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**Nov 15 2024**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

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

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

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Camille Bird,

Appellant,

v.

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

Respondent.

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REPLY BRIEF OF APPELLANT

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November 14, 2024

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## REPLY ARGUMENT

Appellant Camille Bird, by and through her counsel, hereby replies to the Respondent PetSmart LLC brief of September 30<sup>th</sup>, 2024.

In its arguments, Respondent PetSmart LLC is essentially asking this Court to permit the trial courts of this State to become triers of fact, considering and weighing various factual issues, considering and choosing competing inferences, and thereafter resolving those inferences in favor of one of the parties, here the Respondent. Rule 56 SCRCP and the South Carolina appellate courts have flatly prohibited the trial court from usurping a jury's role and engaging in such an endeavor. Abdelgheny v. Moody, 432 S.C. 346, 349, 852 S.E.2d 225, 227 (Ct. App. 2020) The standard for summary judgment according to the text of Rule 56 SCRCP is just that of a genuine issue of material fact – a reasonable genuine issue- and is not proof to a preponderance of the evidence or more likely than not. Moreover, in South Carolina, plaintiffs may prove their case by circumstantial evidence. “[N]egligence may be proved by circumstantial evidence as well as direct evidence.” Chaney v. Burgess, 143 S.E.2d 521, 523, 246 S.C. 261, 266, (1965).

There is meaningful evidence, taken together, in this record that establishes certainly a reasonable inference for a jury to conclude the leak in the refrigerator was a continuous ongoing leak of which PetSmart would have had notice, actual or constructive, of the water on the floor before Ms. Bird fell. Indeed, there is no evidence that this leak event was a sudden event about which PetSmart would have had no notice or knowledge.

To begin with, the conclusions contained in the Affidavit and exhibits of expert witness Brian Durig states that due to the defective wicking pads, the leak would have been a continuous leak, not a sudden one-time issue. (R. pp. 412). There is no dispute that the leak in the refrigerator was being caused by defective wicking pads in the refrigerator, as after Ms. Bird fell,

the wicking pads were replaced to fix the leak. (R. pp. 445-447); (R. pp. 412). There is no expert testimony to the contrary. Durig further explains in his affidavit exactly how the wicking pads would have caused an ongoing issue, when he states in paragraph 9 of his affidavit:

“The wicking pads assist the water in the condensate drain pan to evaporate off. So, a problem with the wicking pad would take 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 True GDM cooler. A problem with the wicking pads **would cause a continuous leaking problem** - every time to the refrigeration system operated to cool the inside of the temperature of the cooler - water could spill out of the condensate drain pan onto the floor.”

(R. pp. 409-444). (emphasis added) Certainly this evidence, given to a reasonable degree of engineering certainty, creates a reasonable inference that the leak would have been continuous and on-going, that the leak had been occurring – and was not just a sudden, one-time event.

Moreover, a plain reading of the incident report and internal corporate emails stating that the refrigerator was leaking before the plaintiff fell corroborates Durig’s conclusions and serves as independent evidence themselves of an ongoing leaking problem. (R. pp. 448). Defendant’s unilateral interpretation of these documents does not negate the plain, obvious reading of the documents themselves. Indeed, nowhere in this record is there any testimony, document, or other evidence that states the any reference to ongoing leaking was referring solely to a prior leak in July of 2019 that had been fixed. Again, an incident report describing facts relevant to Ms. Bird’s

fall would refer to the salient facts relevant to her fall, not a leak that had been repaired and was no longer presenting a danger. Indeed, Jordan Coates testimony that the leak would have been noticed that day, taken in a light most favorable to the appellant, resolving all ambiguities, inferences and conclusions in her favor, is further evidence that PetSmart knew on the day of and before Ms. Bird fell about the leaking refrigerator, and thus the water on the floor.

The nature of the leak has been described by PetSmart's own employees as a dripping leak, not a sudden gushing. (R. p. 302, line 24 – p. 303, line 11); (R. p. 73, lines 4-17). Thus, the obvious inference is that this leak took time occur and would have taken time to form a puddle the size that PetSmart describes in deposition testimony. A dripping leak would not suddenly create a size of a spill described by PetSmart employees. PetSmart conducted floor safety inspections the morning of Ms. Bird's fall, up to just 30 minutes before she fell. (R. p. 290, line 24 – p. 291, line 14). And PetSmart employees were to be on a constant look out for spills. Again, a plaintiff in a premises liability case is not required to prove with precision the lifespan of the hazard. 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)

Finally, the testimony of PetSmart employees that a warning sign was placed there and present before the plaintiff fell is again evidence that PetSmart had notice of the leak-a reasonable inference that the sign was placed to warn of a hazard. The warning sign issue is a plain factual dispute requiring a jury's consideration and resolution.

### CONCLUSION

Because there is evidence that creates a genuine issue of material fact for a jury to decide whether PetSmart had notice of the water on the floor prior to Ms. Bird's falling, this court should reverse the trial court's order granting summary judgment to PetSmart.

s/Thomas M. Creech, Jr.

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