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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

DeAndra G. Benjamin, Circuit Court Judge

Case No. 2009-CP-18-0452

Rita M. Pugh, ... Respondent,

v.

Bi-Lo, LLC, ... Appellant.

INITIAL BRIEF OF RESPONDENT

John S. Nichols, SC Bar #4210
BLUESTEIN NICHOLS
THOMPSON & DELGADO
Post Office Box 7965
Columbia, SC 29202
(803) 779-7599
(803) 779-8995 (facsimile)
jsnichols@bntdlaw.com

Julio A. Rossington, SC Bar #73905
ROSSINGTON LAW OFFICES, LLC
1317-M N. Main Street, #140
Summerville, SC 29483
(843) 261-1114
julio.rossington@rossingtonlaw.com

Attorneys for Respondent

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COUNTER-STATEMENT OF THE ISSUES ON APPEAL

I. Did the Trial Judge correctly deny Bi-Lo's Motion for Directed Verdict and/or JNOV, because there was some evidence in the record to support each element of Plaintiff's premises liability claim?

II. Did the Trial Judge abuse her discretion in refusing to charge the jury on Bi-Lo's affirmative defense of comparative negligence, in refusing to include comparative negligence on the verdict form, and in denying Bi-Lo's New Trial Motion on this ground?

III. Did the Trial Judge err in denying Bi-Lo's New Trial Motion on the grounds that the verdict was grossly and shockingly excessive in light of the evidence presented so as to be tainted by an improper motive?

IV. Did the Trial Judge err in denying Bi-Lo's New Trial Motion based upon Bi-Lo's assertion that the jury verdict included an improper award of attorney's fees?

COUNTER-STATEMENT OF THE CASE

Rita M. Pugh (Plaintiff) filed a complaint against Bi-Lo, LLC ("Bi-Lo"), on February 13, 2009, asserting that on August 13, 2008, Plaintiff suffered personal injuries while a customer in one of Bi-Lo's supermarkets. (Complaint). Plaintiff asserted she "slipped and fell abruptly on the concrete floor, due to liquid residue and fruit on the grocery store floor...." (Complaint, p. 2, ¶ 7). Plaintiff asserted Bi-Lo employees failed to come to her aid after she fell. (Complaint, p. 2, ¶ 8). Plaintiff stated claims for "Premises Liability" and "Negligence/Gross Negligence." (Complaint, pp. 2-4). She requested an award of actual and punitive damages as well as other relief. (Complaint, p. 4).

Bi-Lo filed its answer on April 1, 2009, admitting that something occurred on August 13, 2009, but denying liability for Plaintiff's injuries. (Answer, p. 1). Bi-Lo also stated affirmative defenses of comparative negligence (Answer, p. 3), unconstitutionality of punitive damages (Answer, p. 4), improper claim for punitive damages (Answer, p. 5), intervening and superseding negligence of a third party (Answer, pp. 5-6), no duty to warn of the unknowable (Answer, p. 6), assumption of the risk (Answer, p. 6), failure to state a claim (Answer, p. 6), assumption of the risk (stated separately – Answer, p. 7), laches, waiver and/or estoppel (Answer, p. 7), election of remedies (Answer, p. 8), and a generic "reliance on additional defenses." (Answer, p. 7).

On April 3, 2009, Bi-Lo filed a notice of voluntary bankruptcy pursuant to Chapter 11. (Notice). Thereafter the case proceeded and the parties engaged in discovery in 2011. Bi-Lo moved for summary judgment on February 16, 2012. The circuit court denied the motion and the matter proceeded to trial.

On April 24, 2012, a jury returned a verdict for the Plaintiff for $71,874.00 in actual damages. (Verdict Form).

On May 2, 2012, Bi-Lo moved for JNOV or, alternatively, a new trial. (Motion). Bi-Lo also moved for New Trial *Nisi Remittitur* or for a new trial under the Thirteenth Juror Doctrine. Plaintiff filed a memorandum in opposition to the motions. (Plaintiff's Reply).

On August 20, 2012, the circuit court entered an order denying Bi-Lo's post-trial motions. (Order of Aug. 15, 2012, entered Aug. 20, 2012).

Bi-Lo timely filed and served its Notice of Appeal from the verdict and from the Post-Trial rulings on August 31, 2012.

FACTS

SCOPE OF APPELLATE REVIEW

In an action at law, on appeal of a case tried by a jury, the jurisdiction of the appellate court extends merely to the correction of errors of law. *Carson v. CSX Transp., Inc.*, 400 S.C. 221, 734 S.E.2d 148 (2012). The admission or exclusion of evidence, the decision of the circuit court as to particular jury instructions, and the denial of a motion for a new trial *nisi* are all actions within the sound discretion of the circuit court and will not be disturbed on appeal absent an abuse of discretion. *Carson,* citing *Historic Charleston Holdings, LLC v. Mallon,* 381 S.C. 417, 434, 673 S.E.2d 448, 457 (2009) (admission of evidence); *Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008) (jury charge); *O'Neal v. Bowles*, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993) (new trial *nisi additur*). An abuse of discretion occurs when the circuit court's findings are either controlled by an error of law or are based on unsupported factual conclusions. *Carson*; *Kiriakides v. Sch. Dist. of Greenville Cty.*, 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009).

This appeal involves a challenge to the trial court's failure to direct a verdict and to the refusal to grant a JNOV or new trial following a jury verdict. When reviewing the denial of a motion for directed verdict, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the non-moving party. *Andrade v. Johnson*, 356 S.C. 238, 588 S.E.2d 588 (2003); *Wintersteen v. Food Lion, Inc.*, 344 S.C. 32, 542 S.E.2d 728 (2001). If the evidence as a whole is susceptible of only one reasonable inference, no jury issue is created and a directed verdict motion is properly granted. *Andrade*; *Wintersteen*.

A motion for a JNOV is merely a renewal of the directed verdict motion. *Richardson v. Piggly Wiggly Cent., Inc.*, 404 S.C. 231, 743 S.E.2d 858 (Ct. App. 2013). "A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict." *Gause v. Smithers*, 403 S.C. 140, 149, 742 S.E.2d 644, 649 (2013); *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (Ct. App. 2000). The trial court must deny a motion for a directed verdict or JNOV if the evidence yields more than one reasonable inference or its inference is in doubt. *Town of Hollywood v. Floyd*, 403 S.C. 466, 480, 744 S.E.2d 161, 168 (2013).

On appeal from a circuit court's denial of a motion for a directed verdict or a JNOV, the reviewing court applies the same standard as the circuit court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *Gause v. Smithers*, 403 S.C. at 149, 742 S.E.2d at 649; *RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331-332, 732 S.E.2d 166, 171 (2012). The appellate court will not reverse the circuit court's ruling on a JNOV motion unless there is no evidence to support the ruling or the ruling is controlled by an error of law. *Gause v. Smithers*, 403 S.C. at 149, 742 S.E.2d at 649; *Law v. S.C. Dept. of Corr.*, 368 S.C. 424, 434–35, 629 S.E.2d 642, 648 (2006). *See also Town of Hollywood v. Floyd*, at 480, 744 S.E.2d at 168 ("a JNOV motion may be granted only if no reasonable juror could have reached the challenged verdict").

Finally, the grant or denial of a motion for a new trial *nisi* rests within the discretion of the trial court and its decision will not be disturbed on appeal unless its findings are wholly unsupported by the evidence or the conclusions reached are

controlled by error of law. *Sapp v. Wheeler*, 402 S.C. 502, 741 S.E.2d 565 (Ct. App. 2013).

Testimony

Plaintiff is forty-five years old and lives in Charleston, South Carolina. (Tr. p. 64, ll. 14-18; p. 73, ll. 8-9). At the time of the incident and at the time of trial she lived with her boyfriend, Adam Bagley. (Tr. p. 76, ll. 21-24).

When asked to describe the slip and fall, Plaintiff testified:

> I had went into Bi-Lo, I always go in there and shop every weekend because that's [where] we got our groceries. I was walking in with my, with the buggy, my purse sitting inside the buggy, and we were by the fruit looking, and Adam was in front of me a little ways, and then all of a sudden this, boom, I'm on my backside. I slipped, and I didn't know what happened. I didn't even understand what was going on until I got up, I went to get up and fell again, and I realized what I had slipped on was water and grapes.

(Tr. p. 74, ll. 11-19; p. 97, ll. 13-16). Plaintiff denied she intentionally tried to fall. (Tr. p. 75, ll. 6-12). She stated that this was the first time she had fallen in her life. (Tr. p. 76, ll. 3-8).

Plaintiff testified her boyfriend, Adam, helped her get up and she reported the fall to the manager. (Tr. p. 76, ll. 13-22). An employee used napkins to try to clean the floor (Tr. p. 77, ll. 15-18; p. 78, l. 25 - p. 79, l. 1; p. 79, l. 23 - p. 80, l. 1). The napkins were not enough to clean up the water and "the smushed grapes." (Tr. p. 80, ll. 4-7). The employee picked up the napkins but there was still water on the floor. (Tr. p. 80, ll. 9-10). The manager then brought a mop over and Plaintiff watched them clean up the substance. (Tr. p. 79, ll. 1-4; p. 80, ll. 14-20). It took ten or more minutes for them to clean up the

substance. (Tr. p. 79, ll. 16-18).

Plaintiff stated she did not claim that Bi-Lo "intentionally put the grapes and the water on the floor" for her to fall. (Tr. p. 81, ll. 10-12; p. 82, ll. 1-6). She agreed that Bi-Lo should have prevented the fall from happening. (Tr. p. 82, ll. 8-10). She added, "you should always check your floors to make sure if there's any spills or anything going on, if you're a manager you walk your floors." (Tr. p. 82, ll. 15-17).

When asked to describe what she saw, Plaintiff stated, "When I got up there was actually some smushed grapes to the left hand side of me that, I know I smashed some that was under my butt, but there were some already smashed to the left hand side of me, right beside the cooler." (Tr. p. 82, l. 23 - p. 83, l. 1). She believed the grapes were the debris that made her fall. (Tr. p. 83, ll. 2-4). She described them as "a handful of grapes...." (Tr. p. 83, ll. 12-13). There was also more than a small amount of water. (Tr. p. 83, ll. 7-10). Plaintiff was surprised that Bi-Lo's incident report stated the employee found "one smushed grape," and stated that was not correct and estimated there was "more than ten." (Tr. p. 83, l. 17 - p. 84, l. 3). She was certain those grapes were in a "smushed condition" where she fell that day. (Tr. p. 84, ll. 4-9).

Plaintiff described her injuries. At first she was hurting on her lower back and her head "was pounding" because she struck it very hard on the concrete floor. (Tr. p. 85, ll. 5-17). The next day she tried to go to work but "couldn't handle it." (Tr. p. 86, ll. 13-15). She was in pain, and her whole body was stiff. (Tr. p. 86, ll. 22-23). Plaintiff went to the hospital to be examined that day. (Tr. p. 86, l. 23 - p. 87, l. 14). Plaintiff was still in pain following the treatment she received at Roper Hospital. (Tr. p. 92, ll. 11-16).

Plaintiff then went to a chiropractor at the suggestion of a lawyer. (Tr. p. 87, l. 24 - p. 88, l. 25). Plaintiff identified the medical bills she asserted were related to the injuries she received in the fall. (Tr. p. 89, l. 12 - p. 90, l. 8; Plaintiff's Exh. 1). The cost of the treatment totaled $3,814.00. (Tr. p. 90, l. 12 - p. 91, l. 2; Plaintiff's Exh. 1). The treatment did help her with the pain. (Tr. p. 92, ll. 19-24).

Plaintiff testified she still had pain in her back, neck and head. (Tr. p. 93, ll. 2-8). She did not have issues with her back prior to the fall. (Tr. p. 92, ll. 9-11). She also had not been in any falls since the fall at Bi-Lo. (Tr. p. 93, ll. 12-19). She was in an automobile wreck but was not injured in the wreck. (Tr. p. 93, l. 21 - p. 94, l. 2).

The fall has affected Plaintiff's life. She cannot lift her grandchildren like she used to do. (Tr. p. 94, ll. 15-23). Her back "just goes numb" and her leg "goes numb" and she cannot stand very long. (Tr. p. 94, l. 24 - p. 95, l. 1). When she sits for long periods of time her right side goes numb. (Tr. p. 95, ll. 2-3). Plaintiff did not have these conditions prior to the fall. (Tr. p. 95, ll. 4-8).

On cross-examination, Plaintiff agreed she had been in the store "ten minutes at the most." (Tr. p. 99, ll. 20-21). The grocery cart was empty except for her purse, and her boyfriend was walking ahead of the cart. (Tr. p. 99, l. 22 - p. 100, l. 8). When asked why she did not see the substance on the floor, Plaintiff stated:

> I wasn't looking down, I was looking at the fruits and vegetables and stuff. Why would I be looking down shopping? I went in there to shop for groceries. You think when you go in a store it would be safe.

(Tr. p. 100, ll. 9-14).

Plaintiff described the water she saw on the floor as "a lot of water." (Tr. p. 100,

ll. 15-21; p. 110, ll. 20-23; p. 111, ll. 3-5). She did not see the grapes or the water prior to her fall. (Tr. p. 100, ll. 22-24). Plaintiff also could not say who put the water or the grapes on the floor. (Tr. p. 100, l. 25 - p. 101, l. 2; p. 135, l. 18 - p. 136, l. 12). Plaintiff believed the grapes and water had been there "for a while" because "when I got up the ones that I smushed was all over my butt." (Tr. p. 101, ll. 14-17). She also saw grapes in the water that were already smashed. (Tr. p. 101, ll. 19-20).

On redirect examination, Plaintiff reaffirmed that she fell in the Bi-Lo store and there were grapes and water on the floor when she fell. (Tr. p. 142, l. 7 - p. 143, l. 4; p. 144, ll. 19-22). She stated there should not have been grapes and water on the floor where she fell. (Tr. p. 144, lines 23-25). Plaintiff was certain that she fell because of the grapes and water on the floor. (Tr. p. 145, ll. 1-5).

Adam Bagley

Plaintiff's boyfriend, Adam Bagley, testified that Plaintiff and he walked into Bi-Lo, got their cart, and began shopping. (Tr. p. 148, l. 24 - p. 149, l. 2). He did not see Plaintiff fall, but he heard her fall from behind him. (Tr. p. 149, ll. 3-4). He also noticed "there was grapes and water where she fell." (Tr. p. 149, ll. 24-25; p. 156, l. 20 - p. 157, l. 1). Mr. Bagley continued to shop while Plaintiff reported the fall and saw to it that the debris was cleaned up. (Tr. p. 149, l. 25 - p. 150, l. 2).

Mr. Bagley also testified about Plaintiff's damages. He stated she was in pain and complained about her arm and her back. (Tr. p. 152, l. 25 - p. 154, l. 1). After the fall Plaintiff was "a little slower" and complained of pain in her back. (Tr. p. 154, ll. 19-25).

When asked who he thought was at fault for what happened to Plaintiff, Mr. Bagley stated, "the store management, or the LLC." (Tr. p. 156, ll. 7-11). He added, "I believe it's management's responsibility... to keep it safe for consumers...." (Tr. p. 156, ll. 16-17). He did not think the floor was safe that day. (Tr. p. 156, ll. 18-19).

On cross-examination, Mr. Bagley stated they had been in the store five to ten minutes at the time Plaintiff fell. (Tr. p. 158, ll. 5-10). Mr. Bagley was walking about a step or two in front of the cart to the right. (Tr. p. 158, ll. 13-15). He was a "couple of steps from the cart...three or four feet, or so." (Tr. p. 158, ll. 18-20; p. 159, ll. 22-25). He could have reached back and touched the cart. (Tr. p. 159, ll. 11-12). Mr. Bagley did not encounter a two foot puddle of water or a bunch of grapes. (Tr. p. 160, ll. 1-10).

Mr. Bagley did not see Plaintiff fall. (Tr. p. 159, ll. 18-19). He heard her fall and went to help her up. (Tr. p. 160, ll. 13-18). As he reached down to help Plaintiff, she slipped a second time and Mr. Bagley noticed there was water and some grapes on the floor. (Tr. p. 161, l. 10 - p. 164, l. 20). The debris was to their left. (Tr. p. 166, ll. 13-20). Although Plaintiff did not mention her clothes being wet, Mr. Bagley noticed she was wet. (Tr. p. 170, l. 19 - p. 171, l. 1). Mr. Bagley was unable to say how long the debris had been on the floor. (Tr. p. 173, l. 11 - p. 174, l. 3). He added it was Bi-Lo's duty to know that the debris was on the floor prior to the fall. (Tr. p. 173, l. 25 - p. 174, l. 1). He also had no information that anyone at Bi-Lo actually placed the water and grapes on the floor. (Tr. p. 174, ll. 11-14).

Erica Rice

Ms. Rice is the co-manager of Customer Service for Bi-Lo. (Tr. p. 179, ll. 15-19; p. 180, ll. 23-25). Part of her job is to walk the floor at least once every two hours and to maintain a floor log. (Tr. p. 181, l. 1 - p. 182, l. 5). Walking the floor is not discretionary. (Tr. p. 198, ll. 21-22). When she walks the store she makes certain there are no substances on the floor. (Tr. p. 214, ll. 21-24).

Ms. Rice stated that when a customer reports a fall there is a procedure they follow. (Tr. p. 183, ll. 16-19). An employee goes immediately to the location where the customer fell. (Tr. p. 183, l. 20 - p. 184, l. 1). The employee then asks the customer if they need assistance and asks permission to help. (Tr. p. 184, ll. 1-6). If there is a hazard that another customer "may have an issue with" the employee cleans it up or calls someone who can. (Tr. p. 184, ll. 7-16). They clean up fruit with paper towels. (Tr. p. 184, l. 21 - p. 185, l. 4).

Ms. Rice stated Plaintiff reported to her that there were grapes and water on the floor and that she had slipped. (Tr. p. 186, ll. 15-23; p. 188, ll. 22-24). Plaintiff reported injuries to her ankle, leg, and hip or side. (Tr. p. 187, l. 16 - p. 188, l. 4). Ms. Rice claimed she used four paper towels to clean up one smashed grape. (Tr. p. 194, ll. 8-13; p. 219, ll. 7-13).

Ms. Rice identified the Store Parking Lot and Sales Floor Sweep Log. (Tr. p. 190, ll. 7-22; Plaintiff's Exh. Nos. 2, 3). Bi-Lo's policy is to walk the store every two hours. (Tr. p. 196, ll. 9-10). Also, under Bi-Lo's policies, "teammates [staff] in the store are trained to, when they walk through areas[,] to look at the floor and to maintain if there's

something on the floor to either report it or clean it up." (Tr. p. 201, ll. 7-15). It is the job of staff to be vigilant and make sure the premises are safe. (Tr. p. 201, ll. 23-25).

On the day of the fall, Plaintiff reported the incident at about 9:30 p.m. (Tr. p. 203, ll. 2-5). Ms. Rice had done a walk through at 8:03 p.m. (Tr. p. 194, l. 17 - p. 195, l. 9; p. 196, ,ll. 18-19). The Guideline required that the walk though begin at 8:00 p.m. (Tr. p. 196, ll. 13-17). The prior walk through was a 6:10 p.m. (Tr. p. 195, ll. 16-17). Ms. Rice stated that because the prior walk through occurred at 6:10 p.m. she was within the two-hour policy because "[d]ue to other things that happen in the store you have two hours from your last scheduled walk to walk again." (Tr. p. 196, ll. 21-24). She agreed thedebris had to have fallen onto the floor between 8:03 p.m. and 9:30 p.m. (Tr. p. 203, l. 13 - p. 204, l. 6).

During the store's busy hours there would be between 12 and 16 employees, not including management. (Tr. p. 204, l. 21 - p. 205, l. 5; p. 205, ll. 19-25). There are usually between one to three managers at the store during busy hours. (Tr. p. 206, ll. 1-2). At the time of the fall, there may have been three employees in the store in addition to Ms. Rice. (Tr. p. 204, ll. 10-20; p. 205, ll. 13-14). Ms. Rice believes that three employees is sufficient to staff the store at that hour. (Tr. p. 205, ll. 6-8). When there are only three employees there, none of them are responsible for the produce area. (Tr. p. 206, ll. 3-5).

The fall occurred on a Sunday. (Tr. p. 217, ll. 3-6). Ms. Rice acknowledged that on the Wednesday following Plaintiff's fall she walked the store at 6:00 p.m. and someone else did the next walk through at 8:40 p.m. (Tr. p. 197, l. 14 - p. 198, l. 4). This was not within the Bi-Lo guidelines. (Tr. p. 198, ll. 5-6; p. 217, ll. 7-15). Ms. Rice did not

know if there was some problem in the store because she was not there at the time. (Tr. p. 198, ll. 7-8).

Ms. Rice also acknowledged that on the Friday after the fall the 4:00 p.m. walk-through was not done until 5:10 p.m. (Tr. p. 199, ll. 5-15). The 6:00 p.m. walk-through was done at 7:14 p.m. (Tr. p. 199, ll. 16-18). Neither of these entries were within Bi-Lo's policy. (Tr. p. 199, ll. 19-21). Employees can submit documentation for the reason they did not check the store on time, but there was nothing listed on the document. (Tr. p. 200, ll. 1-3; p. 220, ll. 10-12). No one was specified to work in the produce area during that time. (Tr. p. 206, ll. 3-20). She said there was no way to know if any of the employees worked in that area that night. (Tr. p. 206, l. 19 - p. 207, l. 1).

Ms. Rice said that it is not common for fruit to be spilled in the fruit produce area. (Tr. p. 202, ll. 1-3). She agreed that this was not the first time in her ten years at Bi-Lo she had heard of grapes or fruit being spilled in the produce area. (Tr. p. 202, ll. 7-9).

Directed Verdict

Bi-Lo moved for a directed verdict at the close of Plaintiff's case. (Tr. P. 221). The trial court heard argument and then denied the motion as to liability generally, but granted the motion as to Plaintiff's claim for punitive damages. (Tr. p. 221-225).

Bi-Lo then rested its case without presenting evidence, and renewed its motion for directed verdict as to liability. (Tr. p. 225, l. 17 - p. 226, l. 10; p. 227, l. 6 - p. 228, l. 1; p. 242, ll. 2-4; p. 241, l. 25 - p. 242, l. 5). The court denied the motion. (Tr. p. 228, ll. 4-5).

Proposed Jury Instruction

Bi-Lo requested a charge on comparative negligence and Plaintiff objected. (Tr. p. 228, ll. 18-23). In response, Bi-Lo's counsel argued:

> I believe that the testimony was that she was operating an empty cart, and her own testimony, her own description was that it was a Two by Two foot square of water with a massive amount of grapes around it, and I believe I asked her where she was going, and she said I wasn't looking at the ground, I was looking around. I believe that's enough to send the comparative negligence to the jury.

(Tr. p. 228, l. 24 - p. 229, l. 6). Plaintiff responded:

> And that's an affirmative defense. The defense, we would submit, still has a duty to present these facts, and we don't believe that was divulged during the trial. So, we would object to the comparative negligence charge.

(Tr. p. 229, ll. 13-17). Both parties agreed the trial court's standard charges were "fine" except for the comparative negligence charge. (Tr. p. 229, l. 20 - p. 230, l. 3). After a recess, the court ruled:

> The defendant has to present evidence to prove comparative negligence, and I understand that you are saying that that came in through the plaintiff, but I think her testimony that she gave goes more to the, as to whether or not there was a notice issue as opposed to if she did anything to contribute to the fall. I don't believe there's been any testimony given that she did anything to contribute to the fall, and with the argument that was made earlier, I think if that was the case, in every slip and fall case it would be a comparative negligence case if the issue was, well, she should have seen it. I think that probably goes to, more so, the notice issue as opposed to a negligence issue. So, I am going to not charge comparative negligence based on those findings.

(Tr. p. 230, ll. 12-25; see also p. 286, ll. 19-24). Bi-Lo objected to the failure to include comparative negligence in the instructions. (Tr. p. 241, ll. 1-7; p. 284, ll. 11-24).

Jury Instructions

The trial judge charged the jury on the preponderance of the evidence burden of proof. (Tr. p. 268, l. 24 - p. 269, l. 14). The judge also charged on direct and circumstantial evidence. (Tr. p. 269, l. 15 - p. 270, l. 14). This included the charge that the "existence of a fact cannot be based on speculation, surmise or conjecture." (Tr. p. 270, ll. 9-10). The trial judge charged the jury further regarding credibility. (Tr. p. 270, l. 15 - p. 271, l. 7).

The judge next gave a general charge on negligence. (Tr. p. 272, l. 6 - p. 273, l. 23). The judge followed with an instruction on premises liability. (Tr. p. 273, l. 24 - p. 277, l. 17). This included the following:

> I charge you that the mere fact that an injury has been sustained by a visitor is not, in and of itself, sufficient to impose liability. A merchant's liability may not be based solely on the presence of moisture on the floor.

Tr. p. 274, ll. 5 - 9). The judge then charged the definition of actual notice as follows:

> Next the plaintiff must show that the unsafe condition was caused by an agent or employee of the Defendant or that the Defendant had actual or constructive notice of the unsafe condition. What is actual notice defined? Actual notice has been defined as notice expressly and actually given and brought home to the parties directly. Notice is actual when it is directly and personally communicated to or received by the person to be notified. Actual notice is such notice as is positively proved to have been given to a party directly and personally. Actual notice means all the facts are disclosed and there is nothing left to investigate. Notice is regarded as actual where the person thought to be charged therewith either knows of the existence of the particular facts in question, or is conscious of having the means of knowing it, even though such means may not be employed by him. Generally, actual notice is synonymous with knowledge. By actual notice it's meant that specific information concerning the defect was brought to the attention of the party or its agent or its employee prior to the occurrence.

(Tr. p. 274, l. 10 - p. 275, l. 4). The judge followed with the following charge on constructive notice:

> What is constructive notice? Constructive notice is such notice as implied or imputed by law. By constructive notice it is meant that the condition existed for such a length of time that the party in the exercise of reasonable care should have discovered the defective condition, although in fact it had [no] actual knowledge of it. The storekeeper's constructive knowledge of the foreign substance can be established by showing that the foreign substance had been on the floor for a sufficient time and that the storekeeper would have discovered and removed it had the storekeeper used ordinary care. **The question of whether the substance was on the floor for such a length of time as to infer that the Defendant was negligent in not discovering and removing it is not one that can be left to speculation.** Constructive notice is information or knowledge of a fact imputed by law to a person although he or she may not actually have it, because he could have or should have discovered the fact by proper diligence and the situation was such as to cast upon him or her the duty of inquiring into those facts. Every person who had actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact has constructive notice of the fact itself in all cases in which by pursuing that inquiry he might have learned such fact. One has constructive notice of a fact when from all the facts and circumstances known to him or her at the relevant time he or she has reason to know that it exists. A person has reason to know a fact when he has such information as would prompt a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence. Constructive notice is a legal inference which substitutes for actual notice. It is notice imputed to a person whose knowledge of facts is sufficient to put him or her on inquiry if these facts were pursued with due diligence they would lead to other undisclosed facts. Therefore, this person is presumed to have actual knowledge of the undisclosed fact. Constructive notice can have the same effect as actual notice.

(Tr. p. 275, l. 5 - p. 276, l. 17) (bold added).

The trial judge then charged the jury that the Plaintiff must prove the Defendant failed to use reasonable care to fix the unsafe condition, adding "the Defendant does not insure [its] customer safety but owes the customer a duty of ordinary care in keeping the

premises in a reasonably safe condition." (Tr. p. 276, ll. 18-22). The judge also charged the law of "business invitee," and stated, "the Defendant has the duty to use reasonable care to discover unreasonably dangerous conditions on the premises and either correct the condition or warn the invitee of the danger." (Tr. p. 276, l. 23 - p. 277, l. 17). The judge then charged the jury on proximate cause. (Tr. p. 277, l. 18 - p. 278, l. 18).

The judge next charged the jury as to damages. (Tr. p. 278, l. 19 - p. 282, l. 4). This included instruction as to the burden of proof and the basic elements of past and future damages recoverable.

Lastly, the judge charged the jury not to base its verdict on "sympathy, passion, prejudice, emotion or any other consideration not in evidence in this case." (Tr. p. 282, ll. 5-8).

Jury's Note

During deliberations the jury sent the following question to the judge:

> May we ask for Forty-Seven thousand nine hundred and sixteen thousand dollars plus attorney's fees and Court costs, period, worded like this, or do we have to put a specific dollar amount?

(Tr. p. 287, ll. 20-23; p. 289, ll. 14-16). The judge advised the lawyers it would charge "if you find for the plaintiff you have to put a specific dollar amount." (Tr. p. 287, ll. 23-24; p. 289, ll. 22-25). The judge viewed the question as a request of whether the jury had "to put a specific dollar amount." (Tr. p. 289, ll. 9-21). Bi-Lo's lawyer stated, "I believe that they can put zero, so it will be zero to whatever, just some sort of a digit." (Tr. p. 288, ll. 5-6; p.. 289, ll. 5-8). Bi-Lo's lawyer then confirmed that the response would be "if you

find for the Plaintiff you must award a specific dollar amount." (Tr. p. 289, l. 22 - p. 290, l. 2). With the parties' agreement, the judge wrote the response on the jury's note and had the bailiff return it to them. (Tr. p. 291, ll. 4-15).

The jury returned a verdict for Plaintiff for $71,874.00. (Tr. p. 292, ll. 18-22). At Bi-Lo's request, the judge polled the jury. (Tr. p. 292, l. 23 - p. 293, l. 7). The judge gave Bi-Lo ten days to provide post-verdict motions. (Tr. p. 293, ll. 10-11).

Bi-Lo filed written motions for post-verdict relief. Bi-Lo contended it was entitled to judgment as a matter of law, notwithstanding the jury's verdict. (Motion of 5/12/12, pp. 5-8). Bi-Lo also claimed entitlement to a new trial on the ground that: (a) the verdict was grossly excessive and based on improper considerations since the jury awarded Plaintiff attorneys' fees in addition to the full amount she sought; (b) the verdict was more than 18 times the medical expenses without a showing of any permanent injury so that it was grossly excessive; (c) the judge's refusal to charge the jury as to comparative negligence; and (d) "the Thirteenth Juror Doctrine." (Motion of 5/12/12, pp. 8-14).

On August 20, 2012, the trial judge entered a detailed order denying Bi-Lo's motion. (Order of 8/15/12, entered 8/20/12). The judge ruled that "Defendant concedes in his own post-trial motion that Plaintiff offered evidence of actual or constructive notice. Although Defendant may dispute Plaintiff's theory of the case and the evidence presented, in party by Defendant's own employee, a jury question was presented as to whether Defendant was negligent." (Order, p. 3). The judge outlined the evidence from which the jury could have found for Plaintiff, and concluded the evidence created "issues of fact best resolved by a jury." (Order, pp. 4-6).

Next, the judge rejected Bi-Lo's contention that the verdict was motivated by "corruption, prejudice, passion, or any other improper motive." (Order, pp. 6-8).

Regarding the failure to charge comparative negligence, the judge first rejected Bi-Lo's contention that the judge did so *sua sponte.* (Order, p. 8). The judge added:

> Defendant failed to present any evidence, direct or circumstantial, that warrants a comparative negligence jury instruction. Defendant bears the burden or proving comparative negligence. There was no conflicting inferences to be made from the evidence presented as Defendant presented none. Further, Defendant presented no witnesses and rested its case after the presentation of Plaintiff's case in chief. Defendant failed to present a scintilla of evidence of comparative negligence. Moreover, Defendant did not argue any facts that could lead a jury to infer comparative negligence during closing arguments. Defendant's only defense was that "we are not responsible," however, and failed to provide evidence that would link responsibility for the fall to [Plaintiff]. In addition, Bi-Lo's own employee admitted under oath that she did not blame [Plaintiff] for the fall. Defendant's failure to present evidence of Plaintiff's negligence barred them from receiving a comparative negligence jury instruction in this case.

(Order, pp. 8-9).

Lastly, the judge denied Bi-Lo's motion based upon the "Thirteenth Juror" doctrine. (Order, pp. 9-12). The judge rejected Bi-Lo's argument regarding the brevity of deliberations (Order, pp. 9-10), and held there was evidence to support the verdict. (Order, pp. 10-12).

Bi-Lo did not move for the judge to reconsider any portion of its order, but instead served its notice of appeal on August 31, 2012.

ARGUMENTS

I. THE TRIAL JUDGE CORRECTLY DENIED BI-LO'S MOTION FOR DIRECTED VERDICT AND/OR JNOV, BECAUSE THERE WAS SOME EVIDENCE IN THE RECORD TO SUPPORT EACH ELEMENT OF PLAINTIFF'S PREMISES LIABILITY CLAIM

Bi-Lo asserts that Plaintiff did not present any evidence from which a jury could reasonably conclude that Bi-Lo had constructive notice of the debris on the floor. (App. Br. pp. 1-2). Bi-Lo contends that the trial court accordingly erred in denying its motions for directed verdict and JNOV. This Court should affirm.

A. Error Preservation

In a footnote, Bi-Lo initially notes that in denying JNOV, the trial judge indicated she denied the motion on two separate grounds: (1) that there was evidence of constructive notice and (2) there was evidence from which the jury could have found actual notice. (App. Br. p. 1, footnote 2; Order of 8/15/12, p. 4, ¶ (ii)). Bi-Lo also notes out the trial court's ruling that *Wintersteen v. Food Lion, Inc.*, 344 S.C. 32, 542 S.E.2d 728 (2001) does not control in this case. (App. Br. p. 1, footnote 2; Order of 8/15/12, p. 3). Apparently anticipating an error preservation argument, Bi-Lo asserts "to be clear" it is appealing all aspects of the order. (App. Br. p. 1, footnote 2). The Court should not accept this assertion.

To the extent the trial judge made separate rulings on a ground no one argued (*i.e.*, that Bi-Lo had actual notice), it was incumbent upon Bi-Lo to move pursuant to Rule 59, SCRCP, to request that the judge alter or amend the judgment to remove that ruling. *See*

In re Timmerman, 331 S.C. 455, 460, 502 S.E.2d 920, 922 (Ct. App. 1998) ("[w]hen a party receives an order that grants certain relief not previously contemplated or presented to the trial court, the aggrieved party must move, pursuant to Rule 59(e), SCRCP, to alter or amend the judgment in order to preserve the issue for appeal."); *Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 468 S.E.2d 292 (1996) (where special referee granted specific relief not contemplated, and the record contained no post-judgment motion challenging the issue, Supreme Court held the issue was not preserved for appellate review). Because this independent ground was not properly challenged, it is the law of this case, and forms a basis to affirm. *See Anderson v. Short*, 323 S.C. 522, 476 S.E.2d 475 (1996) (where a decision is based on more than one ground, the appellate court will affirm unless the appellant challenges all grounds because the unappealed ground will become the law of the case). Thus, the Court could affirm on this basis and avoid ruling on the other grounds Bi-Lo raises.

With regard to Bi-Lo's assertion that it has preserved its challenge to the trial judge's separate ruling that the case is not controlled by *Wintersteen*, the Court should find that issue is also not preserved. As the Supreme Court has instructed, "an appellate court ... may not *reverse* for any reason appearing in the record." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 421-422, 526 S.E.2d 716, 724 (2000) (emphasis by the Court). Instead,

> The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an

appellate court will review those issues and arguments.

Id. The Court stated that "[i]mposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." *Id., citing Brown v. Singletary*, 226 S.C. 482, 85 S.E.2d 738 (1955) (party may not neglect or ignore vices in the trial, then expect to assert those vices on appeal in case of disappointment at trial). Bi-Lo failed to move pursuant to Rule 59, SCRCP, for the judge to alter or amend the conclusion that this case is not controlled by the analysis in *Wintersteen*, so that ruling is now the law of this case.

Accordingly, this Court should summarily affirm the verdict and remit this case to the circuit court.

B. The Issues on the Merits

As to the merits of the issues on appeal, the trial judge's decision to deny Bi-Lo's motion for JNOV was correct. This Court should affirm.

In South Carolina, a merchant owes a customer a duty of ordinary care to keep his premises in a reasonably safe condition. *Richardson v. Piggly Wiggly Cent., Inc.*, 404 S.C. 231, 743 S.E.2d 858 (Ct. App. 2013). 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 (2001). 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. *Id.*, at 35, 542 S.E.2d at 729-730.

In *Wintersteen*, the Supreme Court adhered to its common law foreign substance analysis stating:

> [A]lthough there may be a foreseeable risk that substances will wind up on the floor, there is no specific act of the defendant which causes the substance to arrive there, *i.e.*, it generally arrives there through the handling of a third party. To require shopkeepers *to anticipate and prevent* the acts of third parties is, in effect, to render them insurers of their customers' safety. This is simply not the law of this state.

344 S.C. at 35-36, 542 S.E.2d at 730 (emphasis added). *Accord Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 580 S.E.2d 440 (2003) (quoting *Wintersteen*).

In *Wintersteen*, the plaintiff "slipped and fell on a puddle of clear liquid" while walking near "a self-service soda fountain equipped with an ice dispenser" in a Food Lion store. 344 S.C. at 34, 542 S.E.2d at 729. Wintersteen admitted Food Lion had neither actual nor constructive notice of the liquid on the floor but instead argued "the storekeeper has a duty to minimize such risks and take measures to prevent the items from falling" because it is foreseeable that the ice dispenser will cause liquid to fall to the floor. 344 S.C. at 35, 542 S.E.2d at 730. Affirming this Court's decision that the trial court should have directed a verdict for Food Lion, the Supreme Court distinguished between liability for failure to correct an existing dangerous condition and liability for failure to prevent the dangerous condition from arising in the first place. The Court stated:

> 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.

344 S.C. at 35–36, 542 S.E.2d at 730. Thus, the Supreme Court rejected a "strict liability" model for the traditional rules governing merchant liability in these cases. This is the narrow holding of *Wintersteen.*

Under the "traditional" rules, a merchant may be liable if the merchant had actual or constructive knowledge of the dangerous condition and failed to remedy it. *Wintersteen.* Constructive notice is a legal inference which substitutes for actual notice. *O'Leary-Payne v. R.R. Hilton Head, II, Inc.*, 371 S.C. 340, 638 S.E.2d 96 (Ct. App. 2006). It 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. *Id. See also Fickling v. City of Charleston*, 372 S.C. 597, 643 S.E.2d 110 (Ct. App. 2007) (finding issue of constructive notice was a question for the jury where there was evidence the condition existed for a sufficient time, there were employees who could have seen it, and the defendant had a policy for dealing with hazards on a sidewalk). *Cf.*, *e.g.*, *Wintersteen*, 344 S.C. at 36-37 n. 1, 542 S.E.2d at 730 n. 1 (noting generally that constructive notice can be established by evidence that a defect existed for a sufficient length of time for the defendant to have discovered the defect and remedied it).

Bi-Lo contends that the *only* evidence in this case is that it did not have constructive notice of the debris on the floor. The Court should reject this argument. While there is evidence that Bi-Lo had no actual or constructive notice, this Court's scope of review requires affirmance if there is any evidence from which a jury could have found actual or constructive notice.

In this case, Plaintiff testified that she slipped on several "smushed" grapes and a pool of water about two feet in diameter. She testified that she had been in the store as much as ten minutes. Her boyfriend agreed that they had been in the store as long as ten minutes. The assistant manager, Ms. Rice, acknowledged that Bi-Lo had a maintenance log and an inspection policy, and on several occasions the employees failed to follow those procedures. She also acknowledged that on the evening of Plaintiff's injury the inspections were late, and that the debris had to have been on the floor between her prior inspection at 8:03 p.m. and 9:40 p.m ., the time of the fall.

This evidence is sufficient to support the jury's verdict for Plaintiff as to Bi-Lo's liability for her injuries. The trial judge correctly denied Bi-Lo's motion for JNOV, and this Court should affirm.

Bi-Lo cites to *Gillespie v. Wal-Mart Stores, Inc.*, 302 S.C. 90, 394 S.E.2d 24 (Ct. App. 1990) in support of its claim that it was entitled to a directed verdict or a JNOV. (App. Br. pp. 2, 25, 27). *Gillespie*, however, is meaningfully distinct from this case.

In *Gillespie*, the plaintiff slipped in water on the floor while checking out at a Wal-Mart store. This Court stated "the record does not show that any Wal-Mart employee, including the checkout clerk in the vicinity of the wet floor, actually knew the

floor was wet. It also does not show how long the water had been on the floor or how long the water was within the checkout clerk's field of vision." *Id.* at 91, 394 S.E.2d at 25. The Court added, "[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. The 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 91-92, 394 S.E.2d at 25 (citations omitted).

In this case, however, there was some evidence that Plaintiff had been in the store as long as ten minutes, that Bi-Lo had violated its own internal inspection policy, and that Plaintiff fell on a large quantity of water and a bunch of grapes, some of which were mashed prior to her fall. This evidence is more than speculative evidence and provides a basis from which the jury could have returned a verdict for Plaintiff.

Bi-Lo also cites to *Calvert v. House Beautiful Paint and Decorating Center, Inc.*, 313 S.C. 494, 443 S.E.2d 398 (1994) for the proposition that the "mere fact the substance was on the floor is insufficient standing alone to charge the storekeeper with negligence." (App. Br. p. 21). The Supreme Court in *Calvert* noted "the record reveals no evidence of constructive notice. The evidence establishes only that the storekeeper inspected the store each morning before opening, the store was swept after closing the previous day, and no foreign substance was on the floor immediately before Calvert's fall." *Calvert*, 313 S.C. at 495, 443 S.E.2d at 399. Unlike *Calvert*, however, there is no dispute that the foreign substance was on the floor before Plaintiff's fall. Also, the only evidence in *Calvert* was

that the merchant, a small paint supply store with only three aisles, had an inspection and sweeping procedure that it had followed, while Bi-Lo admitted it failed to follow its inspection and sweeping policy. *Calvert* is distinguishable in a meaningful way.

Bi-Lo cites to *Hunter v. Dixie Home Stores*, 232 S.C. 139, 101 S.E.2d 262 (1957) in support of its argument that Bi-Lo was entitled to a directed verdict. *Hunter* is also distinguishable from this case in a meaningful way. In *Hunter*, plaintiff fell in defendant's "self service" grocery store. She brought a premises liability claim and obtained a verdict. The Supreme Court reversed, however, stating:

> The evidence in this case, as is heretofore stated, does not show that the appellant had any actual knowledge that the beans were in the aisle where the respondent was walking. The evidence does not show what time of day her injury occurred, nor whether other customers had previously been in the store and used the aisle where the respondent was walking. There is an absence of any evidence showing how the beans [got] on the floor or how long they had been there before the respondent stepped on them and fell, nor is there any evidence that the beans had been walked upon by any other customer.

Id. at 144, 101 S.E.2d at 265. In this case, however, there was evidence that Plaintiff was injured at about 9:30 p.m., that the store had been open at least since the walk-through at 6:10 p.m. and the subsequent walk-through at 8:03 p.m., and that some of the grapes were "smushed" prior to Plaintiff's slip and fall on the debris.

Bi-Lo points to *Wimberly v. Winn-Dixie Greenville, Inc.*, 252 S.C. 117, 165 S.E.2d 627 (1969) for the rule that a jury may not speculate on the issue of constructive notice. (App. Br. p. 27). In *Wimberly*, the Court noted there was "no evidence" that tended to prove the rice in that case was on the floor "at any particular time prior to the actual fall." *Id.* at 122, 165 S.E.2d at 629. The Court stated:

> A search of the record fails to reveal any evidence showing how long the rice had been on the floor. The store had been swept just before opening at 8 a.m., and the fall occurred between 10 and 11 a.m. in an area adjoining the produce area. The produce manager testified that although he went to the back of the store from time to time to procure goods from a storage area, he passed over the point where the fall occurred every ten or fifteen minutes and was stationed in the immediately adjacent produce area the entire morning. He saw no rice on the floor prior to the fall.
>
> Mr. Boykin, in charge as assistant manager, testified that he walked up and down the aisle before the opening of the store and several times during the day. He did not see rice on the floor prior to the fail.

Id. In this case, however, there was evidence that some of the grapes were "smushed" prior to the fall, that Plaintiff fell about 10 minutes after arriving at the store, and that Bi-Lo violated its own inspection and sweeping policies. Unlike *Wimberly*, there was some evidence from which the jury could have concluded Bi-Lo had constructive notice, and its conclusion was not based upon speculation.

Bi-Lo cites to *Pennington v. Zayre Corp.*, 252 S.C. 176, 165 S.E.2d 695 (1969) in support of its argument. (App. Br. p. 27). Once again, however, *Pennington* involved a complete absence of evidence that the debris in that case (plastic bags) had been "on the floor at any time prior" to the fall. *Id.*, at 179, 165 S.E.2d at 696. Here, Plaintiff's testimony that she fell on a large puddle of water and a number of grapes, some of which were "smushed" prior to her fall, and that Bi-Lo violated its own inspection and sweeping policy, is more than mere speculation.

In a footnote, Bi-Lo challenges the trial judge's description of Plaintiff's testimony as "without contradiction." (App. Br. pp. 24-26). Bi-Lo also contends the trial judge's statement that Bi-Lo conceded "in [its] own post-trial motion that [Plaintiff]

offered evidence of actual or constructive notice" is "simply incorrect, and there is no basis for it in the record." (App. Br. p. 29). Bi-Lo did not challenge these "findings" or statements by way of a motion for reconsideration pursuant to Rule 59, SCRCP, so that any challenge to these statements in the order is not preserved. *Cf.*, *Brown v. Singletary*, 226 S.C. 482, 85 S.E.2d 738 (1955) (party may not neglect or ignore vices in the trial, then expect to assert those vices on appeal in case of disappointment at trial).

In sum, viewing the evidence in a light most favorably for Plaintiff, the trial judge correctly denied Bi-Lo's motion for directed verdict and permitted the jury to determine whether Bi-Lo had constructive notice of the hazardous condition prior to Plaintiff's fall. Likewise, the trial judge correctly denied Bi-Lo's motion for JNOV after the jury had rendered its verdict. This Court should affirm those rulings.

II. THE TRIAL JUDGE DID NOT ABUSE HER DISCRETION IN REFUSING TO CHARGE THE JURY ON BI-LO'S AFFIRMATIVE DEFENSE OF COMPARATIVE NEGLIGENCE, IN REFUSING TO INCLUDE COMPARATIVE NEGLIGENCE ON THE VERDICT FORM, AND IN DENYING BI-LO'S NEW TRIAL MOTION ON THIS GROUND

Bi-Lo contends the trial judge erred in refusing Bi-Lo's request to charge comparative negligence based upon the trial judge's view "that there was insufficient evidence presented to submit the issue of [Plaintiff's] comparative negligence to the jury." (App. Br. p. 30). Bi-Lo contends that the trial judge effectively granted Plaintiff a directed verdict as to this defense, and this was error. This Court should not be persuaded by these arguments.

The decision to grant or deny a new trial motion rests within the discretion of the trial judge, and her decision will not be disturbed on appeal unless her findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law. *Burke v. AnMed Health*, 393 S.C. 48, 710 S.E.2d 84 (Ct. App. 2011). In order to warrant a reversal for a trial judge's refusal to give a requested charge, the refusal must have been both erroneous and prejudicial. *Ballou v. Sigma Nu Gen. Fraternity*, 291 S.C. 140, 352 S.E.2d 488 (Ct. App. 1986). Bi-Lo has failed to establish that the trial judge's ruling was erroneous, or that it has suffered any prejudice.

The trial judge held that because Bi-Lo presented no evidence at trial, and Bi-Lo had the burden on its affirmative defense of comparative negligence, then there was no basis for giving the comparative negligence instruction. The trial judge specifically ruled that the evidence Bi-Lo pointed to in support of its argument went to the issue of constructive notice, not comparative negligence. Bi-Lo characterizes this ruling as

"plainly incorrect." (App. Br. pp. 31-32).

To begin with, Bi-Lo did not challenge the trial judge's discussion by means of a motion to alter or amend the judgment pursuant to Rule 59, SCRCP. The argument that the ruling was "plainly incorrect" was not made to, or ruled upon by, the trial judge in the first instance. This argument, therefore, is not preserved for review. *Brown v. Singletary*, 226 S.C. 482, 85 S.E.2d 738 (1955) (party may not neglect or ignore vices in the trial, then expect to assert those vices on appeal in case of disappointment at trial), *cited in I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 421-422, 526 S.E.2d 716, 724 (2000). Furthermore, the trial judge's ruling that a defendant who puts forth *no* evidence fails to carry the burden of proof on an affirmative defense was not challenged, and is, therefore, the law of this case. *See Anderson v. Short*, 323 S.C. 522, 476 S.E.2d 475 (1996) (where a decision is based on more than one ground, the appellate court will affirm unless the appellant challenges all grounds because the unappealed ground will become the law of the case).

Also, comparative negligence is an affirmative defense, and a defendant asserting an affirmative defense bears the burden of its proof. *Youmans v. South Carolina Dept. of Transp.*, 380 S.C. 263, 670 S.E.2d 1 (Ct. App. 2008). Bi-Lo made the strategic decision not to bring forth evidence in support of its case in chief. Instead, Bi-Lo relied on its contention that Plaintiff failed to meet her burden of proof. In electing this do-nothing strategy, Bi-Lo failed to carry its burden of proof on the affirmative defense.

Lastly, the trial judge's ruling is correct as a matter of law. Bi-Lo contends Plaintiff was negligent in failing to keep her eyes on the floor and to see the "open and

obvious hazard" (the debris) upon which she slipped. (App. Br. p. 31). But this cannot be the law. A merchant counts upon its patrons to look at merchandise as the patron browses its aisles. The merchant therefore can anticipate that a customer will not be scouring the floor, but instead that the customer can reasonably rely upon the merchant maintaining the premises in a safe condition. In fact, a merchant is liable for injuries to an invitee, despite an open and obvious defect, if the merchant should anticipate that the invitee will nevertheless encounter the condition, or that the invitee is likely to be distracted. *Callander v. Charleston Doughnut Corp.*, 305 S.C. 123, 406 S.E.2d 361 (1991) (adopting Restatement (Second) of Torts, § 343(A) (1965)). The merchant may also be required to warn the invitee, or take other reasonable steps to protect the invitee, if "the possessor of the property has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious,... or fail to protect himself against it." *Callander* (citing Restatement (Second) of Torts, § 343A, comment (f) at 220-221).

Bi-Lo expects its patrons to be shopping as they move throughout the store and to be distracted by its merchandise. To say that Plaintiff should have been looking down and should have seen the debris on the floor ignores this reality. If Bi-Lo is correct, then *every* slip and fall case involving a foreign substance on the floor would automatically require an instruction on comparative negligence. Bi-Lo cites no authority for this proposition because there is none. Instead, it is the invitee's duty to exercise ordinary care to observe such obstructions as an ordinarily prudent person would expect, under normal conditions, in the aisles of the place of business in which he is an invitee. *Begin v. Georgia Championship Wrestling, Inc.*, 172 Ga.App. 293, 322 S.E.2d 737 (Ga. App. 1987).

Looking conspicuously for defects, without interruption, is not required of an invitee. *Id. See also Marshall v. A&P Food Co.*, 587 So.2d 103, 110 (Ct. App. La. 2006) ("The law does not require a supermarket customer to devote his attention meticulously to the floor in front of him as he walks.... In a self-service store, a patron has a diminished duty to see that which should be seen because his attention is presumed to be attracted to the advertised goods on the shelves.").

Accordingly, the trial judge did not abuse her discretion in refusing Bi-Lo's request that she charge the jury the law of comparative negligence under the facts and circumstances of this case. This Court should affirm that decision.

III. The Trial Judge Did Not Err in Denying Bi-Lo's New Trial Motion on the Grounds That the Verdict Was Grossly and Shockingly Excessive in Light of the Evidence Presented So as to Be Tainted by an Improper Motive

Bi-Lo contends the verdict in this case is grossly excessive so as to shock the conscience of the court and to "clearly indicate[]" the figure the jury reached was motivated by passion, carice, prejudice, partiality, corruption or some other improper motive. (App. Br. p. 33). Bi-Lo asserts that under the circumstances of this case, the verdict for $71,874.00 was "grossly and excessively shocking" because it was "more than 18 times her medical expenses" and "exceeded even what her counsel proposed during closing arguments," and "clearly intended to award [Plaintiff] attorneys' fees...." (App. Br. pp. 34-35). Bi-Lo also contends that because 2/3 of the verdict is the precise number Plaintiff's counsel suggested, the verdict *must* reflect an improper award of attorneys'

fees. Bi-Lo states "the customary standard percentage of an attorney's contingent fee" is "1/3rd." (App. Br. p. 35).[1] The Court should not be persuaded by these arguments.

The trial judge instructed the jury on the law of proximate cause (Tr. p. 272, l. 24 - p. 273, l. 23; p. 277, l. 18 - p. 278, l. 5) and damages, including the elements a plaintiff may recover. (Tr. p. 278, l. 5 - p. 282, l. 4). Those elements included economic and non-economic components (pain and suffering, loss of the enjoyment of life). The assessment of the unliquidated non-economic components was uniquely within the jury's province. *Hicks v. Herring*, 246 S.C. 429, 144 S.E.2d 151 (1965); *Edwards v. Lawton*, 244 S.C. 276, 136 S.E.2d 708 (1964); *Wright v. Gilbert et al.*, 227 S.C. 334, 88 S.E.2d 72 (1955); *Mims v. Florence County Ambulance Service Com'n*, 296 S.C. 4, 370 S.E.2d 96 (Ct. App. 1988). The jury in this case was free to accept or reject any or all of the evidence and arrive at the verdict based upon its own view of the testimony and exhibits.

Pain and suffering is recognized by the Courts of this State as a very material element of damages on which a recovery may be bottomed. *Edwards v. Lawton*, 244 S.C. 276, 136 S.E.2d 708 (1964). Damages for pain and suffering are unliquidated and indeterminate in character and the assessment of unliquidated damages must rest in the sound discretion of the jury, controlled by the discretionary power of the trial Judge. *Edwards v. Lawton*; *Wright v. Gilbert*, 227 S.C. 334, 88 S.E.2d 72 (1955).

Pain and suffering have no market price. *Edwards v. Lawton*. They are not capable of being exactly and accurately determined, and there is no fixed rule or standard

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[1] Bi-Lo offered no evidence to support this statement, nor did Bi-Lo ask the court below (or this Court) to take judicial notice of this "fact." In any event, Bi-Lo's attack on the verdict is not proper, as discussed below.

whereby damages for them can be measured. *Edwards v. Lawton*. Hence, the amount of damages to be awarded for pain and suffering must be left to the judgment of the jury, subject on to correction by the courts for abuse. *Edwards v. Lawton*. *See also Mims v. Florence County Ambulance Service Com'n*, 296 S.C. 4, 370 S.E.2d 96 (Ct. App. 1988) (the amount of damages a jury may award for physical pain and suffering and for mental pain and suffering is incapable of exact measurement and is therefore left for determination by the jury); *Hicks v. Herring*, 246 S.C. 429, 144 S.E.2d 151 (1965) (no formula for the measurement of actual damages in personal injury cases is possible, and the amount to be awarded is peculiarly within the judgment and discretion of the jury, subject to the supervisory power of the trial judge over jury verdicts; if the trial judge, in the exercise of his discretion, is convinced that the amount awarded is overliberal, he has the authority and corresponding duty to reduce the verdict by order *nisi*, and the supreme court may reverse because of the claimed excessiveness of the verdict only in those extreme cases in which the amount assessed is 'so shockingly excessive as manifestly to show' that that jury was actuated by caprice, passion or prejudice).

In *Harvey v. Strickland*, the Supreme Court stated:

> [T]he matter of damages was for the jury's determination. *See Stevens v. Allen*, 342 S.C. 47, 536 S.E.2d 663 (2000) (recognizing that every violation of a legal right imports damage and authorizes the maintenance of an action and the recovery of at least nominal damages, regardless of whether any actual damage has been sustained). *See also Boan v. Blackwell*, 343 S.C. 498, 541 S.E.2d 242 (2001) (analyzing damages for "loss of enjoyment of life" and "pain and suffering"); *Gathers v. Harris Teeter*, 282 S.C. 220, 317 S.E.2d 748 (Ct. App.1984) (physical injury is not an element of a battery); *Tisdale v. Pruitt*, 302 S.C. 238, 394 S.E.2d 857 (Ct. App.1990) (evidence that patient was denied right to make an informed consent to procedure, suffered pain from the procedure and

> suffered emotional injury were sufficient to present jury issue on whether damages were sustained and proximately caused by doctor's wrongful conduct).

350 S.C. 303, 315 n. 4, 566 S.E.2d 529, 536 n. 4 (2002). In fact, "loss of enjoyment of life" and "pain and suffering" are separate and distinct elements of damages. As the Court in *Boan* stated:

> An award for pain and suffering compensates the injured person for the physical discomfort and the emotional response to the sensation of pain caused by the injury itself. Separate damages are given for mental anguish where the evidence shows, for example, that the injured person suffered shock, fright, emotional upset, and/or humiliation as the result of the defendant's negligence.
>
> On the other hand, damages for "loss of enjoyment of life" compensate for the limitations, resulting from the defendant's negligence, on the injured person's ability to participate in and derive pleasure from the normal activities of daily life, or for the individual's inability to pursue his talents, recreational interests, hobbies, or avocations.

Boan v. Blackwell, 282 S.C. at 501-502, 541 S.E.2d at 244 (citations omitted).

In *Cabler v. L. V. Hart, Inc.*, the Supreme Court instructed:

> [T]he fact that no verdict of this size has been given heretofore for a similar injury does not of itself portend excessiveness, passion, prejudice or capriciousness[.] [I]n determining whether a verdict is excessive it must be remembered that the maximum amount which a jury might properly award as damages under the evidence in a personal injury case cannot be determined with any degree of certainty, and must be largely a matter of judgment.
>
> * * *
>
> The difficulty in drawing comparisons with prior awards, in order to determine excessiveness, is especially evident in cases involving pain and suffering as an element of damage because the nature and extent of the injuries and the suffering resulting therefrom is seldom, if ever, alike in any two cases.

251 S.C. 576, 581-582, 164 S.E.2d 574, 577 (1968) (citations omitted). *See also Lynch v. Toys R Us-Delaware, Inc.*, 375 S.C. 604, 654 S.E.2d 541 (Ct. App. 2007) (affirming verdicts of $50,000 actual and $250,000 punitive damages on false imprisonment, malicious prosecution and slander claims where plaintiff testified to injury to reputation, which led to humiliation, sleeplessness and emotional pain; Court of Appeals held Plaintiff's testimony constituted evidence of actual damages).

As for whether Plaintiff's counsel asking for a verdict in a particular range (or even of a specific amount) somehow limited the recovery, the Court should not be persuaded by this argument. To begin with, counsel's statements regarding the facts of a case are not admissible evidence. *Ex parte Morris*, 367 S.C. 56, 624 S.E.2d 649 (2006). *See also Johnson v. Charleston & W. C. Ry. Co.*, 234 S.C. 448, 108 S.E.2d 777 (1959) (calculations made or diagrams shown on blackboard during argument are not evidence); *Howle v. PYA/Monarch, Inc.*, 288 S.C. 586, 344 S.E.2d 157 (Ct. App. 1986) (Court affirmed damages award of $200,000.00 where plaintiff's counsel during his closing argument used a blackboard to illustrate damages, put certain figures on the board to represent the different elements of damages claimed by plaintiff, including a per diem calculation for pain and suffering, and at the end, counsel added up all the figures, coming up with a total of $195,767; Court noted counsel repeatedly told the jury that he could not suggest a figure for pain and suffering and he stressed that any amount awarded plaintiff for pain and suffering was for the jury alone to determine). Bi-Lo would have this Court treat counsel's closing argument as some sort of binding stipulation or evidence that bound the jury to an upper range, but this is not the law.

During closing arguments, Plaintiff's lawyer suggested ways in which a jury could value the case. (Tr. p. 252, l. 10 - p. 254, l. 3). Counsel reminded the jury that it had the total of Plaintiff's medical bills as an exhibit.[2] (Tr. p..254, ll. 5-12). Counsel suggested to the jury the number "479,160" as a figure representing the number of days since the accident, twice divided by two (i.e., divided by four). (Tr. p. 253, l. 6 - p. 254, l. 3; p. 255, ll. 20-23). Counsel also suggested the jury award "ten cents for every minute," or $47,916.00. (Tr. p. 256, ll. 13-18).

During rebuttal argument, Plaintiff's lawyer stated:

> * * * Ladies and gentlemen, we gave you a proposal with respect to the damages in this case, mental anguish, pain and suffering, loss of enjoyment of life, the medical bills. Ladies and gentlemen, there's some people that believe [Plaintiff's] compensation should be twenty-five thousand dollars. There's some that believe it should be forty-seven, ladies and gentlemen. **You get to decide whatever that number is, and only you.**

(Tr. p. 267, ll. 7-14) (bold added). So even if counsel's argument could be considered evidence or some form of stipulation, these statements reiterate that the figure counsel gave was a suggestion of the way the jury could perform the difficult task of evaluating non-economic damages in the case, and a reminder that "whatever that number is" was solely within the jury's province.

The Court should reject Bi-Lo's arguments and affirm the trial judge's denial of Bi-Lo's motion for New Trial Absolute.

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[2] Those bills totaled $3,814.00. (Tr. p. 90, l. 12 - p. 91, l. 2; Plaintiff's Exh. 1).

IV. THE TRIAL JUDGE DID NOT ERR IN DENYING BI-LO'S NEW TRIAL MOTION BASED UPON BI-LO'S ASSERTION THAT THE JURY VERDICT INCLUDED AN IMPROPER AWARD OF ATTORNEY'S FEES

Bi-Lo contends the jury's verdict is improper as it "undeniably" reflects an award of attorney's fees on top of the value of the case suggested by Plaintiff's counsel in closing arguments. (App. Br. pp. 36-37). The Court should not be persuaded by this argument.

As noted above, during deliberations the jury sent the following question to the judge:

> May we ask for Forty-Seven thousand nine hundred and sixteen thousand dollars plus attorney's fees and Court costs, period, worded like this, or do we have to put a specific dollar amount?

(Tr. p. 287, ll. 20-23; p. 289, ll. 14-16). The judge advised the lawyers it would charge "if you find for the plaintiff you have to put a specific dollar amount." (Tr. p. 287, ll. 23-24; p. 289, ll. 22-25). The judge viewed the question as a request of whether the jury had "to put a specific dollar amount." (Tr. p. 289, ll. 9-21). Bi-Lo's lawyer initially (and incorrectly) stated, "I believe that they can put zero, so it will be zero to whatever, just some sort of a digit." (Tr. p. 288, ll. 5-6; p.. 289, ll. 5-8). Bi-Lo's lawyer then confirmed that the response would be "if you find for the Plaintiff you must award a specific dollar amount." (Tr. p. 289, l. 22 - p. 290, l. 2). With the parties' agreement, the judge wrote the response on the jury's note and had the bailiff return it to them. (Tr. p. 291, ll. 4-15). There was no further objection to the hand-written instruction, nor was there any motion for mistrial. The jury returned a verdict for Plaintiff for $71,874.00. (Tr. p. 292, ll. 18-22).

The judge thereafter polled the jury at Bi-Lo's request. (Tr. p. 292, l. 23 - p. 293,

l. 5). Each juror swore that the verdict was his or her verdict. (Tr. p. 293, ll. 6-7). *See, e.g.*, *State v. Linder*, 276 S.C. 304, 278 S.E.2d 335 (1981) ("polling" is a practice whereby the court determines from the jurors individually whether they assented and still assent to the verdict); *Sanders v. Charleston Consol. Ry. & Lighting Co.*, 154 S.C. 220, 151 S.E. 438 (1930) (same). The juror's in this case heard the evidence, received a curative instruction addressed to their note that "if you find for the plaintiff you must award a specific dollar amount" (Tr. p. 290, l. 25 - p. 291, l. 1), and returned a general verdict for Plaintiff. (Verdict Form).

Bi-Lo invites this Court to dissect the verdict into pieces, speculating that the jury must have disobeyed its instructions and awarded an excessive verdict to account for attorney's fees. The Court should decline to do so.

In South Carolina, an appellate court must uphold a jury verdict if it is possible to reconcile its various features. *Camden v. Hilton*, 360 S.C. 164, 600 S.E.2d 88 (Ct. App. 2004). Furthermore, "a jury verdict should be upheld when it is possible to do so and carry into effect the jury's clear intention." *Id.* at 174, 600 S.E.2d at 93 (citations omitted). Here, the jury was specifically instructed, without objection, to "award a specific dollar amount" if it found for Plaintiff, and there was no specific instruction regarding the award, or not, of attorney's fees.

Bi-Lo cites to *Wachovia Bank Nat. Ass'n v. Beane*, 397 S.C. 612, 725 S.E.2d 715 (Ct. App. 2012) in support of its argument that the Court must reverse the general verdict in this case. (App. Br. p. 38). *Beane*, however, is meaningfully distinct from this case.

In *Beane*, in 2002 the Beanes borrowed over $370,000 from Wachovia to start a

new business. They secured the load through a pledge of securities Wachovia held for them. The Beanes defaulted on the note in 2003, and Wachovia demanded payment of the entire outstanding balance of about $225,000. In 2006 the Beanes sought to amend their answer to assert a counterclaim for negligent mismanagement of the securities account. Wachovia then filed a motion for summary judgment as to the Beanes' obligation on the note.

The master in equity heard both motions in 2007, ruling for Wachovia as to liability on the note but setting the matter for a hearing as to the amount of damages. The master granted the Beanes' motion to amend to the extent the Beanes sought a right of setoff of the amount they owed on the note. The two matters were tried together in late 2008 and the trial court submitted the Beanes' setoff claim to the jury. The court charged the jury that "it may award only one form of relief – money damages." *Id.* at 615, 725 S.E.2d at 717. The charge and the verdict form gave the jury two options: award the Beans damages in a specific amount for Wachovia's alleged mismanagement of the securities account, or find no liability and award a verdict to Wachovia. Nevertheless, the jury awarded the Beanes three separate elements of relief: (1) money damages "in the amount of $198,395.17," (2) "plus all attorney fees," and (3) "any remaining amount on the Beanes' loan account forgiven." *Id.* The trial court denied Wachovia's motion for new trial and Wachovia appealed.

This Court reversed and held the new trial motion should have been granted. First, the Court stated, "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." *Id.* at 616, 725 S.E.2d at 717. The Court added:

> First, the jury awarded the Beanes forgiveness of the remaining amount of the loan account. Because the trial court's charge did not permit the jury to award this relief, and because the master awarded summary judgment on the note, the jury acted outside of its authority in awarding this relief. Moreover, there was no evidence presented as to the amount due on the loan as of the date of trial. Therefore, it was impossible for the jury to determine if the Beanes proved damages that equaled or exceeded the amount due on the loan. As to this element of the verdict, the jury awarded relief not permitted by the trial court in an unknown amount as to which there is no evidentiary support.
>
> **Second, the jury awarded the Beanes attorney's 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.** *See Jackson v. Speed*, 326 S.C. 289, 307, 486 S.E.2d 750, 759 (1997) ("Attorney's fees are not recoverable unless authorized by contract or statute."). **After the jury returned the verdict, both parties and the trial court agreed that attorney's fees were not recoverable. The trial court could not cure this improper action of the jury by simply excluding the attorney's fees from the judgment.**
>
> Third, the jury awarded the Beanes $198,395.17. However, the only evidence of damages suffered by the Beanes as a result of the negligent mismanagement of the securities account is the testimony of their expert stating the account underperformed by $176,121.00. While it may have been possible for the Beanes to prove consequential damages beyond the financial loss due to underperformance of the account, no such proof was offered. The Beanes contend on appeal that the expert's testimony of $176,121.00 does not include interest. However, the record gives the jury no basis on which to determine how to calculate any lost interest. We also note the trial court charged pain and suffering as an element of damages.[3] However, there is no evidence in the record concerning pain and suffering. Therefore, the maximum award supported by the evidence presented in this case is the amount of damages testified to

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[3] The Court noted the record did not explain why the trial court charged the jury as to "pain and suffering," which "are not recoverable in a claim for mismanagement of a financial account." *Beane*, at 617 n. 1, 725 S.E.2d at 718 n. 1.

by the Beanes' expert—$176,121.00.

> *The combination of the three elements of damages yields a grossly excessive verdict.* The verdict demonstrates that the jury acted on some basis other than the evidence presented and that it did not follow the legal instructions given by the trial court. Our courts have consistently held that when a grossly excessive jury verdict is based on improper considerations such as these, the trial judge must grant a new trial.

Beane, at 616-618, 725 S.E.2d at 717-718 (bold and italics added).

Bi-Lo plucks the language bolded above from the opinion in support of its argument (App. Br. p. 38), but placed back into the context of the facts of that case, the language makes sense. The jury in *Beane* expressly awarded "plus all attorney fees" as an element of its verdict even though there was no evidence to support such an award and fees were not recoverable anyway. And the Court made it clear that reversal was based upon the "combination of the three elements of damages" – (a) offset of $198,395.17 in a contract dispute when the only evidence supported a maximum award of $176,121.00 for the under-performance claim, (b) the express award of "all attorney fees" and (c) the forgiveness of anything remaining on the loan balance).

In this case, the jury returned a general verdict that included a noneconomic component, which *is* recoverable in a personal injury case. Second, the jury did not expressly award attorney fees. Third, the jury did not award relief not sought and not covered by the jury instructions (*i.e.*, forgiveness of the loan balance). Lastly, there is *no* evidence that the jury "did not follow the legal instructions given by the trial court." *Beane*, at 617, 725 S.E.2d at 718.

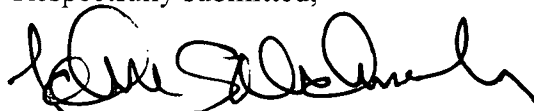
The Court should find that the *Beane* case does not control the outcome in this

case, and should affirm the trial judge's denial of Bi-Lo's motion for new trial absolute.

CONCLUSION

For the reasons stated the Court should affirm the trial court's denial of Bi-Lo's motions and affirm the jury's verdict in its entirety.

Respectfully submitted,



John S. Nichols, SC Bar #4210
BLUESTEIN NICHOLS
THOMPSON & DELGADO
Post Office Box 7965
Columbia, SC 29202
(803) 779-7599
(803) 779-8995 (facsimile)
jsnichols@bntdlaw.com

Julio A. Rossington, SC Bar #73905
ROSSINGTON LAW OFFICES, LLC
1317-M N. Main Street, #140
Summerville, SC 29483
(843) 261-1114
julio.rossington@rossingtonlaw.com

Attorneys for Respondent

November 4, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

RECEIVED
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SC Court of Appeals

DeAndra G. Benjamin, Circuit Court Judge

Case No. 2009-CP-18-0452

Rita M. Pugh, ... Respondent,

v.

Bi-Lo, LLC, ... Appellant.

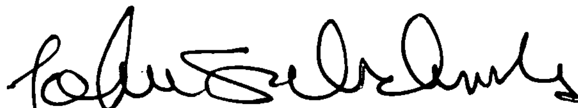
DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

Respondent proposes the following be included in the Record on Appeal:

1. Notice of Bankruptcy Stay of April 3, 2009;
2. Plaintiff's Reply to Post-trial motions.

I certify that this designation contains no matter which is irrelevant to this appeal.

Respectfully submitted,



November 4, 2013

John S. Nichols, SC Bar #4210
BLUESTEIN NICHOLS
THOMPSON & DELGADO
Post Office Box 7965
Columbia, SC 29202
(803) 779-7599
(803) 779-8995 (facsimile)
jsnichols@bntdlaw.com

Attorney for Respondent

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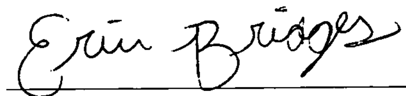
PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Appellant with a copy of the *Respondent's Initial Brief* and *Designation of Matter* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

Duke R. Highfield, Esquire
Russell Grainger Hines, Esquire
Brant R. Horton, Esquire
Stephen L. Brown, Esquire
Young Clement Rivers, LLP
P.O. Box 993
Charleston, SC 29402



November 4, 2013
Columbia, South Carolina

Erin Bridges
BLUESTEIN, NICHOLS, THOMPSON & DELGADO, LLC