

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Dorchester County
Court of Common Pleas

DeAndrea G. Benjamin, Circuit Court Judge

Case No. 2009-CP-18-0452

Rita M. Pugh,

Respondent,

v.

Bi-Lo, LLC,

Appellant.

INITIAL BRIEF OF APPELLANT

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INTRODUCTION

This is a slip-and-fall case involving an alleged foreign substance (water/grapes) on the floor of Appellant Bi-Lo, LLC's ("Bi-Lo") store. In cases of this type, "a storekeeper," such as Bi-Lo, "is liable **only upon** a showing that it actually placed the foreign substance on the floor, or that it had actual or constructive notice thereof." Wintersteen v. Food Lion, Inc., 344 S.C. 32, 36, 542 S.E.2d 728, 730 (2001) (emphasis added). Here, no evidence was presented showing that Bi-Lo actually placed the water/grapes on the floor, or that it had actual notice thereof. Accordingly, the case turns on whether the Respondent, Rita M. Pugh ("Ms. Mizell"¹), presented any evidence from which a jury could reasonably infer and conclude that Bi-Lo had constructive notice of the water/grapes on the floor.²

¹ When this case was filed, the Respondent went by the last name Pugh. During the pendency of the case, the Respondent divorced. At the time of trial, she went by the name Mizell, and she is referred to by that name herein. (Trial Tr. p. 4, lines 18-25.)

² The trial court denied Bi-Lo's directed verdict motions explaining only, "I believe that there are genuine issues of fact that must be decided by the jury." (Trial Tr. p. 224, line 25 - p. 225, line 2, p. 227, line 21 - p. 228, line 5.) In the trial court's written order denying Bi-Lo's post-trial motions (which included Bi-Lo's motion for JNOV), the trial court seemed to at least suggest (as a basis for its denial of Bi-Lo's motion) that evidence was presented from which the jury could have found that Bi-Lo had actual notice of the water/grapes. (Order Denying Post-Trial Motions, p. 4) ("Bi-Lo had actual and/or constructive notice") Indeed, the trial court's order on post-trial motions even indicated that the foreign-substance analysis endorsed and adhered to by our Supreme Court in Wintersteen is not controlling in this case (even though this case is unquestionably a slip-and-fall/foreign-substance case). (Order Denying Post-Trial Motions, p. 3.) To be clear, in this appeal, Bi-Lo challenges the entirety of the trial court's rulings denying it a directed verdict and JNOV, to include any aspect of those rulings that held or otherwise suggested that South Carolina's traditional foreign

With respect to constructive notice, the question is whether the foreign substance was on the floor for such a length of time as to infer that the storekeeper was negligent in not discovering and removing it. Gillespie v. Wal-Mart Stores, Inc., 302 S.C. 90, 92, 394 S.E.2d 24, 25 (Ct. App. 1990). Critically, the answer to this question “is not one that can be left to speculation.” Id.

Respectfully, the trial court erred by denying Bi-Lo’s motions for a directed verdict/JNOV, because Ms. Mizell did not present any evidence from which a jury could reasonably conclude that Bi-Lo had the requisite constructive notice. On this point, Ms. Mizell testified only that, after she fell, she saw some smushed grapes to her left that she did not believe had been smushed in the fall (suggesting that this observation indicated that the grapes had been on the floor for some time prior, though she conceded that she could not tell how long). Even viewing this evidence in the light most favorable to Ms. Mizell, the mere fact that grapes were smushed at some

substance analysis is not controlling and any aspect of those rulings that held or otherwise suggested that evidence was presented from which a jury could reasonably conclude that Bi-Lo actually placed the water/grapes on the floor, or that Bi-Lo had actual or constructive notice thereof. That said, in this appeal, Bi-Lo places greater emphasis on the absence of evidence to support a finding constructive notice, because, respectfully, the absence of evidence to show that Bi-Lo actually placed the water/grapes on the floor or that Bi-Lo had actual notice thereof is simply not capable of being disputed in good faith; indeed, as will be highlighted below, Ms. Mizell conceded the absence of such evidence at trial. (Trial Tr. p. 135, line 14 - p. 136, line 12.) That is why Bi-Lo states that the case turns on the constructive notice issue.

unknown (and, based upon the evidence presented, unknowable) time before the fall provides no evidence from which a reasonable inference can be drawn and conclusion reached as to whether the smushed grapes had been there for any particular period of time before the fall—be it measured in hours, minutes, or mere moments—leaving to (impermissible) speculation the dispositive issue of whether the smushed grapes were on the floor for such a length of time that Bi-Lo was negligent in not discovering and removing the condition. Consequently, Bi-Lo was entitled to judgment in its favor as a matter of law.

Additionally, and, again, respectfully, to the extent that the trial court did not err in failing to grant Bi-Lo a directed verdict/JNOV, the trial court erred by denying Bi-Lo a new trial absolute.

The trial court refused to charge the jury on (and include on the verdict form) Bi-Lo's affirmative defense of comparative negligence (essentially, granting Ms. Mizell a directed verdict as to this defense). Bi-Lo duly pleaded this defense in its answer,³ and evidence was presented at trial supporting the jury's consideration of it. According to Ms. Mizell's own testimony—which, for the purposes of this analysis must be viewed in the light most favorable to Bi-Lo—there was a substantial amount of water and

³ (Answer, ¶ 15.)

grapes on the floor that caused her to fall, but that she did not see this hazard (which it could reasonably be inferred was open and obvious) notwithstanding her unobstructed view of the same. She further testified that she was not looking down, which could give rise to at least a reasonable inference that she did not exercise reasonable care for her own safety. Under the circumstances, the trial court was obligated to instruct the jury on and submit for its consideration the issue of Ms. Mizell's comparative negligence, and the trial court's refusal to do so was both, erroneous and prejudicial.

Moreover, the jury's verdict was undeniably tainted by an improper motive; it is grossly and shockingly excessive in light of the evidence presented and also clearly included an improper award of attorney's fees to Ms. Mizell. The trial court granted Bi-Lo a directed verdict on Ms. Mizell's claim for punitive damages—Ms. Mizell has not appealed this ruling. The case was submitted to the jury for determination of actual damages. Ms. Mizell presented evidence of \$3,814.00 in medical expenses related to the fall—she presented no evidence of any wage loss or lost earning capacity. During closing argument, Ms. Mizell's counsel suggested to the jury that a proper award in favor of Ms. Mizell was \$47,916.00. The jury awarded Ms. Mizell \$71,874.00, an amount more than 18 times her medical expenses; an

amount \$23,958.00 in excess of her own attorney's suggestion of the value of the case (percentage-wise, 50% more than her attorney proposed); and an amount which, subtracting 1/3rd thereof (the amount universally known/believed to be the standard percentage of an attorney's contingent fee), yields exactly the amount Ms. Mizell's counsel suggested, \$47,916.00. Indeed, during its deliberations, the jury actually sent the trial court a note that inquired if it could award attorney's fees.

Most respectfully, the trial court's denial of Bi-Lo's motions for directed verdict/JNOV should be reversed and this Court should grant Bi-Lo judgment as a matter of law or remand this case to the trial court for entry of such a judgment. Alternatively, to the extent that Bi-Lo is not entitled to judgment as a matter of law, this case should be remanded to the trial court for a new trial absolute.

STATEMENT OF THE ISSUES ON APPEAL

- I. Did the trial court err by not granting Bi-Lo a directed verdict and/or JNOV, because Ms. Mizell did not present sufficient evidence to allow a jury to reasonably conclude that she had proved the essential elements of her slip-and-fall claim?

- II. Did the trial court err and prejudice Bi-Lo by refusing to charge the jury on Bi-Lo's affirmative defense of comparative negligence, essentially granting Ms. Mizell a directed verdict as to this defense, and refusing to include comparative negligence for the jury's consideration on the verdict form (and also in later denying Bi-Lo a new trial on account of this error when Bi-Lo again raised this issue via post-trial motion)?

- III. Did the trial court err by refusing to grant Bi-Lo a new trial where the jury's verdict was grossly and shockingly excessive in light of the evidence presented so as to be tainted an improper motive?

- IV. Did the trial court err by not granting Bi-Lo a new trial where the jury improperly awarded Ms. Mizell attorney's fees?

STATEMENT OF THE CASE

Ms. Mizell commenced this action against Bi-Lo by filing a summons and complaint on February 13, 2009. (Summons; Complaint.) She alleged causes of action for premises liability and negligence/gross negligence; more specifically, she alleged a slip-and-fall claim, contending that, while grocery shopping at a Bi-Lo store in Dorchester County, she was caused to fall and injure herself by a foreign substance on the floor. (Complaint.) Bi-Lo timely answered, denying the material allegations of Ms. Mizell's complaint, and setting up a number of affirmative defenses, including Ms. Mizell's comparative negligence. (Answer.)

After a stay on account of bankruptcy proceedings, and following a period of discovery, the case was tried in the Dorchester County Court of Common Pleas on April 23 and 24, 2012, before the Honorable DeAndrea G. Benjamin and a jury. (Trial Tr. p. 1.) Only three witnesses were called to testify during trial: Ms. Mizell; Ms. Mizell's boyfriend, Adam Bagley, who was with her at the time of the accident; and Bi-Lo's store manager, Erica Rice. Ms. Mizell called all of these witnesses during her case-in-chief. Because Ms. Mizell had already called Bi-Lo's witness, Rice, during her case-in-chief, Bi-Lo rested without calling any witnesses.

After Ms. Mizell rested, Bi-Lo moved for a directed verdict as to the

entirety of Ms. Mizell's claim, arguing that no evidence had been presented from which the jury could reasonably find that Bi-Lo created the alleged dangerous condition, had actual notice of the alleged dangerous condition, or had constructive notice of the alleged dangerous condition. Bi-Lo also moved for a directed verdict as to punitive damages. The trial court granted a directed verdict to Bi-Lo only as to Ms. Mizell's claim for punitive damages. (Trial Tr. p. 220, line 25, p. 221, line 13 - p. 225, line 15.)⁴ For the sake of preserving the record, out of an abundance of caution, even though Bi-Lo did not present any witnesses after Ms. Mizell rested, Bi-Lo formally rested and renewed its motion for a directed verdict as to the entirety of Ms. Mizell's claim, which the trial court again denied. (Trial Tr. p. 225, line 16 - p. 228, line 5.)

Consistent with its answer, which, again, pleaded the affirmative defense of Ms. Mizell's comparative negligence, Bi-Lo sought a jury charge on comparative negligence. The trial court refused to charge the jury on comparative negligence, essentially granting Ms. Mizell a directed verdict on this issue, and foreclosing the jury's consideration of it. (Trial Tr. p. 228,

⁴ Ms. Mizell has not appealed the directed verdict in favor of Bi-Lo as to her claim for punitive damages. Accordingly, punitive damages are no longer a part of this case (and should not be a part of this case to the extent that there is a remand for a new trial). See First Union Nat'l Bank of S.C. v. Soden, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct.App.1998) (holding an "unchallenged ruling, right or wrong, is the law of the case and requires affirmance").

line 13 - p. 230, line 25, p. 241, lines 1-16, p. 284, lines 8-25; Bi-Lo's Proposed Jury Charges (Court's Exhibit 4).) The case was thereafter submitted to the jury. Over Bi-Lo's continuing objection, the verdict form did not allow the jury to consider Ms. Mizell's comparative negligence. (Trial Tr. p. 284, line 8 - p. 287, line 11; Verdict Form.)

During its deliberations, the jury sent in a question to the trial court, asking if it could award \$47,916.00 plus attorney's fees and court costs or if it had to put a specific dollar amount on the verdict form. (Trial Tr. p. 287, lines 13-23.) Notably, during closing argument, Ms. Mizell's counsel had specifically proposed to the jury that it award Ms. Mizell \$47,916.00. (Trial Tr. p. 252, line 22 - p. 256, line 18.) Bi-Lo's counsel noted that attorney's fees would not properly be part of any award and the trial court seemingly agreed. (Trial Tr. 288, lines 20-24.) The trial court thereafter answered the jury, explaining, "If you find for the Plaintiff you must award a specific dollar amount." (Trial Tr. p. 290, line 22 - p. 291, line 16.)

The jury then returned a verdict in favor of Ms. Mizell in the amount of \$71,874.00 (two-thirds of which is exactly \$47,916.00), and the trial court entered judgment thereon. (Trial Tr. p. 292, line 8 - p. 293, line 7; Verdict Form; Judgment.) The trial court granted Bi-Lo leave to file post-trial motions within ten days, and Bi-Lo timely filed post-trial motions seeking

JNOV or, alternatively, a new trial. (Trial Tr. p. 293, lines 17-23; Bi-Lo's Post-Trial Motions for JNOV or, alternatively, a New Trial.)

Bi-Lo's post-trial motions were heard by Judge Benjamin on June 27, 2012. (Post-Trial Motion Hearing Transcript.) Judge Benjamin denied Bi-Lo's post-trial motions by order entered August 20, 2012. (Form 4 Judgment (August 20, 2012); Order Denying Bi-Lo's Post-Trial Motions (August 20, 2012).) Following the trial court's denial of its post-trial motions, Bi-Lo timely served/filed its notice of appeal to this Court. (Notice of Appeal.)

STATEMENT OF FACTS

The subject accident happened at approximately 9:30 p.m. on Sunday, August 31, 2008. (Trial Tr. p. 74, lines 4-7, p. 117, lines 5-8, p. 203, lines 2-5; Plaintiff's Exhibit 3 (Bi-Lo Incident Report).) As noted above, only three witnesses testified at trial: Ms. Mizell; her boyfriend, Bagley; and Bi-Lo's store manager, Rice.

According to Ms. Mizell, the fall happened soon after she entered the store. She had been at Bi-Lo for mere minutes; the only thing in her shopping cart at the time of the fall was her purse, not grocery items. When she entered the store, she had obtained a cart and headed for the produce area, but, before she could place the first item in her cart, she slipped and

fell. (Trial Tr. p. 74, line 4 - p. 75, line 5, p. 75 line 15 - p. 76, line 11, p. 97, line 12 - p. 99, line 21, p. 158, lines 5-10.)

After falling, Ms. Mizell claims that she noticed that there was “a lot of water” in the area and more than ten grapes. She claimed that she did not see the water and grapes before the fall because she was not looking down. She expressly conceded that she had no evidence to establish that Bi-Lo/a Bi-Lo employee actually placed the water/grapes on the floor or that Bi-Lo/a Bi-Lo employee had actual notice that the water/grapes were on the floor.⁵

⁵ The below exchange took place between Ms. Mizell and Bi-Lo’s counsel:

[Q]: Just so I’m clear before I sit down, you don’t have any evidence to suggest that Bi-Lo placed this, whatever it was on the floor, grapes or water, right?

[A]: I never said that, I never said that, sir.

[Q]: Alright. Do you have any evidence to establish that Bi-Lo, or a Bi-Lo employee actually placed these grapes or water on the floor?

[A]: No, sir, how can anybody say that Bi-Lo is in fault of that. I just said somebody needs to be reliable for their actions, as simple as that.

[Q]: But you don’t know who put it on the floor, do you?

[A]: No, sir, I can’t say that, you can’t say that, nobody knows.

[Q]: And you . . .

[A]: I know I didn’t do it.

[Q]: And you don’t have any evidence to suggest that Bi-Lo knew that the grapes and water were already on . . .

[A]: I never said that.

[Q]: Let me finish my question.

[A]: Go ahead.

[Q]: You don’t have any evidence to establish that Bi-Lo or an employee of Bi-Lo knew that the grapes or the water was on the ground prior to your fall, do you?

[A]: No, sir.

With respect to constructive notice of the foreign substance, Ms. Mizell testified only that, after she fell, she saw some smushed grapes to her left that had not been smushed in the fall. She claimed that this observation made her think that the grapes had been there for some time, but expressly conceded that she could not possibly tell how long the grapes had been on the floor. (Trial Tr. p. 80, line 25 - p. 81, line 12, p. 82, lines 5-6, p. 82, line 21 - p. 84, line 13, p. 100, line 9 - p. 101, line 25, p. 135, line 14 - p. 136, line 17, p. 144, line 19 - p. 145, line 10.)

After getting back up and notifying Rice of the fall, Ms. Mizell waited while the area where the fall occurred was cleaned, and ultimately completed her shopping trip and left the store. (Trial Tr. p. 76, lines 12 - p. 80, line 24, p. 115, lines 16 - p.116, line 8.) Ms. Mizell did not seek any medical treatment until September 3, 2008. (Trial Tr. p. 117, lines 5-17; Plaintiff's Exhibit 1 (Medicals (Group of 7).) She confirmed that she did not go to the emergency room until after speaking with her attorney. (Trial Tr. p. 117, line 18 - p. 118, line 6.) Her only other medical treatment consisted of visits to Alpha Medical Care, a chiropractor to which she acknowledged being referred by her attorney. (Trial Tr. p. 87, line 20 - p. 88, line 14, p.

(Trial Tr. p. 135, line 14 - p. 136, line 12; *see also* Trial Tr. p. 81, lines 10-12 (Ms. Mizell testifies that she was is not claiming that Bi-Lo put the grapes and water on the floor intentionally), p. 82, lines 5-6 (Ms. Mizell testifies: "We don't know, nobody knows who

118, lines 7-23; Plaintiff's Exhibit 1 (Medicals (Group of 7).)

Although Ms. Mizell made claims at trial of ongoing pain related to the fall, during cross-examination she acknowledged reporting the following "pain ratings" to Alpha Medical Care as of November 13, 2008 (the date of her last treatment):

Neck:	0 out of 10
Low Back:	1 out of 10
Left Shoulder:	0 out of 10

(Trial Tr. p. 118, lines 7-23, p. 119, line 5 - p. 121, line 18.) Additionally, with regard to later back pain, medical records were introduced showing that Ms. Mizell sought treatment at MUSC in July of 2010, complaining of lower back pain. The records show that Ms. Mizell specifically distinguished her 2010 pain from pain suffered as a result of her slip-and-fall at Bi-Lo in 2008, noting that the pain began approximately one month prior and that Ms. Mizell "has not had pain like this before;" indeed, "she experience[d] a fall several years ago, but did not have similar pain and saw [a] chiropractor at that time." (Trial Tr. p. 128, line 7 - p. 132, line 2; Defendant's Exhibit 3, pp. 10 and 12 (MUSC Report dated 7/20/10).) The records specifically identify Ms. Mizell's weight as "[l]arge contributing factor" to the pain she

put that water and them grapes there, nobody has a clue.")

was then experiencing. (Defendant's Exhibit 3, p. 12 (MUSC Report dated 7/20/10).)

Ultimately, Ms. Mizell presented an exhibit summary of her medical expenses totaling \$3,814.00. She did not present any medical testimony. (Trial Tr. p. 89, line 12 - p. 91, line 10; Plaintiff's Exhibit 1 (Medicals (Group of 7).) Ms. Mizell testified that she did not lose any time from work on account of the fall and had no claim for lost wages. (Trial Tr. p. 89, lines 1-11.)

Ms. Mizell's boyfriend, Bagley, testified that he was walking ahead and to the right of the cart Ms. Mizell was pushing, close enough to be able to touch it. Despite this proximity to Ms. Mizell and her path, Bagley did not observe any water or grapes at any time prior to the fall. (Trial Tr. p. 76, lines 21 - p. 77, line 4, p. 99, line 22 - p. 100, line 6, p.147, lines 10-13, p. 148, line 18 - p. 150, line 12, p. 156, line 20 - p. 157, line 1, p. 158, line 11 - p. 160, line 16.)

Bagley testified that, after Ms. Mizell fell, he was mad at her, "thinking she was clumsy." (Trial Tr. p. 168, lines 10-21.) Ms. Mizell confirmed that this was Bagley's reaction. (Trial Tr. p. 116, lines 1-8.) Bagley testified that he had no information to suggest that Bi-Lo created the

alleged hazard, that Bi-Lo had actual knowledge of its presence, or that the substance had been on the floor for any particular length of time before Ms. Mizell fell. (Trial Tr. p. 172, line 11 - p. 174, line 14.)

Bi-Lo's manager, Rice, was on duty at the time of the alleged fall. (Trial Tr. p. 180, line 23 - p. 181, line 18.) Rice testified that Ms. Mizell walked up to her when she was standing behind the customer service counter and reported the fall. Rice went to the area in question and found only one smushed grape. She found no water at all. Rice asked for an associate to bring her paper towels to clean up the grape. The associate handed her approximately four paper towels at once. Rice then used the handful of paper towels to clean up the grape. After cleaning up the grape, Rice completed an incident report outlining her observations and those reported by Ms. Mizell. (Trial Tr. p. 183, line 11 - p. 188, line 8, p. 194, lines 8-10, p. 210, lines 7-9, p. 211, line 18 - p. 214, line 11, p. 219, lines 3-13; Plaintiff's Exhibit 3 (Bi-Lo Incident Report).)

During her testimony, Rice described the steps taken by Bi-Lo to discover foreign substances on the floor. She explained the store's policy of conducting a thorough "walk through" examination of the entire floor area every two hours. (Trial Tr. p. 181, line 19 - p. 182, line 19, p. 194, line 14 - p. 200, line 15, p. 214, lines 12-24; Plaintiff's Exhibit 2 (Bi-Lo Floor Log).)

Indeed, as indicated on Bi-Lo's floor-inspection log, Rice had personally inspected the area at 8:03 p.m. (before the fall, which occurred at approximately 9:30 p.m.) and no foreign substance was present. (Trial Tr. p. 203, line 2 - p. 204, line 6; Plaintiff's Exhibit 2 (Bi-Lo Floor Log).) Rice further explained that all employees were trained to be on the lookout for foreign substances while walking through the store, and to clean them up immediately upon discovery. (Trial Tr. p. 201, lines 2-25, p. 214, line 25 - p. 215, line 2.) Finally, Rice testified that Bi-Lo did not create the alleged hazard and did not have notice of its existence prior to the fall. She was unable to speculate as to how long the substance had been on the ground prior to the alleged fall. (Trial Tr. p. 215, line 3 - p. 216, line 16.)

STANDARD OF REVIEW

When reviewing the denial of a motion for directed verdict or JNOV, the appellate court applies the same standard as the trial court. Elam v. S.C. Dep't of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004). The evidence and inferences that reasonably can be drawn therefrom are required to be viewed in the light most favorable to the non-moving party, here, Ms. Mizell. Sabb v. S.C. State Univ., 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002). The motions should be denied when either the evidence yields more than one inference or its inference is in doubt. McMillan v. Oconee Mem'l Hosp.,

Inc., 367 S.C. 559, 626 S.E.2d 884 (2006). If, however, the evidence as a whole is not susceptible of more than one reasonable inference, the motion should be granted. Sabb, 350 S.C. at 427, 567 S.E.2d at 236. When the reasonable inference is that “there has been a failure of proof as to a material element of the plaintiff’s cause of action, it becomes the duty of the court to resolve the issue against the party having the burden of proof by directing a verdict” or granting JNOV. Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 462 S.E.2d 321, 323 (Ct. App. 1995); *see Sabb*, 350 S.C. at 427, 567 S.E.2d at 236 (explaining that standard of directed verdict and JNOV are the same).

With respect to the trial court’s refusal to give a requested jury charge, jury instructions should be confined to the issues raised by the pleadings and supported by the evidence and where an issue is implicitly suggested by the pleadings and supported by the evidence, the trial judge is obligated to instruct the jury concerning it. Mouzon v. Moore & Stewart, Inc., 282 S.C. 233, 317 S.E.2d 756 (Ct.App.1984). In order to warrant reversal for refusal of the trial judge to give requested jury instructions, refusal must have been both erroneous and prejudicial. Ballou v. 302 Sigma Nu General Fraternity, 291 S.C. 140, 352 S.E.2d 488 (Ct. App. 1986); *see also Dalon v. Golden Lanes, Inc.*, 320 S.C. 534, 540, 466 S.E.2d 368, 372 (Ct.App.1996) (“It is the trial court’s function to charge the jury on the applicable law as raised by

the pleadings and supported by the evidence. In order to warrant reversal for failure to give a requested charge, the refusal must be both erroneous and prejudicial.”) (citation omitted).

With respect to the trial court’s refusal to grant Bi-Lo, Inc. a new trial absolute, where the amount of the verdict is grossly inadequate or excessive so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence, the trial court must grant a new trial absolute. The failure of the trial court to grant a new trial absolute in this situation amounts to an abuse of discretion and a new trial absolute will be granted by the appellate court. O’Neal v. Bowles, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993); Allstate Ins. Co. v. Durham, 314 S.C. 529, 531, 431 S.E.2d 557, 558 (1993) (“A trial judge’s refusal to grant a new trial absolute when the verdict is grossly inadequate or excessive is an abuse of discretion” and on appeal this court will grant a new trial absolute.”). Also, “[a]ttorney’s fees are not recoverable unless authorized by contract or statute,”⁶ and where a jury improperly returns an award of attorney’s fees, the defective verdict cannot be cured merely by excluding the award of attorney’s fees; a new trial must be granted. See Wachovia v. Beane, 397 S.C. 612, 725 S.E.2d 715 (Ct. App. 2012).

⁶ Jackson v. Speed, 326 S.C. 289, 307, 486 S.E.2d 750, 759 (1997).

ARGUMENT⁷

- I. The trial court erred by not granting Bi-Lo a directed verdict and/or JNOV, because Ms. Mizell did not present sufficient evidence to allow a jury to reasonably conclude that she had proved the essential elements of her slip-and-fall claim.**

Respectfully, the trial court's rulings, denying Bi-Lo a directed verdict and JNOV, were in error. The trial court denied Bi-Lo a directed verdict, explaining only that it "believe[d] there are genuine issues of fact that must be decided by the jury." (Trial Tr. p. 224, line 25 – p. 225, line 2.) Again, respectfully, this was not so, because Bi-Lo's directed-verdict motion was a challenge to the sufficiency of the evidence that Ms. Mizell presented to prove her case, even when that evidence is viewed in the light most favorable to Ms. Mizell. And, respectfully, much of what the trial court included in its written order denying Bi-Lo's JNOV motion is beside the point. That Ms. Mizell was an invitee in Bi-Lo's store,⁸ is unavailing to Ms. Mizell. That Bi-Lo had an (alleged) pattern of violating its own policies or that some Bi-Lo employee may have been in the produce area at some time after 8:03 p.m. (but before Ms. Mizell fell at approximately 9:30 p.m.),⁹ is

⁷ Though separately set forth, the analysis/argument presented may contain some overlap amongst the issues before the Court. To the extent that the argument/analysis contained in any particular portion of this brief is relevant to any other portion, the same is hereby incorporated therein by reference.

⁸ (See Order Denying Post-Trial Motions, pp. 3-4.)

⁹ (See Order Denying Bi-Lo's Post-Trial Motions, p. 5.) With particular respect to Rice's testimony, it is a red herring, at best. To be clear, and as an initial, general matter, a

likewise unavailing to Ms. Mizell. Also unavailing is the fact Bagley “utilized the specific word, ‘duty,’” in this testimony, or that Ms. Mizell testified “that there was so much debris on the floor that paper towels were not enough to clean it up” (Order Denying Post-Trial Motions, p. 4.)¹⁰

In South Carolina, a merchant is not an insurer of the safety of its customers. Garvin v. Bi-Lo, Inc., 343 S.C. 625, 628, 541 S.E.2d 831, 832 (2001). “To recover damages for injuries caused by a dangerous or defective condition on a storekeeper’s premises, **the plaintiff must show** either (1) that the injury was caused by a specific act of the defendant which created the dangerous condition; or (2) that the defendant had actual or constructive knowledge of the dangerous condition and failed to remedy it.” Wintersteen, 344 S.C. at 35, 542 S.E.2d at 729 (emphasis added). “In the case of a foreign substance, **the plaintiff must demonstrate** either that the substance was placed there by the defendant or its agents, or that the defendant had actual or constructive notice the substance was on the floor at

review of Rice’s testimony does not reveal any testimony to show either that the substance was placed on the floor by Bi-Lo or its agents, or that Bi-Lo had actual or constructive notice the substance was on the floor at the time of the slip and fall. More specifically, a review shows not only that any conclusion that Bi-Lo had a “pattern of violating its own policies with respect to maintaining its own floors” is dubious, but wholly irrelevant, as the instances cited by Ms. Mizell’s counsel (and, presumably, the trial court) had absolutely nothing to do with the circumstances of Ms. Mizell’s fall. (Trial Tr. p. 179, line 1 – p. 220, line 21; Plaintiff’s Exhibit 3 (Bi-Lo Incident Report).)

the time of the slip and fall.” Id. at 35, 542 S.E.2d at 729-30 (emphasis added). “The mere fact the substance was on the floor is insufficient standing alone to charge the storekeeper with negligence.” Calvert v. House Beautiful Paint & Decorating Ctr., Inc., 313 S.C. 494, 495, 443 S.E.2d 398, 399 (1994).

The foregoing is the appropriate legal standard upon which to evaluate the sufficiency of Ms. Mizell’s evidence in this case about an alleged slip-and-fall accident on a foreign substance. As a matter of law, the trial court erred in finding otherwise. In its order denying Bi-Lo’s post-trial motions, the trial court stated that “[c]ases such as *Wintersteen*, were based upon a non-traditional foreign substance analysis an involving inherently dangerous condition and foreseeable risk of harm.” (Order Denying Bi-Lo’s Post-Trial Motions, p. 3.) Respectfully, this is simply incorrect. Indeed, a review of the Wintersteen decision plainly reveals that the opposite is true; Wintersteen expressly endorsed and adhered to South Carolina’s “traditional ‘foreign substance’ analysis.” 344 S.C. at 35-36, 542 S.E.2d 730.

In Winterseen, the plaintiff sued the defendant grocery store after she slipped on a puddle of clear liquid near a self-service soda fountain with an

¹⁰ Bi-Lo would note, however, that Ms. Mizell’s testimony as to amount of debris on the floor cuts against the trial court’s refusal to charge the jury on comparative negligence and submit Ms. Mizell’s comparative negligence to the jury.

ice dispenser. Similar to the instant case, the defendant moved for a directed verdict, contending that the plaintiff presented no evidence that any of the defendant's employees had actual or constructive notice of the presence of the substance on the floor prior to the accident. The trial court denied the motion, concluding that the defendant, by providing its customers with a self-service soda fountain equipped with an ice dispenser, created a foreseeable risk that ice would fall onto the floor and create a dangerous condition. The jury then awarded the plaintiff \$500,000 in actual damages (notably, as is relevant to another of Bi-Lo's arguments below, reduced by the plaintiff's 45% comparative negligence) and \$500,000 in punitive damages. This Court reversed the trial court, holding that the plaintiff failed to prove that the defendant had actual or constructive notice of the substance on the floor, and therefore the defendant was entitled to a directed verdict.

This Court's decision in Wintersteen was thereafter affirmed by our Supreme Court. After setting forth the applicable standard of review, the Wintersteen Court began its discussion by setting forth the above-referenced standard that "[t]o recover damages for injuries caused by a dangerous or defective condition on a storekeeper's premises, the plaintiff must show either (1) that the injury was caused by a specific act of the defendant which created the dangerous condition; or (2) that the defendant had actual or

constructive knowledge of the dangerous condition and failed to remedy it.” 344 S.C. at 35, 542 S.E.2d at 729. And that, “[i]n the case of a foreign substance,” such as the instant case, “the plaintiff must demonstrate either that the substance was placed there by the defendant or its agents, or that the defendant had actual or constructive notice the substance was on the floor at the time of the slip and fall.” Id., 542 S.E.2d 729-30.

Thereafter, the Wintersteen Court made clear that it endorsed and adhered to South Carolina’s “traditional ‘foreign substance’ analysis” and prior precedent that “a storekeeper is liable only upon a showing that it actually placed the foreign substance on the floor, or that it had actual or constructive notice thereof”:

Wintersteen does not dispute the trial court’s ruling that Food Lion neither placed the substance on the floor nor had actual or constructive notice thereof. Rather, she contends that, if it is foreseeable an item will fall to the floor, then the storekeeper has a duty to minimize such risks and take measures to prevent the items from falling. Although this approach has some appeal, we decline to depart from our traditional “foreign substance” analysis. **We adhere to prior precedent that a storekeeper is liable only upon a showing that it actually placed the foreign substance on the floor, or that it had actual or constructive notice thereof.**

Id. at 35-36, 542 S.E.2d 730 (emphasis added).

Accordingly, and to be clear, whether it was in denying Bi-Lo a

directed verdict or in denying Bi-Lo JNOV, the trial court erred in utilizing any other legal standard than that of South Carolina's "traditional 'foreign substance' analysis." Again, under this analysis, the only thing that matters is whether the plaintiff, here, Ms. Mizell, has presented evidence from which a jury could reasonably conclude that the defendant, Bi-Lo, actually placed the foreign substance on the floor, or that it had actual or constructive notice thereof. She did not do so, and Bi-Lo was entitled to a directed verdict and JNOV.¹¹

¹¹ To be further clear, the trial court's order denying Bi-Lo's motion for JNOV seems to ascribe some degree of significance to the notion that "[t]he testimony presented by [Ms. Mizell] is substantially without contradiction," and that Ms. Mizell "presented the only witnesses in the case." (Order Denying Bi-Lo's Post-Trial Motions, p. 3.) As an initial matter, Ms. Mizell's testimony was not at all without contradiction. Numerous aspects of her testimony were contradicted by Rice (who was Bi-Lo's witness, even though she was called during Ms. Mizell's case-in-chief), including the fact that Rice saw no water at the scene of the fall and only a single smushed grape, when Ms. Mizell testified that there was a significant amount of water and a handful of grapes. (Trial Tr. p. 76, line 12 - p. 84, line 3, p. 211, line 23 - p. 212, line 14). Ms. Mizell also testified that a mop was used to clean up the mess, while Rice testified that no mop was used and the grape was easily cleaned up with the wad of paper towels she was handed by her associate. (Trial Tr. 79, line 23 - p. 80, line 10, p. 185, lines 5-23.) Moreover, in this case Ms. Mizell's testimony was indeed contradicted by her own deposition testimony numerous times on cross-examination, which transcript she even claimed to have been improperly transcribed by the court reporter until the video of her deposition was played during trial to show conclusively that it had been correctly transcribed. (Trial Tr. p. 97, line 1 - p. 137, line 2.) More importantly, however, Bi-Lo wishes to make clear that the trial court erred to the extent that it found Ms. Mizell's testimony had to be contradicted in any respect to merit granting Bi-Lo a directed verdict or JNOV. A motion for directed verdict or JNOV challenges the sufficiency of the plaintiff's evidence in view of the essential elements of the claim that the plaintiff has the burden to prove. *See Jones v. Gen. Electric Co.*, 331 S.C. 351, 503 S.E.2d 173, 176 (Ct. App. 1998) ("In ruling on a directed verdict motion, the trial court is concerned only with the existence or non-existence of evidence . . . it must determine whether a verdict for the opposing party would be reasonably possible under the facts as liberally construed in his favor."). It does not matter whether any of Ms. Mizell's testimony was contradicted; indeed, assuming all of Ms. Mizell's evidence

A number of South Carolina cases have dealt specifically with the sufficiency of evidence against a store owner with regards to foreign substances.

In Gillespie, 302 S.C. 90, 394 S.E.2d 24, this Court affirmed the circuit court's grant of summary judgment for the defendant, Wal-Mart. There, the plaintiff slipped and fell in some water as she entered the checkout lane in a Wal-Mart store. Id. at 90-91, 394 S.E.2d at 24. The plaintiff alleged in her complaint that the clerk could have seen the water "if she had looked." Id. The Gillespie Court held, "[t]he mere fact that water was on the floor of the store and was within the field of vision of a nearby store employee at the time Gillespie slipped upon it is not by itself enough evidence to charge Wal-Mart with negligence." Id. at 91, 394 S.E.2d at 25. Importantly, the Court stated, "**[t]he question of whether the water was on the floor for such a length of time as to infer that Wal-Mart was negligent in not discovering and removing it is not one that can be left to speculation.**" Id. at 92, 394 S.E.2d at 25 (emphasis added).

In Hunter v. Dixie Home Stores, 232 S.C. 139, 101 S.E.2d 262 (1957), our Supreme Court concluded that the evidence was insufficient to

to be uncontradicted and viewing it in the light most favorable to her, she has still did not present sufficient evidence to make her case, which, again, requires evidence that Bi-Lo, actually placed the foreign substance on the floor, or that it had actual or constructive

submit the case to the jury on the issue of the defendant's actual or constructive notice of beans that were on the floor of the defendant's store. The Hunter Court found that the plaintiff had not presented sufficient evidence to create a jury question because there was an absence of evidence showing how the beans got on the floor or how long they had been on the floor before the plaintiff stepped on them. Id. at 143, 101 S.E.2d at 264.

Viewed in the light most favorable to Ms. Mizell, there was still no evidence presented at trial from which a reasonable inference can be drawn that Bi-Lo was responsible for creating the alleged hazard or had actual or constructive notice of its presence. As noted in the above factual recitation, no witness offered any testimony that Bi-Lo created the hazard or had actual notice of the foreign substance's existence prior to the fall. Indeed, Ms. Mizell herself conceded as much. Thus, the case turns on whether Bi-Lo had constructive notice that the foreign substance was on the floor before Ms. Mizell's fall.

With respect to constructive notice, the issue is not merely whether the foreign substance was on the ground before the fall—obviously, in every case involving a slip-and-fall on a foreign substance, the foreign substance is present for some amount of time before the fall. The question is whether the

notice thereof.

foreign substance was on the floor for such a length of time as to infer that the storekeeper was negligent in not discovering and removing it, and this critical question “is not one that can be left to speculation.” Gillespie, 302 S.C. at 92, 394 S.E.2d at 25.

Our Supreme Court has consistently disapproved of allowing a jury to speculate on the issue of constructive notice. In Wimberly v. Winn-Dixie Greenville, Inc., 252 S.C. 117, 122, 165 S.E.2d 627, 629 (1969), the Court concluded that the trial court should have directed a verdict in favor of the defendant in a slip and fall case, holding:

[n]o evidence is pointed out which reasonably tends to prove that the rice was on the floor at any particular time prior to the actual fall. **The jury should not be permitted to speculate that it was on the floor for such a length of time as to infer that defendant was negligent in failing to detect and remove it.**

(emphasis added). Additionally, in Pennington v. Zayre Corp., 252 S.C. 176, 165 S.E.2d 695 (1969), the Court affirmed the grant of involuntary nonsuit against a plaintiff who slipped on a plastic bag, concluding:

The plastic bags were obviously on the floor at the time of the fall. There is no evidence in the record that the bags were on the floor at any time prior thereto. **To hold that the bags had been there sufficiently long that they should have been discovered by the merchant would be pure speculation.**

(emphasis added).

As noted above, the **only** testimony that Ms. Mizell offered on this point was that, after she fell, she saw some smushed grapes to her left that had not been smushed in the fall. She claimed that this observation made her think that the grapes had been there for some time, but expressly conceded that she could not possibly tell how long the grapes had been on the floor. Indeed, her concession necessarily concedes that the length of time that the foreign substance had been on the floor was speculative.

Respectfully, the presence of smushed grapes on the floor as described by Ms. Mizell provides absolutely no evidence from which a reasonable inference can be drawn as to whether the grapes had been there for any particular period of time before the fall, be it measured in hours, minutes, or mere moments. That grapes were smushed in the area of her fall at some unknown (and, based upon the evidence presented, unknowable) time before the fall necessarily leaves to impermissible speculation the dispositive issue of whether the foreign substance was on the floor for such a length of time that a reasonable inference can be drawn that Bi-Lo was negligent in not discovering and removing it, i.e., that Bi-Lo had constructive notice of the foreign substance on the floor prior to the fall. Even viewing the evidence presented in the light most favorable to Ms.

Mizell, the only option available to the jury was to “speculate that [the foreign substance] was on the floor for such a length of time as to infer that defendant was negligent in failing to detect and remove it.” Because this is impermissible,¹² Bi-Lo was entitled to a directed verdict/JNOV, and is now entitled to judgment in its favor as a matter of law.

Lastly, out of an abundance of caution, Bi-Lo must note the line in the trial court’s order denying JNOV that reads, “[i]n this case, [Bi-Lo] concedes in [its] own post-trial motion that [Ms. Mizell] offered evidence of actual or constructive notice.” (Order Denying Post-Trial Motions, p. 3.) Respectfully, this is simply incorrect, and there is no basis for it in the record. Bi-Lo has consistently disputed Ms. Mizell’s ability to present evidence to show the essential elements of her claim, including actual and constructive notice, and in no way can Bi-Lo fairly be deemed to have conceded this point. (See Trial Tr. p. 221, line 13 - p. 225, line 3, p. 227, line 21 - p. 228, line 5; Bi-Lo’s Post-Trial Motion; Post-Trial Motion Hearing Transcript.)

¹² See e.g. Wimberly.

II. The trial court erred and prejudiced Bi-Lo by refusing to charge the jury on Bi-Lo's affirmative defense of comparative negligence, essentially granting Ms. Mizell a directed verdict as to this defense, and refusing to include comparative negligence for the jury's consideration on the verdict form (and also in later denying Bi-Lo a new trial on account of this error when Bi-Lo again raised this issue via post-trial motion).

In ruling against Bi-Lo on this issue, the trial court found that there was insufficient evidence presented to submit the issue of Ms. Mizell's comparative negligence to the jury. (Trial Tr. p. 230, lines 12-25; Order Deny Post-Trial Motions, pp. 8-9.) Respectfully, the trial court erred in this regard.

“The determination of respective degrees of negligence attributable to the plaintiff and the defendant presents a question of fact for the jury, at least where conflicting inferences may be drawn.” Hurd v. Williamsburg County, 363 S.C. 421, 429, 611 S.E.2d 488, 492 (2005). Because the term is relative and dependant on the facts of a particular case, comparing the negligence of two parties is ordinarily a question of fact for the jury. Creech v. South Carolina Wildlife and Marine Res. Dep't, 328 S.C. 24, 32, 491 S.E.2d 571, 575 (1997); *see also* Ross v. Paddy, 340 S.C. 428, 434, 532 S.E.2d 612, 615 (Ct. App. 2000) (even where the evidence is uncontradicted, the jury may believe all, some, or none of the testimony, and where the credibility of the witness has been questioned, the matter is properly left to the jury to

decide.). The trial court's ruling on this issue essentially granted Ms. Mizell a directed verdict as to Bi-Lo's comparative negligence defense, and, of course, in ruling on a motion for a directed verdict, the trial court must view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motion, in this respect, Bi-Lo. Erickson v. Jones St. Publishers, LLC, 368 S.C. 444, 463, 629 S.E.2d 653, 663 (2006).

As set forth in the above factual recitation, Ms. Mizell's trial testimony described an open and obvious hazard consisting of a "lot" of water and many grapes. Ms. Mizell was pushing an empty shopping cart, and had an unobstructed view of the floor in front of her. When asked why she failed to observe what she described as a large hazard despite her unobstructed view, Ms. Mizell testified that she was not looking down at where she was walking. Indeed, Bagley, testified that, immediately after the fall, he was mad at Ms. Mizell, believing her to be clumsy.

The trial court appeared to find that, because Ms. Mizell called all of the trial witnesses in her case-in-chief, no evidence could have been presented to support Bi-Lo's affirmative defense of comparative negligence. (Order Denying Post-Trial Motions, p. 9) ("There were no conflicting inferences to be made from the evidence presented as [Bi-Lo] presented

none. Further, [Bi-Lo] presented no witnesses and rested its case after the presentation of [Ms. Mizell's] case in chief. [Bi-Lo] failed to present a scintilla of evidence of negligence. . . . [Bi-Lo's] failure to present evidence of [Ms. Mizell's] negligence barred them from receiving a comparative negligence jury instruction in this case.") This is plainly incorrect.

Under any fair view of Ms. Mizell's own testimony (and, certainly, viewing it in the light most favor to Bi-Lo), which is undeniably evidence presented in this case, there is at least a reasonable inference that Ms. Mizell should have observed the hazard and avoided it, and that she did not exercise reasonable care for her own safety. Respectfully, because this inference existed, the trial court was obligated to charge the jury on comparative negligence and submit the issue of Ms. Mizell's comparative negligence for the jury's consideration. Because the trial court's failure to do this prejudiced Bi-Lo, Bi-Lo is entitled to a new trial absolute. Dalon, 320 S.C. at 540, 466 S.E.2d at 372; Ballou, 291 S.C. 140, 352 S.E.2d 488; Mouzon, 282 S.C. 233, 317 S.E.2d 756.

Lastly, with particular respect to prejudice suffered by Bi-Lo, Bi-Lo notes the following language from the trial court's order denying its post-trial motions: "[Bi-Lo] did not argue any facts that could lead a jury to infer comparative negligence during closing arguments." (Order Denying Post-

Trial Motions, p. 9.) Bi-Lo submits that this actually highlights the prejudice it suffered; it could not argue comparative negligence to the jury during its closing, because the trial court had already ruled that defense out of the case.

III. The trial court erred by refusing to grant Bi-Lo a new trial where the jury's verdict was grossly and shockingly excessive in light of the evidence presented so as to be tainted an improper motive.

A trial court may grant a new trial absolute on the ground that the verdict is excessive or inadequate. Rush v. Blanchard, 310 S.C. 375, 426 S.E.2d 802 (1993). The trial court must grant a new trial absolute if the amount of the verdict is grossly inadequate or excessive so as to shock the conscience of the court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption or some other improper motives. O'Neal, 314 S.C. at 527, 431 S.E.2d at 556.

As set forth in the above factual recitation, Ms. Mizell testified that she did not miss work on account of the subject fall, and that she had no lost wage claim. She presented no expert medical evidence of her injuries, no evidence that she suffered any permanent injury or disability as a result of the fall, and no evidence of the need for any future treatment. She presented evidence of medical costs totaling \$3,814.00. This was in the form of medical bills entered into evidence, none of which reveal any objective

evidence of injury, only costs for chiropractic care and diagnostic tests that did not reveal any physical injury. (Plaintiff's Exhibit 1 (Medicals (Group of 7).) All of her medical treatment came after consultation with her attorney.

Records introduced at trial showed that, according to Ms. Mizell, she was in almost no pain as of two months and 14 days after the fall (i.e., as of November 13, 2008). Ms. Mizell conceded that doctors could not link any further medical treatment she received after November 13, 2008 to the fall. (Trial Tr. p. 118, line 24 - p. 119, line 4.) Her claims at trial of ongoing back pain related to the fall were contradicted by a 2010 record from MUSC wherein she expressly complained of back pain that was different from that she dealt with as a result of the fall, and which her doctor viewed as being substantially caused by her weight.

Under the circumstances, the jury's award of \$71,874.00 to Ms. Mizell is grossly and shockingly excessive. The verdict, which is more than 18 times her medical expenses, is particularly astonishing when viewed in conjunction with the facts that the award (1) exceeded even what her counsel proposed during closing argument by \$23,958.00 (percentage-wise, it was 50% more than counsel's proposal of \$47,916.00), and (2) it was clearly intended to award Ms. Mizell attorneys' fees as evidenced by the jury's

question to the trial court about an award of attorney's fees and the fact that subtracting 1/3rd (the customary standard percentage of an attorney's contingent fee) from the verdict amount yields exactly Ms. Mizell's counsel's proposed award of \$47,916.00. While, as argued below, Bi-Lo contends that the jury's clear (and improper) award of attorney's fees—where such fees were not recoverable under any cause of action submitted to it and the trial court did not instruct the jury that it could award attorney's fees—is alone enough to warrant the grant of a new trial, it also, in conjunction with the sheer size of the verdict relative to the evidence, warrants the grant of a new trial absolute because it reveals that the jury's verdict was the result of passion, caprice, prejudice, partiality, corruption or some other improper motive. See Wachovia, 397 S.C. at 616, 725 S.E.2d at 717 (“The combined effect of the three elements of the jury’s verdict in this case demonstrates the jury awarded relief that was grossly excessive, based its decision on matters outside of the evidence, and did not follow the jury instructions.”)^{13 14}

¹³ In its order denying post-trial motions, the trial court writes: “[Bi-Lo] references statements made in closing argument by [Ms. Mizell]. [Bi-Lo] did not object even once during [Ms. Mizell’s] proper closing arguments, and therefore has not basis for this line of argument.” (Order Denying Post-Trial Motions, p. 7.) Respectfully, Bi-Lo believes that the trial court misses the point with respect to Bi-Lo’s reference to Ms. Mizell’s counsel’s closing argument. Bi-Lo does not contend that counsel’s argument was improper. Bi-Lo is noting only that, during closing argument, Ms. Mizell’s counsel proposed to the jury that it award Ms. Mizell the specific amount of \$47,916.00, which

IV. The trial court erred by not granting Bi-Lo a new trial where the jury improperly awarded Ms. Mizell attorney's fees.

As set forth in the above factual recitation, during closing arguments, Ms. Mizell's counsel proposed to the jury that it return a verdict of exactly \$47,916.00. After beginning its deliberations, the jury sent back a note asking if it could award attorney's fees. After the trial court advised the jury that it had to award specific dollar amount, the jury returned a verdict of exactly \$71,874.00.

The odd figure of the jury's verdict is undeniably telling in light of the jury's question about awarding attorney's fees and the odd figure that Ms. Mizell's counsel proposed that the jury award during closing argument. It cannot be denied that the widely-held public belief is that a plaintiff's attorney typically receives 1/3 of the total award as a contingent fee.¹⁵ Contrary to the trial court's order denying Bi-Lo's post-trial motions, it does

amount is exactly what is left over after deducting 1/3 from the jury's verdict of \$71,874.00.

¹⁴ Also, in its order denying post-trial motions, the trial court writes: "In fact, [Bi-Lo's] own counsel asserted to the court, the jury can award any amount of damages from '\$0 to \$1,000,000.'" (Order Denying Post-Trial Motions, p. 11.) A review of the transcript plainly reveals that counsel was espousing a general legal proposition that a jury's verdict should be a number. (Trial Tr. p. 288, lines 7-11.) It cannot reasonably be found that Bi-Lo's counsel was suggesting that the jury's verdict in this case could reasonably be \$1,000,000 or otherwise suggesting, conceding, or waiving any later argument that the jury's verdict—once it was reached—was excessive or that it was improperly motivated. To the extent that the trial court's ruling relied upon such a finding it is clearly erroneous.

¹⁵ Indeed, this belief is so widely held that Bi-Lo submits judicial notice of the same may properly be taken by this Court (and the trial court erred in not recognizing this). See Rule 201, SCRE.

not matter whether Ms. Mizell's fee agreement with her counsel actually called for a 1/3 contingent fee; it is enough that the jury's verdict clearly reflects that its motivation was to award Ms. Mizell an amount which, deducting 1/3, yielded the award her counsel proposed.

Of course, as noted above, when 1/3 of \$71,874.00 is subtracted, the remainder is exactly \$47,916.00. Under the circumstances, this simply cannot be seen as a coincidence. Contrary to the trial court's order denying Bi-Lo's post-trial motions, no speculative "delv[ing] into the minds of the jurors" or "dissect[ing] the discussions which took place in the jury room" is needed to see what happened here. (Order Denying Post-Trial Motions, p. 11.) It is clear that the jury awarded Ms. Mizell the entire amount her counsel proposed and impermissibly added an amount above that for attorney's fees. Respectfully, it cannot reasonably be viewed otherwise or explained away as the trial court did in its order denying Bi-Lo's post-trial motions.

"Attorney's fees are not recoverable unless authorized by contract or statute." Jackson, 326 S.C. at 307, 486 S.E.2d at 759. Indeed, a claim of attorney's fees, even where it does rightfully exist, is not within the province of the jury; it is an action at law, in the discretion of trial court. Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 436, 673 S.E.2d 448,

458 (2009). Here, attorneys' fees were not recoverable by Ms. Mizell under any cause of action pleaded or presented to the jury, and the trial court at no time instructed the jury that it could award attorney's fees. (Complaint; Trial Tr. p. 267, line 18 - p. 293, line 25; Verdict Form.)

As this Court recently observed in a remanding a case for a new trial where a jury impermissibly awarded attorneys' fees:

The parties presented no evidence of attorney's fees, the trial court did not instruct the jury that it could award attorney's fees, and as a matter of law, attorney's fees are not recoverable in this action. . . . The trial court could not cure this improper action of the jury by simply excluding the attorney's fees from the judgment.

Wachovia, 397 S.C. at 617, 725 S.E.2d at 716. In this case too, the jury's improper award of attorney's fees compels the grant of a new trial, and the trial court erred in denying the same to Bi-Lo.

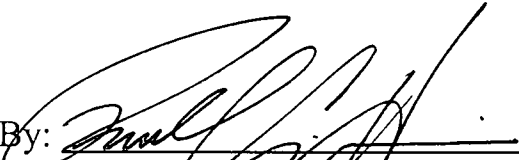
CONCLUSION

For the foregoing reasons, the trial court should be reversed, with a directed verdict/JNOV/judgment as a matter of law being entered (or directed to be entered by the trial court) in favor of Bi-Lo or, alternatively, this case should be remanded to the trial court for a new trial absolute.

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,

YOUNG CLEMENT RIVERS, LLP

By: 

Stephen L. Brown (SC Bar No. 66468)

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Attorneys for the Appellant, Bi-Lo, LLC

Charleston, South Carolina

Dated: 6/19/13

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Dorchester County
Court of Common Pleas

DeAndrea G. Benjamin, Circuit Court Judge

Case No. 2009-CP-18-0452

Rita M. Pugh,

Respondent,

v.

Bi-Lo, LLC,

Appellant.

**APPELLANT'S DESIGNATION OF MATTER TO BE INCLUDED
IN THE RECORD ON APPEAL**

YOUNG CLEMENT RIVERS, LLP
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Attorneys for the Appellant

RECEIVED
JUN 24 2013

SC Court of Appeals

TO: THE HONORABLE JUDGES OF THE SOUTH CAROLINA
COURT OF APPEALS

The Appellant proposes the following to be included in the Record on
Appeal:

1. Order Denying Post-Trial Motions;
2. Summons and Complaint;
3. Answer;
4. Verdict Form;
5. Judgment entered April 24, 2012
6. Form 4 Judgment entered August 20, 2012;
7. Trial transcript in its entirety;
8. Post-trial motion hearing transcript in its entirety;
9. Plaintiff's Exhibit 1 (Medicals (Group of 7));
10. Plaintiff's Exhibit 2 (Bi-Lo Floor Log);
11. Plaintiff's Exhibit 3 (Bi-Lo Incident Report);
12. Defendant's Exhibit 3 (MUSC report dated July 20, 2010);
13. Bi-Lo's Proposed Jury Charges (Court's Exhibit 4);
14. Note from Jury (Court's Exhibit 5); and
15. Bi-Lo's Post-Trial Motions.

I certify that this Designation of Matters contains no matter which is
irrelevant to this appeal.

Respectfully submitted,

YOUNG CLEMENT RIVERS, LLP

By: 

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Charleston, South Carolina

Dated: 6/19/13

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PROOF OF SERVICE

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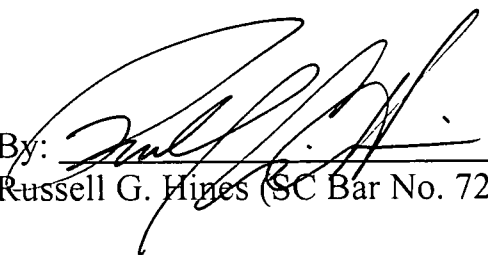
JUN 24 2013

SC Court of Appeals

I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for the Appellant above named, do hereby certify that I have served **the Initial Brief of Appellant** and the **Appellant's Designation of Matters to be Included in the Record on Appeal** on the above-named Respondent by depositing a copy of the same in the United States Mail, postage prepaid, on June 19, 2013, addressed as follows to the Respondent's counsel of record:

Julio A. Rossington, Esquire
Rossington Law Offices, LLC
1305-C N. Main Street, #140
Summerville, SC 29483

YOUNG CLEMENT RIVERS, LLP

By: 
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Charleston, South Carolina

Dated: 6/19/13