STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Anne Lytle and Paris Lytle ,

Plaintiff,

vs.

Bi-Lo, LLC

Defendant.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO: 2012-CP-26-9164

ORDER
GRANTING DEFENDANT BI-LO, LLC'S
MOTION FOR SUMMARY JUDGMENT

This matter comes before me upon motion by Defendant Bi-Lo, LLC ("Bi-Lo") for summary judgment. For the reasons that follow, I find that Defendant's motion should be granted. This matter was heard on June 4, 2013, at the Horry County Courthouse. Appearing on behalf of the Defendant was Jason Luther, Esquire. Appearing on behalf of the Plaintiffs was Frank A. Barton, Esquire. After reviewing the record, including the deposition testimony of the Plaintiffs, and reviewing the memoranda of law and hearing the able arguments of counsel, I hereby find that the Defendant's motion for summary judgment is proper and that the motion should be granted.

BACKGROUND

This is a slip and fall action. On March 4, 2006, Plaintiff Anne Lytle ("Mrs. Lytle") was entering the line for the checkout counter at Bi-Lo when she slipped and fell on a plastic bag. Mrs. Lytle testified in her deposition that the bag was on the floor at the front of the checkout aisle, not the back of the aisle where the cashier usually bags the groceries. There is no dispute that a plastic bag was on the floor where Mrs. Lytle fell.

Mrs. Lytle testified that she did not see the bag at all before she fell. She has no idea how the bag got on the floor. She did not know whether any Bi-Lo employee knew the bag was on the floor before she fell, or if any Bi-Lo employee had a chance to see the bag on the floor before she

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fell. Mrs. Lytle also testified that she has no idea how long the bag was on the floor before she fell. No evidence was presented establishing how the bag came to be on the floor, or how long it had been there.

Angel Jackson, the Store Director, testified that Bi-Lo inspects the floors every two hours for debris or other spills, and any such hazards are cleared from the floors at the time of inspection. According to Bi-Lo's records, the incident occurred at 7:25 p.m., and the floors had last been inspected at 6:30 p.m. Ms. Jackson further testified that prior to Mrs. Lytle's fall, Bi-Lo had received no complaints about a plastic bag on the floor. No evidence was presented that Bi-Lo had been notified of the bag on the floor prior to Mrs. Lytle's fall.

ANALYSIS

Merchants are not insurers of the safety of their customers. Howard v. K-Mart Discount Stores, 293 S.C. 134, 136, 359 S.E.2d 81, 82 (Ct. App. 1987). Rather, they owe customers the duty of exercising ordinary care to keep the premises in a reasonably safe condition. Moore v. Levitre, 294 S.C. 453, 365 S.E.2d 730 (1988). The mere fact that the bag was on the floor is insufficient, in and of itself, to establish liability. Gillespie v. Wal-Mart Stores, Inc., 302 S.C. 90, 91, 394 S.E.2d 24, 25 (Ct. App. 1990).

It is well established in South Carolina that a customer who seeks to recover for injuries sustained as a result of a fall caused by a foreign substance on a storekeeper's floor must prove either that (1) the foreign substance causing the fall was placed on the floor by the storekeeper, or (2) the storekeeper had actual or constructive notice of the presence of the foreign substance on the floor and failed to remove it. Wintersteen v. Food Lion, Inc., 344 S.C. 32, 35, 542 S.E.2d 728, 729 (2001); Bessinger v. Bi-Lo, Inc., 329 S.C. 617, 496 S.E.2d 33, 34 (Ct. App. 1998); Simmons v. Winn-Dixie Greenville, Inc., 318 S.C. 310, 457 S.E.2d 608, 609 (1995); Calvert v. House Beautiful Paint and Decorating Ctr., Inc., 313 S.C. 494, 443 S.E.2d 398, 399 (1994); Gillespie v. Defendant

Stores, Inc., 302 S.C. 90, 394 S.E.2d 24 (Ct. App. 1990); Dennis v. Defendant Stores, Inc., 301 S.C. 529, 392 S.E.2d 810 (Ct. App. 1990). In this case, Plaintiff has failed to provide any evidence that the plastic bag that caused her fall was placed on the floor by Bi-Lo or that Bi-Lo had actual or constructive notice of the presence of the bag on the floor and failed to remove it.

First, Plaintiff has failed to produce any evidence that Bi-Lo placed the plastic bag on the floor. At best, Mrs. Lytle could only speculate that perhaps "someone" dropped the bag from the checkout counter, but she did not know whether that someone was a Bi-Lo employee or a customer. Such speculation is wholly inadequate to establish that Bi-Lo created the dangerous condition. Harris Teeter, Inc. v. Moore & Van Allen, PLLC, 390 S.C. 275, 299, 701 S.E.2d 742, 754 (2010) ("To survive summary judgment, the evidence presented must amount to more than mere speculation and conjecture."); see also Tillery v. Pantry, Inc., 2007 WL 1594380, 3 (D.S.C. Jun. 1, 2007) (applying South Carolina law and granting summary judgment in slip and fall action because the plaintiff's testimony was, "No, I don't know" who put the foreign substance on the ground).

Second, Plaintiff has failed to produce any evidence that Bi-Lo had actual or constructive notice of the plastic bag on the floor but failed to remove it. Plaintiff admits that she does not know if any Bi-Lo employee actually knew the bag was on the floor before she fell. There is no other evidence that would establish that Bi-Lo had notice of the bag prior to Plaintiff's fall. In addition, Plaintiff has presented no evidence regarding the length of time the plastic bag had been on the floor sufficient to establish Bi-Lo's constructive notice. Plaintiff testified she had no idea how long the bag had been on the floor. It would be impermissible to speculate that the bag had been on the ground sufficiently long that Bi-Lo should have discovered the bag and was negligent in failing to remove it. Pennington v. Zayre Corp., 252 S.C. 176, 179, 165 S.E.2d 695, 696 (1969) ("There is no evidence in the record that the bags were on the floor at any time prior [to the accident]. To hold that the bags had been there sufficiently long that they should have been discovered by the merchant

would be pure speculation."); accord Wintersteen v. Food Lion, Inc., 336 S.C. 132, 136, 518 S.E.2d 828 (Ct. App. 2000).

Plaintiff argues that the plastic bag was in the exclusive control of Bi-Lo and that this circumstantial evidence is sufficient to establish that Bi-Lo created the dangerous condition. However, Plaintiff's argument that the grocery bag was in the exclusive control of the defendant and, therefore, the defective condition had to have been created by the defendant sounds in *res ipsa loquitur* rather than circumstantial evidence. Watson v. Ford Motor Co., 389 S.C. 434, 453, 699 S.E.2d 169, 179 (S.C. 2010) ("South Carolina does not follow the doctrine of *res ipsa loquitur*."). Regardless, our courts have routinely held that the plaintiff is held to a higher standard to avoid summary judgment in slip and fall cases. See Harris Teeter, Inc., 390 S.C. at 299, 701 S.E.2d at 754.

CONCLUSION

Plaintiff has failed to establish that Bi-Lo caused the plastic bag to be on the floor. Moreover, there is no evidence that Bi-Lo had either actual or constructive notice of a dangerous condition prior to the Plaintiff's fall. Therefore, it is

ORDERED, ADJUDGED and **DECREED** that Defendant Bi-Lo, LLC's motion for summary judgment be and hereby is **GRANTED**.

IT IS SO ORDERED.

/s/ Benjamin H. Culbertson

The Honorable Benjamin H. Culbertson
Presiding Judge, Fifteenth Judicial Circuit

Georgetown, South Carolina
June 17, 2013