s/Paige B. George
Paige B. George
Law Office of Barry B. George
1419 Bull Street
Columbia, South Carolina 29201
(803) 254-7222
Attorney(s) for Appellant