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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

G.D. Morgan, Jr., Circuit Court Judge

Appellate Case No. 2024-000678
Trial Court Case No.: 2022-CP-23-00564

Camille Bird, Appellant,

v.

PetSmart, LLC,and FreshPet, Inc., Defendants,
Of which, PetSmart, LLC is the Respondent.

INITIAL BRIEF OF THE APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the circuit court err when it found there to be no genuine issue as to any material fact as there was insufficient evidence establishing PetSmart either placed the water on the floor or had actual or constructive notice of the water on the floor at the time of the fall?

The question includes among other things:

A. Did the trial err in ruling that there was no genuine issue as to any material fact as there was insufficient evidence establishing PetSmart either placed the water on the floor or had actual or constructive notice of the water at the time of the fall

B. Did the trial court err when it decided that PetSmart employee Jordan Coates's statement in the post-fall reports in which he wrote that the "pet food refrigerator has been leaking", as well as internal PetSmart corporate email, were made solely in reference to a July-23, 2019, leak and therefore do not create a reasonable inference that PetSmart had notice, either constructive or actual of the refrigerator leaking water on the floor causing Ms. Bird to fall?

C. Did the trial court err when it ruled that there was insufficient evidence that a sign, if it was there, was placed in response to the puddle of water Plaintiff claims to be the cause of her fall which would constitute evidence of notice of water on the floor to respondent PetSmart.

STATEMENT OF THE CASE

This case is a premises liability case sounding in negligence. The date of the incident is September 6, 2019. The appellant Camille Bird, while shopping at the respondent PetSmart's store located at 1300 Woodruff Road in Greenville County on that date, fell in water on the floor in front of a refrigerator owned by FreshPet, Inc. that had spilled out of the refrigerator. The water had come from a drain pan under the refrigerator, said pan had become full and was leaking from the pan onto the floor.

On February 1, 2022, the appellant Camille Bird (hereinafter "plaintiff" or "appellant" or " Ms. Bird") filed a Summons and Complaint against two defendants PetSmart LLC (hereinafter "defendant" or "respondent" or "PetSmart") and defendant FreshPet, Inc. in the Thirteenth Circuit Court of Common Pleas in Greenville County. PetSmart was served with the Summons and Complaint on February 7th, 2022. Defendant FreshPet Inc was served on February 7th, 2022, as well. PetSmart filed its Answer on March 8, 2022. FreshPet Inc. filed its Answer on March 4th, 2022.

The plaintiff resolved her case against defendant FreshPet, Inc. leaving only the respondent PetSmart in the case. On November 8th, 2023, respondent PetSmart filed a Motion for Summary Judgment. On January 7th, 2024, plaintiff-appellant filed the Affidavit of Brian Durig, P.E., along with exhibits. On January 8th, 2024, plaintiff-appellant filed a Memorandum in Opposition to respondent PetSmart's Motion for Summary Judgment, along with exhibits. That same day, January 8th, 2024, respondent PetSmart filed its Memorandum in Support of Summary Judgment, along with exhibits. Respondent PetSmart's counsel also filed additional exhibits, a photograph and the deposition transcript of Don Johnson on January 10th, 2024. On January 10th, 2024, the circuit court, Honorable G.D. Morgan, Jr., presiding, held a hearing at the Greenville

County Courthouse on respondent PetSmart's Motion for Summary Judgment and at the conclusion of the hearing, took the matter under advisement. On January 23, 2024, the circuit court Judge Morgan filed a "Form 4" Order granting defendant-respondent PetSmart's Motion for Summary Judgment, directing counsel for PetSmart to submit a formal written order. On February 6th, 2024, the circuit court Judge Morgan filed the court's formal Order granting defendant-respondent PetSmart's Motion for Summary Judgment deciding that essentially there was no genuine issue of material fact that respondent PetSmart had notice of the hazard. On February 15th, 2024, plaintiff-appellant Ms. Bird filed a Motion to Reconsider pursuant to Rule 59(e) with the circuit court. On April 1, 2024, the circuit court Judge Morgan denied plaintiff-appellant's Motion to Reconsider by written order filed that day. On April 24th, 2024, plaintiff-appellant served her Notice of Appeal on defendant-respondent PetSmart's counsel, Matthew LaFave. On April 25th, 2024, plaintiff-appellant filed her Notice of Appeal with the circuit court and with the South Carolina Court of Appeals as well Proof of Service of the Notice of Appeal. This appeal follows.

STANDARD OF REVIEW

In reviewing a grant of a summary judgment motion, an appellate court applies the same standard which governs the trial court, that is, looking at the evidence and inferences in a light most favorable to the nonmoving party, is there a genuine issue of material fact. Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 114, 410 S.E.2d 537, 545 (1991). An appellate court "review[s] a grant of summary judgment using the same yardstick as the trial court: we view the facts in the light most favorable to . . . the non-moving party, and draw all reasonable inferences in her favor." Abdelgheny v. Moody, 432 S.C. 346, 349, 852 S.E.2d 225, 227 (Ct. App. 2020) "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party." Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997). "On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." Lanham v. Blue Cross & Blue Shield of S.C., Inc., 349 S.C. 356, 563 S.E.2d 331, (2002)(Citing Williams v. Chesterfield Lumber Co., 267 S.C. 607, 230 S.E.2d 447 (1976)). "Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts." Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000)(citing Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997). **A trial court commits reversible error when it "choos[es] between the multiple inferences emerging from the evidence.** Rule 56, SCRCP, reserves that choice to the jury." Abdelgheny v. Moody, 432 S.C. 346, 351, 852 S.E.2d 225, 228 (Ct. App. 2020)(emphasis added)

ARGUMENT

FACTS

On September 6, 2019, around 9:30AM, soon after the store opened at 9:00AM, appellant Camille Bird (hereinafter "plaintiff" or "appellant" or " Ms. Bird") entered the respondent PetSmart, LLC (hereinafter PetSmart" or "defendant" or respondent") store #1300 located at 1125 Woodruff Road in Greenville, SC, to purchase FreshPet dog food for her pet dog Carolina, a beagle mix. FreshPet sells its dog food products in a refrigerator cooler that it owns and places in the store with through a contract its has with PetSmart. This was the second time that Ms. Bird had purchased pet food from the FreshPet Fridge at this PetSmart location. The previous time had been just 7 or so days earlier on August 29th, 2019. Bird Dep Trans pp 65;23 –66:4. Ms. Bird passed through the entrance doors and went to the FreshPet refrigerators to pick up chicken recipe dog food to purchase. She left Camille in the car. She had her purse over her shoulder, and nothing in her hands. Bird Dep Trans p 15:5-12, p 64:10-15. The refrigerators were located on an aisle that was on the left side of the store, about a quarter of the way into that aisle. Bird Dep Trans pp 63:18-64:3. Ms. Bird entered the aisle where the refrigerators were located, walked on the left side of the aisle. The FreshPet fridges were on the right side of the aisle. Id. She did this so she could see the refrigerators better and see what product was available to find the food she wanted. Id.

There were three refrigerators lined up side-by-side, one in the center, one on the left, and one on the right. Bird Dep Trans pp15:19-16:18. The refrigerators had FreshPet labels signage across the top of the refrigerator. Bird Dep Trans p 64:4-9. But there was something unusual to Ms. Bird about the center refrigerator. Bird Dep Trans p 66:12-17. The center refrigerator did not have any products in it. Bird Dep Trans 16:16-21. There were no lights on in that particular

refrigerator, either. Bird Dep Trans p 17: 20-25. Ms. Bird had noticed that the center refrigerator was in the same condition on August 29th, 2019, as it was on September 6, 2019. Bird Dep Trans p 66:12-17.

Thus, Ms. Bird decided to retrieve pet food from the refrigerator on the *left* because there was no product and the lights were off in the center refrigerator. Ms. Bird did not know whether the power was off to the refrigerator or not, but it was unusual to her that lights would be off and there was no product in that machine. The food she decided to purchase was on the top shelf of the refrigerator that was on the left. Bird Dep Trans pp 64:22-65:11.

Ms. Bird then approached the refrigerator on the left, opened the door, and retrieved the product. Bird Dep Trans pp 66:23-68:5. After she retrieved the food from the refrigerator, she stepped back to shut the door. Id. She then takes a step to her right, to begin walking across the front of the center refrigerator and as she takes the next step, she suddenly slips and falls, hitting a refrigerator on the way down before falling hard onto the floor. Id. pp 66-68. She fell in a "slide down" -she slid down, hitting the refrigerator on the way down before landing in seated position, hitting her buttocks on the floor. Id. at 17:12-19:10. Ms. Bird had stepped into a pool of water that that had been leaking from a pan under the center FreshPet refrigerator. Jordan Coates Dep Trans p40 ln 12-17; Id. p36 ln 17- p37 ln20. The pool of water was located in front of and along the center refrigerator, causing her to slip and fall. Bird Dep Trans p 17:16-19; Picture of refrigerator with markings/indications by Jordan Coates.

After Ms. Bird fell, she was sitting on the floor in the pool of water that was right against the center refrigerator. Bird Dep Trans p 18:5-10. She was able to call out "hello" three times. Bird Dep Trans p 69 ln 16-17. Not too long after that, a male PetSmart employee arrives to her.

He was the first employee to arrive. That employee began screaming for help. Bird Dep Trans 68:25-69:9.

Other employees arrived to the location as well, a male employee and a female employee. Bird Dep Trans 70:13-22. Ms. Bird fell in a sitting position with her head slumped to the left side. Her back was against the center refrigerator, and her legs were across the aisle. Bird Dep Tran pp 17-19. Ms. Bird's head was slanted and all she could see was the tile floor. Bird Dep Trans p 70:8-11. Ms. Bird was sitting in a puddle right in front of the center refrigerator where she fell. Bird Dep Trans p 16:12-18. After lifting up Ms. Bird, the three Petsmart employees placed Ms. Bird in a chair on the other side of the aisle about two to three feet from the refrigerator. Bird Dep Trans pp 70:8-11.

Prior to her falling, Ms. Bird did not notice any water leaking from any of the three refrigerators. Bird Dep Tran pp 16:4-18:16. The first time she became aware of water being on the floor was after she fell. Bird Dep Tran p16:9-15. The water was located right under and in front of the center refrigerator.

Ms. Bird never saw a wet floor sign. Bird Dep Trans pp 70:2-5. Ms. Bird disputes that a wet floor sign present.

Eventually Ms. Bird was able to regain strength to stand. She was assisted out to her car and she drove home, though in pain. She was able to attend a doctor's office and was later diagnosed with very serious injuries to her lower spine, back, requiring the implantation of a spinal stimulator.

Store Safety Inspections of its Floors on Day of Fall

Prior to Ms. Bird's arrival at the store, and prior to opening the store that day, PetSmart employees led by opening team leader Yojan Berrios had walked all aisles of the PetSmart store

conducting a safety inspection of the floors looking for any hazards. Jordan Coates Dep Trans pp28:11-30:14; see also Don Johnson Dep Trans Page 27:15 to 27:18. The store opened at 9:00AM. Jordan Coates Dep Trans Page 26:17 to 26:18 and the inspections of all the aisles of the store, including the aisle of the store where the fall took place, would have taken place beginning in the 1-2 hours prior to the store opening, and ending at the time of store open at 9:00AM, just 30-40 minutes before Ms. Bird fell.

Moreover, in addition to the safety inspections that were done immediately before the store opened, store policy requires all PetSmart employees to inspect the floors throughout the day and perform the necessary maintenance. PetSmart Store Appearance Policy. Store policy has a zero tolerance for wet spots on the floor. Store policy requires that there be no wet spots, pet waste, debris on the floor etc. Id. If an employee discovers a wet spot or pet waste on the floor, store procedure requires the employee to remain with the wet spot while another employee is to retrieve the proper tools to clean up the wet spot. Id. Store policy prohibits an employee from leaving a wet spot or pet waste on the floor unattended. Id. Store employees are required to follow store policy and procedure. Don Johnson Dep Trans p 27:6 to 27:8.

Assistant Store manager Jordan Coates arrived at work around 9:00AM on the September 6, 2019. He was going about his usual duties, when he was informed over the radio that a customer had fallen over by the coolers and that his presence was requested. Coates Dep Trans, p31:11 to 31:13. Coates went to the location immediately upon being notified. Coates testified that when he arrived to the fall location he observed Ms. Bird sitting on a red step stool. Jordan Coates Dep Trans p 31:14 to 32:3. Coates saw water on the floor in front of the refrigerator as well as wet floor signs. Coates Dep Trans p32:14 to 32:18

Mr. Coates saw water that spanned the approximate 3 foot width of the front of the refrigerator and extended out approximately 1 ½ feet into the aisle in front of the refrigerator. See Picture of refrigerator with markings by Jordan Coates - Exhibit 1 from Jordan Coates Deposition. PetSmart, through its counsel, produced a picture that was taken on September 13th, 2019, a week after the accident. Email from Matt LaFave to Thomas Creech dated 01/09/2024 with photo of wet floor sign;. Coates at his deposition was asked to illustrate on the picture the water he observed as it appeared on September 6th, 2019.

The water was not spilling out or gushing out. Coates Dep Trans, p 39:14 to 40:16. Coates determined that the water had simply overflowed the pan underneath the refrigerator. Id. p40 ln 12-16; Id. page 37 ln 14 to p 37 ln 20. Coates has testified that in trying to determine how the water got on the floor, "we had noticed that it was -- that it was pooling at that time -- after she had fallen, that we had looked into the fridge and found that the pan was full and that it needed to be worked on." Id. p. 24 ln 20 to p. 25 ln 13.

Water was dripping onto the floor, in "drops . . . it was not flowing or anything." Dep Don Johnson Dep Trans p 48:7 to 48:8. Eventually a towel was put down in front of the refrigerator to keep the drip of water from spilling onto the floor until FreshPet representatives could come to the store and repair the machine. Id.

As to the wet floor sign or signs, Coates testified that he saw wet floor signs when he arrived to the location of the fall. Coates Dep Trans p 35:13 to 35:21. A store employee Jordan Mills, who was one of the first employees on scene, told Mr. Coates that a wet floor sign was up and it had been there near the water prior to Ms. Bird falling. Coates Dep Tran p 46 ln 10 to p 47 ln 17. And according to the report he filled out, Mr. Coates believed that the wet floor signs were up at the time of the injury. Id. p 53 ln 12 to p 53 ln 14

PetSmart through its management and its employees was aware of the leaking propensities of the FreshPet Fridges at its stores, including the Woodruff Road store. In fact just 40 days or so, on July 29, 2019, this same FreshPet Fridge, serial number 6541189 was reported to be "leaking pretty bad on the floor". Exhibit to Durig Affidavit – "Incident Details" page 2 and "The fridge is leaking pretty bad . . ." Exhibit to Durig Affidavit – "Request Detail" DEF0012 Attached to Durig Affidavit). On August 1, 2019, a thermostat was replaced on this same machine. Affidavit of Bryan Durig.

In his experience, Coates had learned that a leak could be any fault of the machine; or sometimes the leak involved condensation build up on hot summer days. Coates Dep Trans, p 22:1 to 22:25. Coates testified in his deposition that "like most refrigerators, they have some sort of drain pans in the bottom of them so if they -- if they were to fill up or anything like that, it could leak." Id. The FreshPet Fridges have "a silver pan on the bottom that we could - we could empty out, that we would check pretty regularly during hot summers and stuff where -- where there could be a little more condensation pooling at the bottom." Id. p 22 ln 18-25. If Petsmart employees noticed a leak they would check "those pans personally to try and keep – make sure that we didn't have any water pooling on the floor." Coates, Jordan, (Page 23:5 to 23:10). However, "most of the maintenance stuff was handled by FreshPet." Coates, Jordan, (Page 23:9 to 23:10)

Store Incident Report states: "Pet food fridge *has been leaking*"

After the fall, Mr. Coates prepared a report, pursuant to standard operating procedure. PetSmart Incident Report Form - DEF-0002. In the "Incident Information" section of the report, Mr. Coates wrote that: *"[c]ustomer slipped on water. No damage.* ***Pet food fridge has been leaking****. Wet floor signs were present."* (emphasis added)

When asked in his deposition what he meant about the statement that the refrigerator “has been leaking”, the following exchange took place in Mr. Coates deposition::

Q. Okay. Let me go back to the -- the statement that you made about the pet food fridge has been leaking. You didn't write anywhere in this statement that the -- the water leaked from the fridge. Is that correct?
A. Correct. Yeah, that's not in the statement.
Q. Right. And so, would you think that a fair interpretation is this pet food fridge has been leaking that it indicates there had been an ongoing leak with the pet food fridge?
. . .
A. It's possible. I'm just not -- I'm not positive as to if it had been ongoing. I -- from my knowledge, is that -- that if it was ongoing, it would be very short term like, noticed that day. Because usually we have that communication that if there's any sort of issues with the coolers.
Q. Okay. And it says, noticed that day. What do you mean by that?
A. What I mean by that is that if, somebody had noticed that there was water on the floor and put the wet floor sign out, that that's when they probably initially noticed there could have been an issue.
Q. Okay. That could have been causing the leaking?
A. Yeah.
Q. An issue with the fridge causing the leaking?
A. Yes.
Q. And that's why they would have put a wet floor sign out?
A. Correct.
Q. Okay. At that point, an employee that would have made that decision, they should have notified a team leader to get the problem fixed. Would you agree with that?
A. Yes.

Coates Dep Trans p 54:4 to 55:14

Post accident investigation, repairs, and evidence

That day on September 6, 2019, in a phone call, Jordan Coates reported the incident. There is an email which states Description of Incident: THE REFRIGERATOR HAD BEEN LEAKING. THERE WAS A WET FLOOR SIGN UP IN THE AREA. THE CUSTOMER SLIPPED AND FELL IN WATER ON THE FLOOR. THE CUSTOMER FELL ON HER RT. SIDE. THE CUSTOMER SUSTAINED AN UNKNOWN INJURY TO THE RT. HIP." Store 1300 Manager email – DEF0105

A few days after the plaintiff's falling and becoming injured, PetSmart reported the defective refrigerator to FreshPet, who eventually sent a vendor, Konop, out to repair the refrigerator. A service order for that repair job dated September 17, 2019, stated that the FreshPet Fridge was leaking badly and "was a danger to associates and PP". Refrigerator not functioning FreshPet Work Order dated September 10, 2019 FreshPet stated in its Answers to Interrogatories that wicking pads in the refrigerator pan were causing the leaking problem and thereafter the wicking pads were replaced. FreshPet Answers to Plaintiff's First Set of Interrogatories

Email messages between PetSmart corporate discussing the store's knowledge of the leaking machine were turned over in discovery. An internal corporate email regarding this plaintiff's fall in this case plainly reveals that the store had knowledge of the leaking refrigerator before the plaintiff fell on September 6, 2019. Email Krause to Ramirez PetSmart of September 8, 2021 – DEF0023 is an email chain between three PetSmart employees, Carl Fuller, Michelle Krause, and Judy Ramirez, all PetSmart corporate employees located in Arizona. In an attempt to locate reports that the store said it made regarding the refrigerator leaking before the plaintiff fell, Michelle Krause writes "[t]he store is saying they reported a leak from the refrigerator to corporate before 9/6." Id. In that same email, Michelle Krause further states "[t]he incident occurred on

9/6/2019. However, **the store is saying that they reported a leak from the refrigerator to corporate before 9/6 because apparently it had been leaking before the customer fell**." Id. (emphasis added). Michelle Krause then asks "Do we have any record ***of this internally*** **or would the *first request* for repair be the one Carl noted below on 9-9-2019**?" (emphasis added).

Bryan Durig, mechanical engineer, retained by the plaintiff filed an affidavit in this case. In his affidavit, Durig stated that repair records indicated that the wicking pads were defective and caused the water to accumulate in the pan to such an extent that the water would have spilled from the pan onto the floor. Durig states in paragraph 9 of his affidavit that "a problem with the wicking pads would have taken an extended period of time for water to fill the evaporate drain pan and overflow the pan and spill onto the floor then run out from under the TrueGDM cooler. A problem with the wicking pads would cause a continuous leaking problem – every time to the refrigeration system operated to cool the inside temperature of the cooler – water could spill out of the condensate drain pan onto the floor." Affidavit of Brian Durig and Exhibits

ANALYSIS

I. Did the circuit court err when it found there to be no genuine issue as to any material fact as there was insufficient evidence establishing PetSmart either placed the water on the floor or had actual or constructive notice of the water on the floor at the time of the fall?

"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 v. Food Lion, Inc., 344 S.C. 32, 35, 542 S.E.2d 728, 729–30 (2001)(citing Anderson v. Racetrac Petroleum Inc., 296 S.C. 204, 371 S.E.2d 530 (1988); Pennington v. Zayre Corp., 252 S.C. 176, 165 S.E.2d 695 (1969); Hunter v. Dixie Home Stores, 232 S.C. 139, 101 S.E.2d 262 (1957).

"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 the time of the slip and fall." Wintersteen Id. (citing Calvert v. House Beautiful Paint & Decorating Ctr., Inc., 313 S.C. 494, 443 S.E.2d 398 (1994)); Wimberly v. Winn–Dixie Greenville, Inc., 252 S.C. 117, 165 S.E.2d 627 (1969); Pennington v. Zayre Corp., 252 S.C. 176, 165 S.E.2d 695 (1969); Orr v. Saylor, 253 S.C. 155, 169 S.E.2d 396 (1969); Hunter v. Dixie Home Stores, 232 S.C. 139, 101 S.E.2d 262 (1957); Gilliland v. Pierce, 235 S.C. 268, 111 S.E.2d 521 (1959); Gillespie v. Wal–Mart Stores, Inc., 302 S.C. 90, 394 S.E.2d 24 (Ct.App.1990)."

There exists in this record facts from which a reasonable inference can be drawn, as is required under Rule 56 SCRCP, creating a genuine issue of material fact that PetSmart had notice of the water on the floor of its store before the plaintiff fell so that it could have removed the water from the floor. Thus, the court should have denied PetSmart's motion for summary judgement.

A. Did the trial err in ruling that there was no genuine issue as to any material fact as there was insufficient evidence establishing PetSmart either placed the water on the floor or had actual or constructive notice of the water at the time of the fall

Under South Carolina law " '[c]onstructive notice is a legal inference, which substitutes for actual notice.' " Garrison v. Target Corp., 429 S.C. 324, 340–41, 838 S.E.2d 18, 26–27 (Ct. App. 2020), aff'd in part as modified, rev'd in part, 435 S.C. 566, 869 S.E.2d 797 (2022) (quoting Major v. City of Hartsville, 410 S.C. 1, 3, 763 S.E.2d 348, 350 (2014)). "The defendant will be charged with constructive notice whenever it appears that the condition has existed for such length of time prior to the injury that, under existing circumstances, he should have discovered and remedied it in the exercise of due care; " Anderson v. Winn-Dixie Greenville, Inc., 257 S.C. 75, 77, 184 S.E.2d 77 (1971). However, the plaintiff is not required to "precisely measure the lifespan

of the hazard" in order to prove this "temporal element" of constructive notice. Garrison v Target, Id. Finally, constructive notice is "notice imputed to a person whose knowledge of facts is sufficient to put him on inquiry; if these facts were pursued with due diligence, they would lead to other undisclosed facts." LeFont v. City of Myrtle Beach, 430 S.C. 534, 544, 846 S.E.2d 355, 360 (Ct. App. 2020).

The record is replete with evidence that PetSmart had either actual or constructive notice of the water leaking from the refrigerator prior to Ms. Bird's to fall.

To begin with there is no dispute that the water that had spilled onto the floor from the machine was leaking from a pan underneath and part of the refrigerator onto the floor. Thus this case does not involve water on the floor from an unknown source.

PetSmart knew that the machine had a propensity to leak – due to condensation build up in the hot temperature days. As a result, employees would check the area around the refrigerator to see if there was water on the floor. This would have likely been done every day, probably during morning inspections before the store opened.

Also, the machine appeared to have been malfunctioning for at least a week prior to the fall in this case, per Ms. Bird's testimony. The machine was dark. There was no product in the machine, indicating there was a problem with the machine keeping the food cool.

PetSmart employee store manager Don Johnson testified that the water was slowly dripping from a pan underneath the refrigerator that had filled up. Based on the slow dripping nature of leak, and the size of the pool of water that was on the floor, the reasonable inference is that it would have taken some time, likely hours and certainly more than 30 minutes, for drops of water to accumulate into a pool or puddle measuring 1 ½ feet by 3-4 feet, the entire width of the front of the refrigerator. Jordan Coates and Don Johnson described the leak as a dripping, which would

obviously be of a slow nature, as not flowing or gushing or spilling out like water out of a faucet. In fact Johnson testified that employees were able to use a towel to contain the leak until it could be repaired by FreshPet, the owner of the refrigerator, days later. They placed a towel on the floor in front of the refrigerator to keep the water from leaking out onto the floor. Don Johnson Dep Trans, p 47:17 to 49:2. Thus this was a slow leak that a towel was able to contain and would have taken time to accumulate.

Floor safety inspections were performed that morning beginning around 6:00AM and ending at the store open at 9:00AM. Inspections of the aisle where this fall occurred were performed prior to store opening. Any employee performing a safety inspection of the floor, down that aisle, trained in recognizing and spotting hazards, would have seen this water in front of the refrigerator. Moreover, any employee walking down the aisle of the store where the refrigerators were located and passing by the refrigerator at any time in the 30 minutes between the store opening and the plaintiff falling, would have and should have, in the exercise of reasonable care, seen the water on the floor. PetSmart employees are trained to be on a constant lookout for substances such as water, pet urine and the like on the floors of its stores. PetSmart detects the presence of hazards on the floors of its store through its employees who are to be on a constant lookout for the presence of those substances on the floor. In fact, substances such as liquids, water, etc. were seen on the floor regularly. Coates Dep Trans p 19:14 to 20: 4. Pets regularly urinate on the floor at PetSmart. Id. p20:5 to 20:7. Jordan Coates testified that he cleans up pet urine 2-3 times a day. Id. 20:16 to 20:23. Because pets are allowed into the store, and do frequently urinate in the store, there is an inference that store employees are particularly concerned and particularly focused on identifying spills, leaks, and other liquid hazards on the floors of its store. They pay closer attention to the floors for such hazards as opposed to other types of retailers.

Again, under South Carolina law, plaintiff is not required to prove with precision the temporal element of constructive notice. Garrison v Target Id. Thus Under Rule 56 SCRCP, in order to simply survive the low bar of summary judgment, South Carolina law does not require a plaintiff to prove with precision the exact time of the start of the leak, the drip rate, and the precise length of time it would have taken precisely for the water to accumulate to the size that it did before the fall. Plaintiffs are required to only produce enough evidence to create a reasonable inference as the evidence emerges, not to a preponderance, that defendants have notice, either constructive or actual. Thus, there exists a reasonable inference of constructive notice under Rule 56 SCRCP.

Moreover, the evidence is that this leak involved a dripping leak, and that there was no gushing or flowing of water from the refrigerator. Thus, *the leak was not a sudden leak*, such as a burst pipe which PetSmart would not have known about in time. This leak involves a slow accumulation of water, leaking from a pan underneath the refrigerator. As a matter of common sense, a slow dripping leak could reasonably take hours to accumulate in order to form the size of the puddle, as described and drawn on the photograph by Jordan Coates. This puddle would have been observable by PetSmart employees who are trained to identify and locate these types of hazards, especially in front of a refrigerator that had a known history of defects, condensation build up on hot days, and recent leaking, which PetSmart was aware.

Finally, as stated by plaintiff's expert Brian Durig in his affidavit, the leak in this machine was caused by defective or worn out wicking pads, and would have been a *continuous* leak. Thus, the water would have been persistently leaking, continuously leaking until the problem was fixed. PetSmart would have likely seen or appreciated a continuous leak during its store floor safety inspections performed every morning and throughout the day. Thus, it would have been on notice of such leaks. The trial court's failure to appreciate this evidence is error.

B. Did the trial court err when it decided that PetSmart employee Jordan Coates's statement in the post-fall reports in which he wrote that the "pet food refrigerator has been leaking", as well as internal PetSmart corporate email, were made solely in reference to a July-23, 2019, leak and therefore do not create a reasonable inference that PetSmart had notice, either constructive or actual of the refrigerator leaking water on the floor causing Ms. Bird to fall?

In its ruling granting summary judgment, the trial court found that any reference that the refrigerator "has been leaking" was in fact a reference to a July 23, 2019, leak that was repaired. Thus, the court decided that there was no genuine issue of material fact as to that issue. This ruling was error.

"On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." Lanham v. Blue Cross & Blue Shield of S.C., Inc., 349 S.C. 356, 563 S.E.2d 331, (2002)(Citing Williams v. Chesterfield Lumber Co., 267 S.C. 607, 230 S.E.2d 447 (1976)). Again, Rule 56 prohibits the trial court from "choosing inferences". Abdelgheny v. Moody, 432 S.C. 346, 351, 852 S.E.2d 225, 228 (Ct. App. 2020)(emphasis added)(Rule 56 reserves the choosing of inferences emerging from the evidence to the jury, not the court in deciding a motion for summary judgment). Yet, this is precisely what the trial court did when it determined that the sole and only inference to be drawn from the incident report was that the accident report could only be referring to the July 29 leak. Thus, the trial court committed error.

There are multiple, reasonable interpretations and inferences regarding the meaning of the pet food refrigerator "has been leaking" in the incident report. Obviously, the document speaks for itself. A plain common sense reading of the document itself supports the inference that the water leak had been occurring in the immediate past, continuing into the present, and causing Ms. Bird to fall. In essence, there is a reasonable inference from incident report description "that the machine

has been leaking" that the machine was defective and leaking-which would serve as constructive notice to PetSmart of a pan overflowing that needed repair, and thus notice of water on the floor. This document speaks for itself.

Moreover, this report was an incident report that was prepared in response to, and in the context of, and would contain the relevant facts pertaining to, the plaintiff's fall on September 6, 2019. The PetSmart Incident Report Form was created to identify relevant factors of the plaintiff's fall on September 6, 2019, and the facts having a bearing or relationship to her fall, including the causes of the fall. A reasonable inference is that the leaks referenced in the Incident Report referred to post-July 23rd, 2019, leaks. There is a reasonable inference that an Incident Report would not refer to leaks that had occurred in the past that had been repaired and no longer presented a hazard and could not be a cause of the fall. The Incident Report itself, and the facts contained therein, creates the reasonable inference resolved in favor of the plaintiff, and in a light most favorable to the plaintiff, that FreshPet Fridge began leaking again after July 23, 2019, repair. In fact, *that is exactly what happened*. The FreshPet Fridge in fact began leaking again after July 23, 2019, repairs and required a new wicking pad kit repair to stop the leaking of water that caused Ms. Bird to fall on September 6th, 2019. The repair was not made until after Ms. Bird fell.

When asked in his deposition what he meant when he wrote that the "pet food fridge has been leaking" Mr. Coates did not state that he was referring solely to the July 23, 2019. He testified that he was not "positive" that the leak was ongoing. He said that if the leak was ongoing, he probably meant that the leak had been a short-term leak, as in happening "that day", not a July 23, 2019 leak. Thus, this interpretation, in a light most favorable to the plaintiff, imputes notice to PetSmart of the leak occurring that day – the day of the fall, September 6th, 2019.

Moreover, if his testimony conflicts with the plain ordinary reading of the document, then that would raise issues of Mr. Coates's credibility, which a jury would be needed to resolve. The incident report speaks for itself, so when Mr. Coates writes that the "Pet food fridge has been leaking" there is the inference and evidence that there a leak occurring in the past and continuing into the present and was the cause of the water on the floor in this particular incident. The incident report mentions nothing about the July 2019 leak and subsequent repair.

Thus, deciding that the incident report was referring only to a July 19, 2019 leak necessarily required the court to engage in choosing and selecting the inferences to be drawn from the evidence. This job is reserved for a jury, not the court, under Rule 56 SCRCP.

Corporate email produced in this case also is evidence, and corroborates the other evidence, of Petsmart's knowledge of the leak prior to Ms. Bird falling. The email from Michelle Krause in which she writes "[t]he incident occurred on 9/6/2019. However, **the store is saying** that they reported a leak from the refrigerator to corporate **before 9/6** because apparently ***it had been leaking before the customer fell***."(emphasis added). Krause then adds "Do we have any record of this internally or would the first request for repair be the one Carl noted below on September 9, 2019?" This email is direct evidence in a business record of the defendant's knowledge that the machine was leaking *before the plaintiff fell*. It's an admission. The defendant can attempt to explain away the admission; the defendant's unilateral explanation does not negate the admission made in the email. The email speaks for itself.

Krause begins the email chain in an effort to locate records or reports documenting the store reporting the leaking defective refrigerator before 9/6. From the text of the email, it is apparent that Krause had talked with store employees specifically about Ms. Bird's fall and the cause of her fall. Thus, the store knew that the refrigerator had been leaking "before the customer

fell." If the machine had been repaired and the store had no knowledge of a leak, the store would not have informed Ms. Krause that the machine had been leaking before the customer fell. The store would have simply reported the customer fell on water in front of the refrigerator. The store would not have informed Krause that the refrigerator was leaking water before the customer fell if it had no knowledge of such leaking.

Thus, there is the reasonable inference, in a light most favorable to the plaintiff, that the store in fact did know about a leaking refrigerator in the days prior to Ms. Bird falling and told Krause as much. So Krause then tries to find the report the store was "saying" it had made, and emails Judy Ramirez for any reports that were made. She asks whether there any "record of this internally" or was the first report after the incident, September 9, 2019. Apparently, there were no records of reports of the water leaking in the days before the leak as the store says that it made. The only reports were for after the plaintiff fell and the July 23, 2019 report of refrigerator leaking. But July 23, 2019, leak had been repaired. Thus, there is an inference that the store never made the report its "saying" that it made, even though it was required to do so per store policy.

The court's decision that the email, and incident report referring the previous leaking were made solely in reference to an isolated July 23, 2019, leak is not supported by the record. There is nothing in the email that states that the store had no knowledge of a leak in the days prior to the customer falling. Nor is there any mention in these emails that the store said there was no further leaking known to us after the July 23, 2019, leak and repair. Or that the machine was not leaking in the days prior to the plaintiff falling. The court itself made that inference, which was error. In fact the email clearly states: "it had been leaking **before the customer fell**", which infers a recent leak as a cause of the customer falling, not a remote leak that would have had nothing to do with the customer falling.

Thus, the court erred when it decided that these references to recent leaks or ongoing leaking were made in reference solely to July 23, 2019, leaks. In fact, these documents and the information contained therein, in a light most favorable to the plaintiff appellant Ms. Bird constitute evidence of PetSmart's knowledge of an ongoing leaking problem and water on the floor.

C. Did the trial court err when it ruled that there was insufficient evidence that a sign, if it was there, was placed in response to the puddle of water Plaintiff claims to be the cause of her fall which would constitute evidence of notice of water on the floor to respondent PetSmart.

PetSmart employee Jordan Coates testified that there was a wet floor sign or signs -1 or 2- up in the area of the refrigerators when he arrived to the scene. Furthermore, Coates wrote in the Incident Report that "wet floor signs were present". Mr. Coates testified that he was informed that wet floor signs were put up prior to the plaintiff falling. Moreover, the picture Exhibit ____ that Mr. Coates has testified was a fair and accurate representation of the scene as it existed that day show a wet floor sign in front of the refrigerator **on the left**. The plaintiff disputes the presence of a sign of the presence of a wet floor sign, as she testified there was not one present before she fell, as she did not see one.

Rule 56 SCRCP tasks the court with reviewing the evidence in the record to determine if there is any evidence from which reasonable inference can be drawn that create a genuine issue of material fact. There is obviously a factual dispute as to the presence of a wet floor sign.

Evidence in the record, while not conclusive on the matter, of the presence of a sign creates the inference that an employee in fact noticed the water on the floor and placed a wet floor sign in response. But its inferable that instead of following store policy, the employee simply placed the sign and walked off. There is no evidence in this record that there was an

employee standing at the location of the fall when Ms. Bird fell. Moreover, if a store employee had in fact mopped up a pool of water in front of the refrigerator, that employee would have notice of the leaking refrigerator. As a result, the employee would have known that the refrigerator was leaking and would have been on notice inquiry that the leak was coming from the pan. Constructive notice is "notice imputed to a person whose knowledge of facts is sufficient to put him on inquiry; if these facts were pursued with due diligence, they would lead to other undisclosed facts." LeFont v. City of Myrtle Beach, 430 S.C. 534, 544, 846 S.E.2d 355, 360 (Ct. App. 2020). Thus, the evidence of the presence of a sign constitutes evidence of both the defective refrigerator and the water on the floor.

The plaintiff disputes that there was a wet floor sign, this is simply a factual dispute. There is a genuine issue as to whether there was wet floor sign at the refrigerator on September 6, 2019, prior to Ms. Bird falling. The only photograph produce in this case by the defense of the location of the fall was apparently taken on September 13, 2019, almost a week after the fall. Email from Matt LaFave to Thomas Creech dated 01/09/2024 with photo of wet floor sign. Also, the picture shows the wet floor sign in front of the cooler on the left. If a sign were present that day, and in front of the cooler on the left, the plaintiff would have walked right into the sign likely tipping it over as she went to retrieve food out of the refrigerator on the left. Or she would have hit the sign as she turned to walk in front of the center cooler. There is no evidence that a wet floor sign was ever knocked over or found laying on its side.

The court is tasked under Rule 56 SCRCP to review the record as a whole and all the evidence contained therein to see if there is any evidence that would create a reasonable inference of notice of the hazard to the defendant, regardless of which party produces said evidence into the record or if one party disputes the existence of that evidence.

Finally, adequacy of the wet floor sign as an effective warning is not an issue before this Court. Argument was not made to the lower court regarding adequacy and court did not rule on such argument. The only question before the court was whether the purported presence of the sign is evidence of PetSmart's knowledge and thus notice of the leaking refrigerator and water on the floor.

CONCLUSION

For the above reasons, the appellant-plaintiff Camille Bird asks that this Court find the trial court committed error in deciding there were no genuine issues of material fact that PetSmart had notice of the water leaking on the floor in front of the PetSmart refrigerator before she fell, and reverse the decision of the trial court granting summary judgment to the Respondent PetSmart LL, remanding the case back to the circuit court for a trial.

s/ Thomas M. Creech Jr.

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