THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
G.D. Morgan, Jr., Circuit Court Judge

Appellate Case No. 2022-CP-23-00564

Camille Bird, Appellant,

v.

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

FINAL BRIEF OF RESPONDENT

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This 18th Day of November 2024
Columbia, South Carolina

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STATEMENT OF ISSUE ON APPEAL

I. **DID THE CIRCUIT COURT CORRECTLY RULE THAT APPELLANT HAD FAILED TO PRESENT SUFFICIENT EVIDENCE TO ESTABLISH A GENUINE ISSUE OF MATERIAL FACT TO WITHSTAND DEFENDANT'S MOTION FOR SUMMARY JUDGMENT?**

STATEMENT OF THE CASE

On September 6, 2019, Camille Bird [hereinafter referred to as "Appellant"], was present at Respondent's store located at 1125 Woodruff Road, Suite 900 in Greenville, South Carolina. Appellant alleged that she arrived at Respondent's store for the purpose of purchasing FreshPet food, which was stored in refrigerators. Appellant claims that she reached into one of the refrigerators and retrieved a roll of FreshPet dog food. As she turned to leave Appellant alleges that she "suddenly and without warning ... slipped and fell." See Complaint ¶ 12. The fall, which occurred at approximately 9:40 a.m., purportedly resulted in Appellant landing on her behind with her back against the refrigerator. Upon falling, Appellant indicated that she called out for help and a male employee responded who ultimately requested assistance from an assistant manager, Jordan Coates. Appellant, with the assistance of Jordan Coates, completed an accident report after which time she left the store and went to her home.

The lawsuit from which this appeal has arisen commenced on February 1, 2022, when Appellant filed her Complaint raising Premises Liability/Negligence as her sole cause of action. Thereafter, on March 8, 2022, Respondent filed its Answer denying all allegations of negligence and raising numerous affirmative defenses. Following several months of discovery, on November 8, 2023, Respondent filed a Notice of Motion and Motion for Summary Judgment. Appellant filed the Affidavit of Brian Durig, P.E., along with exhibits on January 7, 2024 and filed a Memorandum in Opposition to Respondent's Motion for Summary Judgment, with exhibits the following day, January 8, 2024. That same day, Respondent filed its Memorandum in Support of Summary

Judgment, with exhibits. Respondent filed additional exhibits including a photograph and the deposition transcript of Don Johnson on January 10, 2024. Also on January 10, 2024, the circuit court, Honorable G.D. Morgan, Jr. presiding, held a hearing at the Greenville County Courthouse on Respondent's Motion for Summary Judgment. The Honorable Judge Morgan filed a Form 4 Order granting Respondent's Motion for Summary Judgment on January 23, 2024, thereafter, entering a formal Order deciding there was no genuine issue of material fact that Appellant had failed to provide evidence that Respondent had notice of the hazard. Appellant subsequently filed a Motion to Reconsider pursuant to Rule 59(e), SCRCP, which Judge Morgan denied. This appeal ensued thereafter.

STANDARD OF REVIEW

An appellate court, when called on to review the granting of a Motion for Summary Judgment, shall "apply the same standard that governs the trial court under Rule 56(c), SCRCP, which provides that summary judgment is proper when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law." *USAA Property and Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008); (*See also* Rule 56(c), SCRCP; *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005); *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002)). "Rule 56(c) of the South Carolina Rules of Civil Procedure provides that a [circuit] court may grant a motion for summary judgment 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Bovain v. Canal Ins.*, 383 S.C. 100, 105, 678 S.E.2d 422, 424 (2009); (quoting Rule 56(c), SCRCP).

"Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Id.*; (*See also Middleborough Horizontal Prop. Regime Council of Co-Owners v. Montedison S.p.A.*, 320 S.C. 470, 479, 465 S.E.2d 765, 771 (Ct. App. 1995); citing *Baugus v. Wessinger*, 303 S.C. 412, 401 S.E.2d 169 (1991)). "Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." *Id.*, (*See also Nelson v. Charleston County Parks & Recreation Comm'n*, 362 S.C. 1, 5, 605 S.E.2d 744, 746 (Ct. App. 2004)). "However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." *Id.* at 377 S.C. at 653-54.

ARGUMENT

1. Appellant failed to produce any evidence tending to prove Respondent had either actual or constructive notice of the substance that caused the incident.

To establish negligence on the part of a merchant in South Carolina, a plaintiff must prove: (1) a duty of care owed to the plaintiff by the defendant; (2) a breach of that duty by some act or omission; and (3) that the plaintiff suffered damages proximately caused by the breach. *See Nelson v. Piggly Wiggly Cent., Inc.*, 390 S.C. 382, 391, 701 S.E.2d 776, 780 (Ct. App. 2010). Where a plaintiff is attempting to recover for damages or injuries allegedly resulting from the presence of a foreign sustenance on the floor of the shopkeeper's premises, the plaintiff is required to show "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 v. Food Lion, Inc.*, 344 S.C. 32, 35, 542 S.E.2d 728, 729-30; (*see also 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)).

In South Carolina, a merchant owes a customer a duty of ordinary care to keep his premises in a reasonably safe condition. *Wimberley v. Winn–Dixie Greenville, Inc.*, 252 S.C. 117, 165 S.E.2d 627 (1969). Regarding slip and fall cases generally, "[i]t has long been the law in South Carolina that a merchant is not an insurer of the safety of his customer but owes them only the duty of exercising ordinary care to keep the premises in reasonably safe condition." *Milligan v. Winn-Dixie Raleigh, Inc.*, 273 S.C. 118, 120-121, 254 S.E.2d 798, 799 (1979).

Appellant argues that summary judgment was not appropriate, when granted, because evidence presented, or reasonable inferences drawn therefrom, establish that the refrigerator at issue was leaking prior to Appellant's fall, thus putting Respondent on actual or constructive notice of the leak. In this case, Appellant alleges that she slipped and fell as a result of water on the floor in the area of a "FreshPet Fridge." Specifically, Appellant alleges that the "'FreshPet Fridge' . . . was in a state of disrepair leaking water, said water caused the plaintiff to slip and fall and become injured on September 6, 2019." *See* ¶ 7 Appellant's Complaint. Rather than Respondent's employees spilling, dropping, or doing any affirmative act that caused the water to be present on the floor, the undisputed evidence establishes that the water on the floor where Appellant claims to have fallen came to be present as a result of water overflowing from a pan within the refrigerator. *See* Jordan Coates Deposition, p. 24, ll. 18-25; see also Incident Report dated 09/09/2019. Given the absence of evidence that Respondent or an agent thereof placed the substance on the floor, Appellant bore the burden, to withstand the Motion for Summary Judgment, to present evidence showing Respondent had actual or constructive knowledge of the substance and, despite such knowledge, failed to remedy the same.

Depositions taken of Appellant and Respondent's then assistant manager, Jordan Coates, both contain testimony that Respondent did not have actual knowledge of the substance on the floor. (R. p. 231, lines 23-25), (R. p. 232, lines 1-11), and (R. p. 350, lines 22-25). Appellant failed to provide any evidence to establish Respondent had actual knowledge of the presence of a foreign substance prior to the alleged fall. Moreover, Respondent provided affirmative evidence that it did not have actual knowledge of the substance. It is thus undisputed from the evidence presented by Appellant that Respondent did not have actual knowledge of the pool of water on the floor where Appellant allegedly fell prior to the occurrence.

Further, Appellant failed to provide any evidence tending to show that Respondent had constructive notice of the alleged dangerous condition prior to the incident. There are two possible ways for a Plaintiff to demonstrate that a Defendant had constructive notice of a dangerous condition: (1) the passage of time, and (2) if the defendant creates conditions of such a recurrent nature that the defendant may be chargeable with constructive notice on the day of the accident. "A storekeeper '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[.]'" *Garrison v. Target Corporation*, 435 S.C. 566, 577, 869 S.E.2d 797, 803 (2022); (*quoting Anderson v. Winn-Dixie Greenville, Inc.*, 257 S.C. 75, 77, 184 S.E.2d 77 (1971)). "The customer can establish the storekeeper's constructive knowledge of the dangerous condition by showing that the foreign substance had been on the floor for a sufficient length of time that the storekeeper would or should have discovered and removed it had the storekeeper used ordinary care." *Gillespie*, 302 S.C. at 91, 394 S.E.2d at 24 – 25.

In the present case, there has been no evidence introduced in the record to suggest that Respondent had constructive notice of the presence of a foreign substance due to the passage of

time. Specifically, Appellant was asked, and responded in the negative, if she knew how long the puddle of water had been on the floor prior to her fall. (R. p. 179, lines 11-13). Likewise, Jordan Coates also testified that he did not know how long the puddle had been present. (R. p. 350, lines 12-16). Appellant seemingly relies on testimony from two (2) of Respondent's employees in an attempt to establish that the leak was slow, and therefore the leak would have taken some time for the puddle to accumulate. However, there was no evidence establishing the rate at which the water was leaking from which the Court could be determined how long it took for the substance to be present in the amount it was when discovered after Appellant's fall. In that same breath, Appellant notes that store inspections began at 6:00AM the morning of the incident. Appellant did not provide any evidence to establish the substance was present in the aisle during the routine inspection.

Appellant repeatedly, and conveniently, ignores the presence of evidence so as to allow her to assert the existence of reasonable inferences from other evidence. Appellant, as a case in point, focused her argument on the nuances of the wording utilized by Jordan Coates in the completion of the incident report, which stated, in pertinent part, "[p]et food fridge has been leaking." Appellant, however, fails to properly acknowledge the deposition testimony in which Coates refutes the assertion that the language utilized in the incident report implies the leak was "ongoing" beyond the day of the fall. (R. p. 315, lines 10-24). Likewise, Appellant refers to an email produced during discovery in an attempt to claim Respondent had knowledge of a leaking refrigerator before the subject incident. This argument, however, plainly ignores the balance of evidence in the record establishing the prior leak in July was of a completely different nature and was resolved long before Appellant's fall. Jordan Coates clearly testified that the leaking issue reported in July were resolved prior to Appellant's fall. Further, Jeannie Rogalla, of FreshPet, Inc., testified that repairs

for the July issue were made by a local technician at the direction of Konop Refrigeration. (R. p. 127, lines 6-15). Ms. Rogalla also explained the repairs that were done in July were addressing a different issue than what was needed to address the leaking issue identified after Appellant's fall.

In fact, in other arguments, Appellant erroneously makes baseless assertions unsupported by any evidence, which are then claimed to be "reasonable inference[s]." By way of example Respondents note three (3) such instances. First, Appellant asserts Respondent knew the machines "had a propensity to leak – due to condensation build up in hot temperature days ... [and] [a]s a result, employees would check the area around the refrigerator to see if there was water on the floor." *See Final Brief of Appellant* P. 15. Appellant asserts the checking "would likely have been done every day, probably during morning inspections before the store opened." *See Final Brief of Appellant* P. 15. Second, a claim is made that "the machine appeared to have been malfunctioning for at least a week prior to the fall in this case." *See Final Brief of Appellant* P. 15. Appellant contends the evidence supporting this assertion rested on the facts the machine was dark and contained no merchandise indicating there was a problem keeping merchandise cold. This assertion ignores the obvious fact that if the machine was powered off it would not have been cooling and as such would not have been producing condensation to fill the pan from which a leak was reportedly found. Finally, Appellant argues it would have taken "hours and certainly more than 30 minutes, for drops of water to accumulate into a pool or puddle measuring 1 1/2 feet by 3-4 feet, the entire width of the front of the refrigerator." *See Final Brief of Appellant* P. 15. Appellant fails to direct this Court to any evidence in the record to support these assertions, which is owed to the fact that there is none.

The other possible way for Appellant to prove Respondent had constructive notice is the continual condition capable of implying constructive notice. In *dicta*, the South Carolina Supreme

Court has suggested that the length of time a substance has been on the floor "is not the only manner in which to establish constructive notice." *Wintersteen supra*, 344 S.C. 32, 36, 542 S.E.2d 728, 730 (2001). "Notably, in [two recent South Carolina decisions] the conditions were of such a recurrent nature that the defendants were chargeable with constructive notice on the day of the accident." *Id.*

The first of the two decisions mentioned in *Wintersteen* by the Supreme Court is its own decision in *Henderson v. St. Francis Community Hospital*, 303 S.C. 177, 399 S.E.2d 767 (1990). In *Henderson*, the Plaintiff stepped on an accumulation of sweet gum balls, turned her foot, and fell while walking in the Greenville St. Francis Hospital parking lot. *Henderson*, 303 S.C. 177, 399 S.E.2d 767. The Court hinted in *Wintersteen* that the constantly falling sweet gum balls of *Henderson* were of such a recurrent nature that the defendants could be charged with constructive notice, however, the Court's *Henderson* decision was not based upon that theory. *Henderson*, 303 S.C. at 180, 399 S.E.2d at 769. *Henderson* was based on the fact that the hospital planted the sweet gum trees that created the problem, it had received notice that the problem existed, it did not remove the trees after receiving such notice, it built a stairway immediately adjacent to one of the trees, and it failed to implement and or utilize a regular maintenance program. *Id.*

The second decision mentioned in *Wintersteen* is the South Carolina Court of Appeals decision of *Pinckney v. Winn-Dixie Stores, Inc.*, 311 S.C. 1, 426 S.E.2d 327 (Ct. App. 1992). In *Pinckney*, Frances Pinckney slipped and fell on poinsettia leaves in a Winn-Dixie. *Pinckney v. Winn-Dixie Stores, Inc.*, 311 S.C. 1, 426 S.E.2d 327 (Ct. App. 1992). Again, the Court hinted in *Wintersteen* that the constantly falling poinsettia leaves of *Pinckney* were of such a recurrent nature that the defendants were chargeable with constructive notice because it was "inferable that, under the situation there existing, the falling to the floor of the leaves can be likened to a leaking faucet."

Wintersteen, 344 S.C. at 36, 542 S.E.2d at 730. However, the Supreme Court in *Wintersteen* noted that the Appellate Court's decision in *Pinckney* was not based upon that theory. There was "evidence of record from which the jury might well have inferred that the store manager observed the poinsettia leaves falling to the floor and that the leaves were left on the floor until the next periodic sweeping." *Id.*

The *Wintersteen* Court's *dicta* further refers to this theory by stating that even where "recurrence is of such a nature as to amount to a continual condition" it must be "coupled with other evidence, such as store employees' knowledge thereof." *Id.* Only then does the Court suggest that a recurrent condition "may be sufficient to create a jury issue as to the defendant's constructive notice at the time of the accident." *Id.* In the instant case, Appellant presented no evidence that the refrigerator that was found to be leaking was placed in the store by Respondent. Moreover, there is no evidence that the leak was of such a recurring nature that it could be argued, let alone found, that it was constant thereby charging Respondent with constructive notice.

Appellant refers repeatedly to an internal email exchange which references a prior leak from the fridge in issue. However, Appellant presented no evidence that there was a persistent leak following the first reported leak in July of 2019, the resolution of the leak in July of 2019, and the second leak in September of 2019. There is no evidence in this chain tending to establish a recurring condition that rises to a level sufficient to establish constructive notice. Although the South Carolina Supreme Court did not expressly define "constantly," it is safe to assume that even under the most liberal interpretation of the word, it is more than one time.

Appellant has failed to establish any evidence tending to prove constructive notice. Appellant continues to reference several other pieces of evidence that have no bearing on the burden Appellant was required to meet in the lower court. Appellant seemingly forgets who bears

the burden of proof in a negligence action and relies more upon the evidence not presented by Respondent than meeting her own burden. Even viewing all of the evidence presented in the light most favorable to Appellant, she has failed to present any evidence tending to prove Respondent was on notice of the substance beyond mere speculation. Therefore, the court did not err when it found there to be no genuine issue as to any material fact that there was insufficient evidence to establish Respondent 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.

2. Jordan Coates's statement in the post-incident report and the internal PetSmart corporate emails do not create a reasonable inference that PetSmart had notice, constructive or actual, that the refrigerator was leaking.

In reviewing the grant of a summary judgment motion, the appellate court applies the same standard as the trial court under Rule 56(c), SCRCP; "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." *Bell v. Progressive Direct Ins. Co.*, 407 S.C. 565, 576, 757 S.E.2d 399, 404 (2014) (citing *Williams v. Chesterfield Lumber Co.*, 267 S.C. 607, 230 S.E.2d 447 (1976)). "Nevertheless, 'when the evidence is susceptible of only one reasonable interpretation, summary judgment may be granted.'" *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 463, 892 S.E.2d 297, 301 (2023) (quoting *Brooks v. Northwood Little League, Inc.*, 327 S.C. 400, 403, 489 S.E.2d 647, 648 (1997))). Additionally, "it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Id.* at 463-64, 892 S.E.2d at 301 (citing *Town of Hollywood v. Floyd*, 403 S.C. at 477, 744 S.E.2d at 166).

In the instant case, there is only one reasonable inference when reading the incident report in light of the prevailing evidence in the case. When looking to the totality of the circumstances, and evidence in the record, the phrase "Pet food fridge has been leaking," can only refer to

something that would have been discovered that day. Appellant had a full and fair opportunity to investigate and determine the meaning of the phrase through the deposition of Jordan Coates. In completing the deposition of Mr. Coates, it was clearly stated that if it had been ongoing, it would have been "very short term like, noticed that day." (R. p. 317, lines 16-18). Appellant wishes to argue, without an evidentiary basis, that the statement could reasonably be interpreted as meaning the leak had continued unresolved since July of 2019. For this inference to be "reasonable" one would have to ignore the evidence in the record, which includes Mr. Coates testimony that he knew the July problem had been fixed because "we didn't have any – we didn't have the issue anymore after that." (R. p. 342, lines 5-6). Specifically, he noted the "issue" he was referencing was the leaking. Appellant purports that this one sentence is indicative of other post-July leaks; however, Appellant failed to prevent any evidence of any other leak to overcome a summary judgment ruling. The only reasonable inference to come from this incident report is that the same cooler had leaked once before, been repaired, and at the time of the incident, apparently started leaking again. Even taking all interpretations and inferences in the light most favorable to Appellant, it is unreasonable to infer that other leaks had occurred between July and September when there were no reports, work orders, or any other evidence of such.

Here, Appellant also attempts to conflate the internal emails with an admission that the cooler was continuously leaking before the Appellant's incident. In an internal email, Michelle Krause writes that "the store is saying that they had reported a leak from the refrigerator to corporate before 9/6 because apparently it had been leaking before the customer fell." (R. p. 448). Once again, the only reasonable inference to draw from this evidence is that Ms. Krause was referring to the July 2019 leak. Before this incident, the July 2019 leak was the only recent leak reported to corporate, it was the only leak for which a work order existed, and it was the only leak

of which Respondents had notice. Appellant failed to produce any evidence beyond mere speculation that this email was in reference to any other leak, because no such leak exists. Thus, the court did not err in finding the post-incident report and corporate emails did not create a reasonable inference that PetSmart had notice of the leak prior to the incident.

3. **Appellant failed to produce evidence that the wet floor sign in question was placed in response to the puddle of water Appellant alleges caused her fall.**

Appellant finally attempts to allege that presence of a wet floor sign was indicative that Respondent was on notice of water on the floor and placed the sign in response. However, to infer the presence of the sign as being evidence of Respondent's knowledge of the specific puddle present when Appellant fell requires the Court to engage in surmise and speculation. Appellant denies the presence of a wet floor sign at the time of the incident. Mr. Coates did not appear at the scene of the incident until shortly after the incident occurred and reportedly was told the sign was present. One reasonable inference to draw from these facts is that there was not a wet floor sign present at the time of the incident; in response to the incident, an employee placed a wet floor sign; and the wet floor sign was in place when Mr. Coates arrived in the aisle to assist Appellant. Alternatively, one may infer the wet floor sign was placed in advance of Appellant's fall due to the floor having been wet. Appellant ignores her obligation to investigate this further and simply asks the Court to view the signs presence as placing Respondent on notice of an issue. Appellant's allegations attempt to place Mr. Coates in the aisle at the time of the incident, which is not what occurred, and Appellant has produced no evidence of such. Thus, the trial court correctly ruled that there was insufficient evidence that a sign was placed in the aisle prior to Appellant's fall indicating notice of the hazard to Respondent.

CONCLUSION

For the reasons set forth above, Respondent respectfully asks that this Court find the trial did not err in deciding there were no genuine issues of material fact that Respondent did not have actual or constructive notice of the water leaking on the floor in front of the FreshPet refrigerator before Appellant's fall and affirm the decision of the trial court granting summary judgment to the Respondent.

Respectfully submitted,

November 18, 2024

s/Matthew C. LaFave

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CERTIFICATE OF COUNSEL

The under signed certifies that this Final Brief of Respondent complies with Rule 211, SCACR.

Respectfully submitted,

This 18th day of November 2024

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