

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

ORIGINAL

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No.: 2012-CP-26-9164
2013-001550

Anne Lytle and Paris Lytle.....Appellants,

v.

Bi-Lo, LLC.,.....Respondent.

RECORD ON APPEAL

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SC Court of Appeals

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STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Anne Lytle and Paris Lytle ,

Plaintiff,

vs.

Bi-Lo, LLC

Defendant.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO: 2012-CP-26-9164

ORDER

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

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

BACKGROUND

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

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

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

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

ANALYSIS

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

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

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

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

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

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

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

CONCLUSION

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

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

IT IS SO ORDERED.


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

Georgetown, South Carolina
June 17, 2013

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
Anne Lytle and Paris Lytle,	)	
	)	
Plaintiffs,	)	COMPLAINT
	)	(Personal Injury)
v.	)	
BI-LO Store 107,	)	
	)	
Defendant,	)	
	)	

HORRY COUNTY
 09 JAN -6 PM 2:28
 MELBAE HUGGINS
 CLERK OF COURT

The Plaintiffs above named, complaining of the Defendant herein, would respectfully show unto the Court:

FOR A CAUSE OF ACTION BY ANNE LYTLE

1. The Plaintiffs are husband and wife, and are citizens and residents of the County of Horry, State of South Carolina.
2. The Defendant BI-LO is a business organization organized and existing pursuant to the laws of one of the states of the United States, and does conduct business in, and maintain agents, servants, and employees in the County of Horry, State of South Carolina.
3. At all times herein mentioned and in regard to all matters herein mentioned the Defendant BI-LO acted by and through its respective agents, servants, and employees, who were at all times acting within the scope and course of their agency and employment.
4. On or about March 4, 2006, the Plaintiff Anne Lytle visited the

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Defendant's BI-LO Store #107 located at 5020 Dick's Pond Road, Myrtle Beach, South Carolina. As she was exiting the check-out area, she slipped on plastic bags left upon the floor and fell in the check-out area causing her substantial and serious injuries.

5. The aforementioned incident was a direct and proximate result of the negligence and recklessness of the Defendant, as follows:

- a. In allowing debris to collect on the floor in the check-out area;
- b. In failing to properly maintain and clean the area in which the Plaintiff fell;
- c. In failing to properly monitor the area in which the Plaintiff fell;
- d. In failing to properly train its employees to maintain the check-out area;
- e. In allowing the debris to collect on the floor in the check-out area.

6. As a direct and proximate result of the negligence and recklessness of the Defendant, the Plaintiff Anne Lytle suffered injury as follows:

- a. Suffered severe traumatic and permanent injury to her hips, legs, head, neck, back, arms, and other parts of her body;
- b. Incurred substantial medical expenses and will continue to incur such expenses in the future;
- c. Suffered severe pain and mental anguish and will continue to so suffer in the future;
- d. Suffered an impairment in her ability to earn wages in the future;
- e. Suffered an impairment in her ability to enjoy life.

7. As a result of the negligence and recklessness of the Defendant which injured the Plaintiff Anne Lytle, this Plaintiff is informed and believes she is entitled to recover actual and punitive damages against the Defendant.

FOR A CAUSE OF ACTION FOR PARIS LYTLE

8. All allegations of Paragraphs 1 through 7 hereinabove are included herein as fully as if repeated herein verbatim.

9. The Plaintiff Paris Lytle is the husband of Anne Lytle and was married to her at the time of the aforementioned incident.

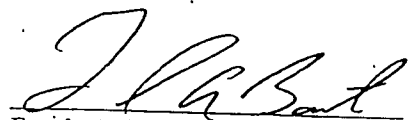
10. As a result of the negligence and recklessness of the Defendant which injured his wife, the Plaintiff Paris Lytle was injured and suffered a loss of the services, society, and companionship of his wife.

11. As a result of the negligence and recklessness of the Defendant which injured the Plaintiff Paris Lytle, he is informed and believes he is entitled to recover actual and punitive damages against the Defendant.

WHEREFORE, the Plaintiffs pray for judgment against the Defendant in an amount in excess of One Million (\$1,000,000.00) Dollars, actual and punitive damages, for the costs of this action, and for such other and further relief as the Court may deem just and proper.

December 29, 2008
West Columbia, South Carolina

JURY TRIAL DEMANDED


Frank A. Barton
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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY

CIVIL ACTION NO: 2009-CP-26-0093

COPY

Anne Lytle and Paris Lytle,

Plaintiffs,

vs.

ANSWER OF DEFENDANT BI-LO, LLC

(Jury Trial Demanded)

Bi-Lo, LLC

Defendant.

TO: FRANK A. BARTON, ESQUIRE, ATTORNEY FOR THE PLAINTIFF AND THE PLAINTIFF NAMED ABOVE:

The Defendant Bi-Lo, LLC would herein file its Answer to the Plaintiffs' Complaint and would respectfully show as follows:

FOR A FIRST DEFENSE

1. Each and every allegation of the Plaintiffs' Complaint not hereinafter admitted is expressly denied.

FOR A SECOND DEFENSE

2. The Defendant Bi-Lo, LLC would admit that it is a corporation organized and existing under the laws of the state of Delaware and would further admit that it does business as a retail establishment in Horry County, South Carolina; all remaining allegations of the Plaintiffs' Complaint are again denied.

FOR A THIRD DEFENSE

3. The Defendant would show, upon information and belief, that any injuries or damages sustained by the Plaintiffs were due to Plaintiff Anne Lytle's own negligent, careless, reckless and grossly negligent acts or omissions which combined and concurred with any negligence on the part of the Defendant, which is specifically denied, to produce such injuries or

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damages, if any, and without which such injuries or damages would not have occurred. The Defendant pleads such negligence, carelessness, recklessness and gross negligence on the part of the Plaintiff Anne Lytle and would ask that this court compare the negligence of the Plaintiff and the Defendant and if it is determined that the Plaintiff Anne Lytle's negligence, carelessness, recklessness and gross negligence was greater than the negligence, carelessness, recklessness and gross negligence of the Defendant, which is specifically denied, then the Plaintiffs should be totally barred from recovery and if it is determined that the Plaintiff Anne Lytle's negligence, carelessness, recklessness and gross negligence is equal to or less than the negligence of the Defendant, then the amount of recovery available to the Plaintiffs should be reduced by the percentage of the Plaintiff Anne Lytle's own negligence, carelessness, recklessness and gross negligence.

FOR A FOURTH DEFENSE

4. This Defendant would show, upon information and belief, that any injuries or damages sustained by the Plaintiffs, which are specifically denied, were the result of the acts or omissions of others not in the employ or control of this Defendant and, therefore, the Plaintiffs cannot recover from this Defendant in any sum whatsoever.

FOR A FIFTH DEFENSE

5. The Defendant would show that the Plaintiffs' claim against the Defendant is barred by the applicable Statute of Limitations.

FOR A SIXTH DEFENSE

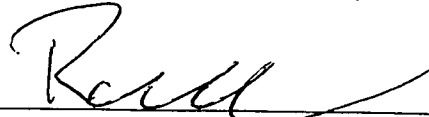
6. The Defendant would show, upon information and belief, that the Plaintiffs' claim for punitive damages violates the Fifth, Sixth, Seventh, Eighth and Fourteenth Amendments to the Constitution of the United States of America in that it violates the double jeopardy clause in that the Defendant could be subjected to multiple awards of punitive damages for the same set of facts; the self-incrimination clause is being violated because the Defendant

can be compelled to give testimony against itself in a penalty situation such as punitive damages; the assessment of punitive damages by a burden of proof less than beyond a reasonable doubt is violative of the Sixth and Fourteenth Amendments in that punitive damages are a fine or penalty and are, therefore, quasi-criminal in nature; Plaintiffs' claim for punitive damages violates the Defendant's right to access the courts as guaranteed by the Seventh and Fourteenth Amendments because the threat of an award of punitive damages chills the Defendant's exercise of that right; the Plaintiffs' claim for punitive damages violates the Eighth Amendment's guarantee that excessive fines shall not be imposed, the Plaintiffs' claim for punitive damages violates both the due process and equal protection clauses of the Fourteenth Amendment in that the standard for awarding either punitive damages is unduly vague and, therefore, violates both procedural and substantive due process safeguards; therefore, the Plaintiff's claim for punitive damages should be dismissed.

WHEREFORE, having fully answered the Plaintiffs' Complaint, the Defendant would pray that the same be dismissed with costs being granted to it. The Defendant also prays for such other and further relief as the Court deems just and proper and also demands a trial by a jury.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.



Ronald B. Diegel, Esquire
4406-B Forest Drive
PO Box 6648
Columbia, South Carolina 29260
(803) 782-4100
Attorneys for **Defendant**

Columbia, South Carolina
May 8, 2009

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Anne Lytle and Paris Lytle,

Plaintiffs,

v.

Bi-Lo, LLC,

Defendant,

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT
2009-CP-26-0093

2012CP269164

CONSENT ORDER

FILED
HORRY COUNTY
12 NOV 26 AM 10:48
MELANIE HUGGINS-WARD
CLERK OF COURT

This case was stricken from the trial roster pursuant to S.C. RP Rule 40(j) within the past year. Now with the consent of the parties hereto,

IT IS HEREBY ORDERED this case is restored to the trial roster and a new case number shall be assigned *after the payment of a new filing fee.*

AND IT IS SO ORDERED.

11/19/, 2012
Columbia, South Carolina
Conway

[Signature]
Fifteenth Judicial Circuit
Chief Administrative Judge

WE CONSENT:

[Signature]
Frank A. Barton
Post Office Box 3972
West Columbia, South Carolina 29171
Attorney for the Plaintiff

[Signature]
Ronald B. Diegel, Esquire
Murphy & Grantland, P.A.
Post Office Box 6648
Columbia, South Carolina 29260
Attorney for the Defendant

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STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Anne Lytle and Paris Lytle ,

Plaintiff,

vs.

Bi-Lo, LLC

Defendant.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO: 2009-CP-26-0093

**NOTICE OF MOTION AND MOTION FOR
SUMMARY JUDGMENT**

**TO: FRANK A. BARTON, ESQUIRE, ATTORNEY FOR THE PLAINTIFF AND THE
PLAINTIFF NAMED ABOVE:**

YOU WILL PLEASE TAKE NOTICE that the undersigned, as attorneys for the Defendant Bi-Lo, LLC, will move before the presiding judge of the Horry County Court of Common Pleas on the tenth (10th) day after service hereof, or as soon thereafter as counsel may be heard, for an Order granting summary judgment in favor of the Defendant Bi-Lo, LLC on grounds that there is no genuine issue as to any material fact when Defendant had no actual or constructive notice of any alleged foreign substance on the floor prior to Plaintiff Anne Lytle's fall.

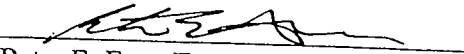
This Motion is made pursuant to Rule 56 of the South Carolina Rules of Civil Procedure and will be supplemented and supported by such affidavits, depositions, discovery responses, memoranda of law, and such other documents as appropriate.

(Signature on following page)

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Respectfully submitted,

MURPHY & GRANTLAND, P.A.



Peter E. Farr, Esquire

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Columbia, South Carolina 29260

(803) 782-4100

Attorneys for the **Defendant**

Columbia, South Carolina
March 11, 2013

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STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Anne Lytle and Paris Lytle ,

Plaintiff,

vs.

Bi-Lo, LLC

Defendant.

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO: 2012-CP-26-9164

**MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT**

**TO: FRANK A. BARTON, ESQUIRE, ATTORNEY FOR THE PLAINTIFF AND THE
PLAINTIFF NAMED ABOVE:**

Defendant Bi-Lo, LLC (the "Defendant") submits this Memorandum of Law in support of its Motion for Summary Judgment. For the reasons set forth herein and in the Motion previously filed and served, Defendant asserts that there is no genuine issue as to any material fact and that Defendant is entitled to judgment as a matter of law pursuant to Rule 56 of the South Carolina Rules of Civil Procedure.

STATEMENT OF THE FACTS

On March 4, 2006, Plaintiff Anne Lytle (the "Plaintiff") was entering the line for the checkout counter at Bi-Lo when she slipped and fell on what she claims was a Bi-Lo grocery bag. (See Anne Lytle Depo., p. 35, portions of which are attached hereto as "Exhibit A"). There is no dispute that a plastic bag was on the floor where the Plaintiff fell. (Anne Lytle Depo., p. 35; see also Affidavit of Angel Jackson, ¶ 5, attached hereto as "Exhibit B"). Plaintiff did not see the bag before she fell, but she believes the bag was on the floor at the front of the checkout aisle, not the back of the aisle where the cashier usually bags the groceries. (Anne Lytle Depo., p. 36). Plaintiff has no idea how the bag got on the floor. (Anne Lytle Depo., p. 36-37). Plaintiff does

does not know how long the bag was on the floor before she fell. (Anne Lytle Depo., p. 36-37). Prior to the Plaintiff's fall, Defendant had received no complaints about a plastic bag on the floor. (Affidavit of Angel Jackson, ¶ 9). There is no evidence that any Bi-Lo employee knew the bag was on the floor before the Plaintiff fell. (Anne Lytle Depo., p. 37; Affidavit of Angel Jackson, ¶ 6).

ARGUMENT

I. SUMMARY JUDGMENT IS APPROPRIATE IF THE PLAINTIFF FAILS TO PRODUCE SUFFICIENT EVIDENCE TO SUPPORT AN ESSENTIAL ELEMENT OF HER CLAIM.

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Flemming v. Rose, 350 S.C. 488, 567 S.E.2d 857 (2002); Baril v. Aiken Reg'l Med. Ctrs., 352 S.C. 271, 573 S.E.2d 830 (Ct. App. 2002). Summary judgment is appropriate where "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." Rule 56(c), SCRPC; see also Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997); Smith v. South Carolina Ins. Co., 350 S.C. 82, 564 S.E.2d 358 (Ct. App. 2002).

A court should grant summary judgment when it is clear that there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed. Etheredge v. Richland School Dist. One, 341 S.C. 307, 311, 534 S.E.2d 275, 277 (2000). "The plain language of Rule 56(c), SCRPC, mandates the entry of summary judgment, after adequate time for discovery against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden

of proof at trial." Carolina Alliance for Fair Employment v. S.C. Dep't of Labor, Licensing, & Regulation, 337 S.C. 476, 485, 523 S.E.2d 795, 800 (Ct. App. 1999). "In such a situation, there can be no genuine issue as to any material fact since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Baughman v. American Tel. & Tel. Co. 306 S.C. 101, 116, 410 S.E.2d 537, 546 (1991).

II. BECAUSE PLAINTIFF HAS PRESENTED NO EVIDENCE THAT DEFENDANT CREATED ANY DANGEROUS CONDITION THAT CAUSED THIS ACCIDENT OR THAT DEFENDANT KNEW OF OR SHOULD HAVE KNOWN OF ANY DANGEROUS CONDITION THAT CAUSED THIS ACCIDENT, DEFENDANT IS ENTITLED TO SUMMARY JUDGMENT.

The Defendant is entitled to summary judgment against the Plaintiff because she has failed to offer any evidence that Defendant created the allegedly hazardous condition on the floor or that Defendant had actual or constructive notice of the substance on the floor prior to the Plaintiff's fall. It is well established in South Carolina that a storekeeper is not an insurer of the safety of his or her customers. Felder v. K-Mart, 297 S.C. 446, 377 S.E.2d 332 (1989). Rather, the storekeeper merely owes its customers the duty of exercising ordinary care to keep the premises in a reasonably safe condition. Moore v. Levitre, 294 S.C. 453, 365 S.E.2d 730 (1988). Likewise, it is well established in South Carolina that a customer who seeks to recover for injuries sustained as a result of a fall caused by a foreign substance on a storekeeper's floor must prove either (1) that the foreign substance causing the fall was placed on the floor by the storekeeper, or (2) that the storekeeper had actual or constructive notice of the presence of the foreign substance on the floor and failed to remove it. Wintersteen v. Food Lion, Inc., 344 S.C. 32, 35, 542 S.E.2d 728, 729 (2001); Bessinger v. Bi-Lo, Inc., 329 S.C. 617, 496 S.E.2d 33, 34 (Ct. App. 1998); Simmons v. Winn-Dixie Greenville, Inc., 318 S.C. 310, 457 S.E.2d 608, 609 (1995); Calvert v. House Beautiful Paint and Decorating Ctr., Inc., 313 S.C. 494, 443 S.E.2d

398, 399 (1994); Gillespie v. Defendant Stores, Inc., 302 S.C. 90, 394 S.E.2d 24 (Ct. App. 1990); Dennis v. Defendant Stores, Inc., 301 S.C. 529, 392 S.E.2d 810 (Ct. App. 1990). In this case, Plaintiff has failed to provide any evidence that the plastic bag that allegedly caused her fall was placed on the floor by Defendant, or that Defendant had actual or constructive notice of the presence of the bag on the floor and failed to remove it.

A. The Plaintiff has failed to produce any evidence that Defendant placed the plastic bag on the floor.

In this case, no evidence exists that a Defendant employee placed the plastic bag on the floor. At best, the Plaintiff could only speculate that perhaps the bag was dropped from the checkout counter, but she did not know whether it was an employee of the Defendant or a customer that dropped the bag. (Anne Lytle Depo., p. 38). However, the mere existence of the bag on the floor is insufficient to establish liability. Because Plaintiff cannot establish that Defendant placed the bag on the floor, Plaintiff is required to establish that Defendant had either actual or constructive notice of the presence of the bag on the floor and failed to remove it.

B. The Plaintiff has failed to produce any evidence that Defendant had actual or constructive notice of the plastic bag on the floor.

1. The Plaintiff has failed to produce any evidence that Defendant had actual notice of the presence of the plastic bag on the floor.

The Plaintiff has offered no evidence establishing that any store employee knew that the bag was on the floor before Plaintiff's fall. Plaintiff admits that she does not know if any employee of Defendant knew the bag was on the floor before she fell. (Anne Lytle Depo., p. 36, 37, 38). Moreover, the floors are inspected every two hours for debris or other spills, and any such hazards are cleared from the floors at the time of inspection. (Affidavit of Angel Jackson, ¶ 7). The incident occurred at 7:25 p.m., and the floors had last been inspected at 6:30 p.m. (Affidavit of Angel Jackson, ¶ 8). Prior to the Plaintiff's fall the Defendant had received no

complaints about a plastic bag on the floor, neither the Store Director nor any other employee of the Defendant was aware that a plastic bag was on the floor, and the Defendant had no notice that a bag had fallen on to the floor in the area where the Plaintiff fell. (Affidavit of Angel Jackson, ¶ 6, 9). In other words, there is no evidence that the Defendant had any knowledge whatsoever that the bag was on the floor prior to her fall. Thus, Plaintiff cannot show that Defendant had actual notice of the bag on the floor.

2. The Plaintiff has failed to produce any evidence that Defendant had constructive notice of the bag on the floor.

A customer can establish a storekeeper's constructive notice of a foreign substance if he or she can show that the foreign substance had been on the floor for a sufficient length of time that the storekeeper would or should have discovered the substance and removed it in the exercise of ordinary care. Gillespie, 394 S.E.2d at 24–25. The question of whether a foreign substance was on the floor for such a length of time as to create the inference that the storekeeper should have discovered it and was negligent for failing to do so cannot be left to speculation. Id. at 25. Here, the Plaintiff has offered no evidence regarding the length of time the bag had been on the floor before her fall. In fact, she admits that she does not know how long the bag was on the floor. (Anne Lytle Depo., p. 36).

In Wintersteen, supra, the plaintiff allegedly slipped and fell in a puddle of clear liquid near a self-service soda fountain with an ice dispenser. Since the plaintiff had no evidence showing that the employees actually knew that liquid was on the floor, the plaintiff had to establish the shopkeeper's constructive knowledge by showing that the puddle had been on the floor a sufficient time. Wintersteen, 344 S.C. at 36. In its opinion, which was upheld by the Supreme Court, the Court of Appeals stated that "while the liquid could have been on the floor for an extended period of time, it is just as possible that it had been on the floor for only

moments before Wintersteen fell.” Wintersteen v. Food Lion, Inc., 336 S.C. 132, 136, 518 S.E.2d 828 (Ct. App. 2000).

The rule of Wintersteen is long established. In Pennington v. Zayre Corp., 252 S.C. 176, 179, 165 S.E.2d 695, 696 (1969), a case cited with approval in Wintersteen, the plaintiff allegedly slipped on a clear plastic bag on the floor of the department store. Three independent witnesses testified that there were multiple plastic bags lying on the floor at the time the plaintiff fell, and the plaintiff testified that on other occasions she had seen plastic bags lying on the floor in this same area. Id. at 179, 165 S.E.2d at 696. However, the South Carolina Supreme Court found that although the plastic bags were obviously on the floor at the time of the fall, there was no evidence that the bags were on the floor prior to the accident. Id. Thus, the Court concluded that it “would be pure speculation” “to hold that the bags had been there sufficiently long that they should have been discovered by the merchant,” and affirmed the lower court’s finding that the defendant did not have constructive notice because the plaintiff had failed to show “that the material had been on the floor sufficiently long that the defendant was negligent in failing to discover and remove it. Id.

Just like the plaintiffs in Wintersteen and Pennington, Plaintiff in the instant case is unable to show how long the bag was on the floor prior to her fall. (Anne Lytle Depo., p. 36). This evidence, or lack thereof, is insufficient to establish constructive notice. In effect, the Plaintiff is asking this Court to allow a jury to impermissibly speculate as to the length of time the bag was on the floor before Plaintiff’s fall, but such speculation is specifically prohibited under the holdings of Pennington and Wintersteen. Therefore, Plaintiff’s evidence, or lack thereof, is insufficient to establish constructive notice of the existence of the bag on the floor, and Defendant’s Motion for Summary Judgment should be granted.

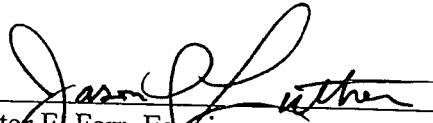
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CONCLUSION

It is undisputed that Defendant did not cause the bag to be on the floor. Moreover, Plaintiff has failed to show that Defendant had notice, either actual or constructive, of the bag on the floor that allegedly caused her fall. Therefore, Defendant respectfully asks this Court to grant its Motion for Summary Judgment.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.



Peter E. Farr, Esquire
Jason P. Luther, Esquire
P.O. Box 6648
Columbia, South Carolina 29260
(803) 782-4100
Attorneys for Bi-Lo, LLC

Columbia, South Carolina
May 30, 2013

000020

1 State of South Carolina) Court of Common Pleas
 2 County of Horry) No.: 2009-CP-26-0093
 3
 4
 5 Anne Lytle and Paris)
 6 Lytle,)
 7 Plaintiffs,)
 8 vs.) Deposition of
 9 Bi-Lo, LLC,) ANNE LYTLE
 10 Defendant.) February 15, 2013

11
 12
 13 Deposition on oral examination of ANNE LYTLE,
 14 reported by Brad H. Thomas, Certified Realtime
 15 Reporter and Notary Public in and for the State of
 16 South Carolina; said deposition taken pursuant to
 17 agreement and in accordance with the South Carolina
 18 Rules of Civil Procedure, at the Law Offices of
 19 Frank A. Barton, 1611 Augusta Road, West Columbia,
 20 South Carolina, on February 15, 2013, at the hour of
 21 12:07 p.m.

22 000021

23
 24 GARBER REPORTING SERVICE, INC.
 25 POST OFFICE BOX 12348
 COLUMBIA, SOUTH CAROLINA 29211
 (803) 256-4500

Appearances

Representing the Plaintiffs:

FRANK A. BARTON, ESQUIRE
Law Offices of Frank A. Barton
1611 Augusta Road
West Columbia, South Carolina 29169-5629
bartonf@hotmail.com

Representing the Defendant:

PETER E. FARR, ESQUIRE
Murphy & Grantland, PA
4406-B Forest Drive
P.O. Box 6648
Columbia, South Carolina 29260
pfarr@murphygrantland.com

Also Present:

PARIS LYTLE

000022

ANNE LYTLE

1 checkout.

2 Q. Okay.

3 A. And that's about the last thing I can tell
4 you that happened.

5 Q. You had your hands on the buggy at the
6 time you started to fall?

7 A. I did.

8 Q. Do you know how close you were to the
9 checkout when you fell?

10 A. I was right in it, in the checkout
11 counter.

12 Q. When you fell did you hit anything other
13 than the floor?

14 A. No.

15 Q. Were you -- did you fall between the
16 checkout counters or were you still out in that big
17 aisle just before the checkout?

18 A. No. I was right at the -- going into the
19 checkout counter as well as I can remember.

20 Q. Okay. Do you know if when you fell part
21 of your body was still out in the main aisle just
22 right in front of the checkout counter or were you
23 actually in that lane?

24 A. I was in the lane.

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25 Q. Do you know what you fell on?

ANNE LYTTLE

1 A. It was -- well, the men came running to
2 help me because I couldn't get up.

3 Q. Were they nice?

4 A. Extremely, but he wasn't -- he was just a
5 customer.

6 Q. Okay.

7 A. Nobody in the store helped me.

8 Q. Okay.

9 A. And it was one of those real slick grocery
10 bags they bag your grocery in at the end of the
11 counter was what I fell on.

12 Q. Did you see the bag?

13 A. Yes, I did. He picked it up and he said,
14 "Ma'am, I saw you when you fell. You stepped on
15 this and fell."

16 Q. Do you know his name?

17 A. No. See, I wasn't thinking.

18 Q. That's all right. What color was that
19 bag?

20 A. A tan bag that says Bi-Lo. They still
21 have the same old bags.

22 Q. Did you see the bag at all before you fell
23 on it?

24 A. No. I was not looking down. **000024**

25 Q. Had you ever seen that bag on the floor as

ANNE LYTTLE

1 you had been in the store that day?

2 A. Say that again.

3 Q. Had you seen the bag at all on the floor
4 while you were in the store that day before you
5 fell?

6 A. No. No.

7 Q. Do you know how that bag got on the floor
8 there?

9 A. I have no idea.

10 Q. And it was up at the front of the checkout
11 area, not back where the bagger would be?

12 A. It was like as you turn in to the checkout
13 and the lady or gentleman takes your groceries and,
14 you know, puts them in and checks you out.

15 Q. Okay.

16 A. And it was as I turned in there that
17 that -- I don't know what happened.

18 Q. Do you know how long that bag had been on
19 the floor?

20 A. Oh, no.

21 Q. Do you know how that bag got on the floor?

22 A. No.

23 Q. Do you know anyone from Bi-Lo who knew the
24 bag was on the floor?

25 A. No.

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ANNE LYTTLE

1 Q. Do you know any reason someone from Bi-Lo
2 should have known the bag was on the floor?

3 A. Well, I would think for safety reasons
4 they would.

5 Q. Do you know how long it had been there?

6 A. I have no idea.

7 Q. Do you know how it got there or who put it
8 there?

9 A. No.

10 Q. Do you know if anyone from Bi-Lo had had a
11 chance to see the bag on the floor yet?

12 A. No.

13 Q. Do you know anything Bi-Lo did wrong in
14 that bag getting onto the floor?

15 A. Well, I feel like for safety reasons they
16 should check their flooring.

17 Q. And if they do periodically check their
18 floor, do you think that's all they need to do?

19 A. Well, that's something I can't answer for
20 Bi-Lo.

21 Q. Okay. If they had done checks of their
22 floor and the bag wasn't on there the last time they
23 had done the check of the floor, can you think of
24 anything they did wrong to get that bag onto the
25 floor?

000026

ANNE LYTTLE

1 A. No. I guess someone just dropped it off
2 the counter. I don't know, sir.

3 Q. But you don't know of anyone from Bi-Lo
4 having any role in that bag getting onto the floor?

5 A. I don't know the people from Bi-Lo. I
6 mean, you know, I just go in and buy my groceries.

7 Q. Sure. You don't know if anyone from Bi-Lo
8 dropped that bag, do you?

9 A. No.

10 Q. It could have been a customer?

11 A. I don't know. I didn't -- I didn't see
12 anybody. I was just intent on getting out of the
13 store, paying for my cat food and getting out of the
14 store.

15 Q. Sure. And you don't know anyone from
16 Bi-Lo who ever saw that bag that was on the floor
17 and never picked it up?

18 A. No.

19 Q. You don't know if anyone from Bi-Lo did
20 see the bag before you fell, do you?

21 A. No. Because I really wasn't paying any
22 attention to the people from Bi-Lo.

23 Q. Did you ever talk with anyone from Bi-Lo
24 after you fell?

25 A. No.

000027

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Anne Lytle and Paris Lytle,

v.

Bi-Lo, LLC,

Plaintiff,

Defendants.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO: 2012-CP-26-9164

AFFIDAVIT OF ANGEL JACKSON

PERSONALLY APPEARED BEFORE ME, the undersigned, who after being duly sworn, deposes and says:

1. I am Store Director at Bi-Lo Store #85 and have been employed with Bi-Lo, LLC for 15 years.
2. On March 4, 2006, I was a Co Customer Service Manager at Bi-Lo Store #107.
3. As Co Customer Service Manager of the store, my duties included investigating incidents such as a slip and fall.
4. Once I was informed on March 4, 2006 that a fall had occurred, I approached the Plaintiff who was with her husband in the area where she fell.
5. A plastic produce bag was on the floor when I arrived where Plaintiff fell.
6. Prior to the Plaintiff's fall, neither I nor any other employee of the Bi-Lo was aware that a plastic bag was on the floor.

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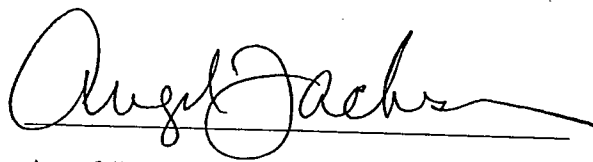
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7. As part of Bi-Lo's policies and practices, the floors are inspected at least every two hours for debris or other spills, and any such hazards are cleared from the floors at the time of inspection.

8. Prior to this incident that occurred on March 4, 2006 at 7:25 p.m., the floors were last inspected at 6:30 p.m.

9. Prior to the Plaintiff's fall, Bi-Lo received no complaints about a plastic bag on the floor. Prior to the Plaintiff's fall, Bi-Lo had no notice that a bag had fallen onto the floor in the area in which the Plaintiff fell.

FURTHER AFFIANT SAYETH NOT.



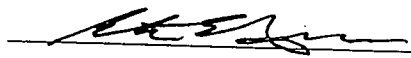
Angel Jackson

5/24/13

Date

SWORN to and subscribed before me

This 24th day of May, 2013

 (L.S.)

Notary Public for South Carolina

My Commission Expires: 1/24/2016

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STATE OF SOUTH CAROLINA
COUNTY OF HORRY

) IN THE COURT OF COMMON PLEAS
) FOR THE FIFTEENTH JUDICIAL CIRCUIT
) 2009-CP-26-0093

Anne Lytle and Paris Lytle,

Plaintiffs,

v.

Bi-Lo, LLC,

Defendant,

**AFFIDAVIT OF
PLAINTIFF**

Personally appeared before me, the Affiant, Anne Lytle, who being duly sworn,
deposes and states:

I am Anne Lytle, one of the Plaintiffs in this action. I was injured in the Bi-Lo store located at 5020 Dicks Pond Road, Myrtle Beach, South Carolina, on March 4, 2006. On that date as I was attempting to check out I slipped on a plastic grocery bag which was laying in the check out aisle.

Prior to my visit to the Bi-Lo store on March 4, 2006, I had visited that store on many occasions. I had shopped there approximately one to two times per week, over a period of ten years. On my visits to the Bi-Lo store, I observed the grocery bags, which were similar to the bag that caused me to fall, were always kept near the cashier or at the end of the check-out counter for use by the store's bagging employees. On my prior visits to the store these bags were always within the control of the cashiers and baggers who would be responsible for bagging the groceries.

At the time of my visit on March 4, 2006, the store was not crowded. There was no customer in the check-out lane at which I fell as I was approaching the check-out area. There certainly were no customers bagging groceries at the check-out area or handling

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the plastic grocery bags. As I was walking into the check-out lane, I had a buggy in front of me, and I was unable to see the grocery bag which had fallen on the floor.

Anne Lytle

Anne Lytle

May 28, 2013
West Columbia, South Carolina

SWORN TO BEFORE ME THIS

28TH DAY OF MAY, 2013

[Signature]

NOTARY PUBLIC FOR SOUTH CAROLINA

MY COMMISSION EXPIRES: 2-10-22

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY) 2012-CP-26-09164

Anne Lytle and Paris Lytle,)

Plaintiffs,)

Transcript of Record

vs.)

June 4, 2013

Bi-Lo, LLC,)

Defendant.)

B E F O R E :

Honorable Benjamin H. Culbertson
Horry County Courthouse
Conway, South Carolina

A P P E A R A N C E S

Frank Anthony Barton, Esquire
Attorney for Plaintiffs

Jason P. Luther, Esquire
Attorney for Defendant

Grace L. Hurley, CVR-CM-M
Circuit Court Reporter

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1 (There were no exhibits marked during the hearing.)

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1 (On the record, June 4, 2013.)

2 THE COURT: All right, looks like the next one is
3 2012-CP-26-9164, Anne is it Lytle?

4 MR. BARTON: Lytle.

5 THE COURT: Lytle, Anne Lytle, L-Y-T-L-E, and others
6 versus Bi-Lo, LLC. According to my roster the matter is
7 before the Court on a motion for summary judgment. Please
8 give the court reporter your name and who you represent.

9 MR. BARTON: Your Honor, I'm Frank Barton. I'm
10 representing the Plaintiffs, Anne Lytle and Paris Lytle.

11 THE COURT: All right.

12 MR. LUTHER: Your Honor, Jason Luther here on behalf of
13 Bi-Lo, LLC, the Defendant.

14 THE COURT: All right, Mr. Luther, this is your
15 motion?

16 MR. LUTHER: That's correct, Your Honor.

17 THE COURT: All right, let me hear from you.

18 MR. LUTHER: All right, I've got a memo which we filed
19 at the end of last week. I don't know if you have a copy.
20 I can hand one up to you.

21 THE COURT: No, thank you.

22 MR. LUTHER: Your Honor, this is a, essentially a slip
23 and fall case arising out of an incident that occurred at the
24 Bi-Lo back in March of 2006. The Plaintiff was shopping one
25 evening, went to leave, as she entered the check-out aisle she

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1 slipped on a bag and fell and is claiming injuries as a
2 result. There is - as you can see the case has a little bit
3 of age on it. Part of that's because there was a bankruptcy
4 proceeding that stayed the case for a while and then it was
5 40(J)'d, but be that as it may we have conducted discovery.
6 The Plaintiff has been deposed. Her husband, also a
7 Plaintiff, has been deposed, and all of that has revealed no
8 evidence to support some of the essential elements of her
9 claim, which is why we're seeking summary judgment.

10 There is no dispute, just to be clear, there is no
11 dispute that there was a bag on the ground, but the dispute is
12 how it got there and who's responsible for it. As you, as you
13 know, I'm sure, the standard in a case like this for a
14 Plaintiff to, to proceed on a claim that's arising from a fall
15 on a floor against the storeowner or the innkeeper is that
16 they either have to prove that the foreign substance causing
17 the fall, which in this case obviously was the bag, was placed
18 on the floor by the storekeeper or they've got to show the
19 storekeeper had notice of it and failed to do something about
20 it and the testimony of the Plaintiff herself fails to
21 establish any of that. I've attached several sections of her
22 deposition testimony to the end of the memo, but suffice it to
23 say when she was asked several times how the bag got there she
24 says, "I don't know." When she was asked how long the bag was
25 there she said, "I have no idea." She provided no evidence

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1 whatsoever that any agent or employee of Bi-Lo, the Defendant,
2 placed the bag there. She was asked, "Did anyone from Bi-Lo
3 have a chance to see the bag on the floor?" She said no. "Do
4 you have, do you have any idea how long it had been there?"
5 "I have no idea." "Do you know how it got there or who put it
6 there?" "No, I don't," and multiple load of questions along
7 that line. So our position is, first of all, she's provided
8 no evidence whatsoever, and I should add by the way, let me
9 back up, we've also attached an affidavit from the store
10 manager who was working at the time and her name is Angel
11 Jackson. In her affidavit she, she claims that - she
12 testifies that on the day of the accident she was working.
13 She was notified that a fall occurred. She approached the
14 Plaintiff who was with her husband in the area where she fell
15 and I should, I should also go back and say the Plaintiff's
16 husband was in the car in the parking lot when this took
17 place. Someone, we're not sure who, went out and notified him
18 of it, but he was not a witness and did not observe the fall.
19 Again, as I said earlier, Angel Jackson has acknowledged there
20 was a bag on the floor when she arrived where the Plaintiff
21 had fallen but she went on to say, "Prior to the Plaintiff's
22 fall neither I nor any other employee of Bi-Lo was aware that
23 the plastic bag was there." She describes their policies and
24 practices for inspections of the floor, and prior to the fall
25 Bi-Lo had received no complaints about a bag and Bi-Lo had no

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1 notice that the bag had fallen on the floor in the area where
2 the Plaintiff fell. So under the, under the standard that
3 South Carolina law has she's provided no evidence that anybody
4 from Bi-Lo put the bag there and she's provided no evidence
5 that Bi-Lo or any one agent of Bi-Lo had actual notice of the
6 bag and she also cannot provide any evidence that they had
7 constructive notice of the bag, and I've cited a couple of
8 cases in the memo that are directly on point. One is the
9 familiar Wintersteen case, as Your Honor I'm sure is well
10 aware. There is a case that precedes Wintersteen which is
11 almost identical to this and it's cited with approval in
12 Wintersteen. That's Pennington versus Zayre Corporation. The
13 cite is 252 S.C. 176. Basically that's a situation where a
14 woman was at a department store and she slipped on a plastic
15 bag and was injured. In that case she had three different
16 independent witnesses who said, "We saw the bag, actually we
17 saw multiple bags on the area of the floor where the Plaintiff
18 slipped and fell," and in fact the Plaintiff herself testified
19 she had been there on multiple occasions and seen bags on the
20 floor, but what the Court said was while it was clear that the
21 bags were there when she fell, it was unclear how they got
22 there and how long they had been there and said to permit a
23 jury to speculate as to whether the Defendant had constructive
24 notice and that the material had been there sufficiently long
25 enough that they could have discovered it and removed it and

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1 didn't do so would be impermissible, and so under the well-
2 established case law in South Carolina we would ask the Court
3 to grant summary judgment in favor of the Defendant, Bi-Lo.

4 THE COURT: All right, Mr. Barton.

5 MR. BARTON: Your Honor, if I may I'm going to hand up
6 the affidavit of Plaintiff which was served on opposing
7 counsel last week.

8 THE COURT: All right.

9 MR. BARTON: I hand two cases and I've provided
10 opposing counsel with copies of those cases. Your Honor, this
11 is not a constructive notice case. This is a case involving
12 instrumentality under control of the storekeeper or
13 storeowner. These - what - she fell on a grocery bag. Now
14 these are the grocery bags that, you know, I don't know if you
15 go to the grocery store, I'm assuming you do, but it's the
16 plastic bags that they keep by the cashier or at the end of
17 the checkout counter for the bagging person. These are bags
18 that are kept under control of the store employees and so I
19 think this makes it a lot different than the cases opposing
20 counsel has been talking about. Specifically in Pennington,
21 Pennington, the Court never addressed, I don't think it was
22 ever stated what kind of bags they were. They never stated
23 that they - there was no testimony that they actually belonged
24 to the store, where they came from or how they got there or
25 that whose control the bags were under. Now the affidavit of

1 the Plaintiff shows that she goes there like one or two times
2 a week and she's lived in this area for ten years. The bags
3 are always kept by the cashier or the bag boy and there's
4 absolutely no evidence whatsoever that anybody else or any
5 customer was using those bags or had the bags or access to the
6 bags before her accident happened.

7 Now, the affidavit of Angel Jackson is - it, it's only
8 got one admissible fact in there, one that she went after the
9 accident and saw the Plaintiff had fallen on a plastic bag.
10 Nothing else in her affidavit says that she went and checked
11 the floors herself. It doesn't say how she determined that
12 the floors had been - I think it says they were looked at
13 about an hour before this happened.

14 THE COURT: Oh, yeah, I think what 6:30 and said this
15 happened at 7:25?

16 MR. BARTON: Yes, sir, now that I think she would know
17 of her own knowledge, but she says that nobody from Bi-Lo had
18 notice. She can testify that she had no notice but I don't
19 think she can testify for every employee at Bi-Lo's. It's
20 specifically not the cashier or the bag boy. This is a case
21 in the nature of an instrumentality that's under the control
22 of the store employees. There's no other explanation for it.
23 So the cases I've handed up Barnwell and Childers they say
24 obviously South Carolina does not recognize res ipsa loquitur
25 but they do recognize proof by circumstantial evidence and

1 when the bags like this were solely under the control of the
2 store employees without any other explanation, without any
3 testimony that there were customers using the bags then I
4 think we've got enough of an inference to go forward to a jury
5 trial.

6 THE COURT: Well, I mean, how is that not - I mean,
7 isn't everything in the grocery store under the control of the
8 store until it's purchased?

9 MR. BARTON: No, no, sir, and here - okay, there's - I
10 looked through a bunch of these cases getting ready for this
11 because this is a serious injury. You had cases where a grape
12 fell on the floor. Well, that could have been a store
13 employee that did it, it could have been a customer and
14 basically you've got produce bags. If this was a produce bag
15 it'd be a totally different story because produce bags are
16 sitting in the produce area, you know, and you pull them out
17 and put, put your vegetables with fruit in them. So virtually
18 every one of these cases where the Court has said directed
19 verdict or summary judgment was proper involves situations
20 where customers or outside parties could have been responsible
21 for dropping what was there. Like if there's water on the
22 floor, without any other explanation that's not sufficient
23 proof but a case of circumstantial evidence, if you're going
24 to the bathroom and there's a bucket and a mop there and you
25 slip on the wet floor and fall or let's say you fall first

1 to make it easier, if you fall first then you see the bucket
2 there that's circumstantial evidence that they were mopping,
3 mopping the floor and caused the problem, especially if you've
4 got a soapy smell there. If, if you go in, you know, some
5 grocery stores have sprinklers over the produce. I mean, if
6 you go in and there's a wet floor right there and you can see
7 that water has trickled down into the floor that's
8 circumstantial evidence. I think if you fall, slip and fall
9 on water on a wet floor and you smell the soap there that's
10 circumstantial evidence that they had mopped the floor. So I
11 think we've got enough there to go forward with the case
12 especially without any other explanation from them as to how
13 this possibly could have happened and I'm not sure just based
14 on their affidavit I'm - even if we didn't provide anything
15 else I don't think that's sufficient for them to get summary
16 judgment because all she can testify to is that, "Yeah, I went
17 there on that date and time. The lady did fall on the bag."

18 THE COURT: I mean, but I guess do you admit and
19 acknowledge that the only evidence you have of the store's
20 liability in this case is that they had control of those bags,
21 therefore they had to be the one that allowed it to fall on
22 the floor?

23 MR. BARTON: In a nutshell, yes.

24 THE COURT: Okay.

25 MR. BARTON: That with, but with the other, along with

1 the evidence that they'd been under their control, just
2 general knowledge of how the grocery stores work, the cashiers
3 bag them, plus there was ---

4 THE COURT: But I mean, you don't, you don't have
5 anything, any other evidence where anybody saw it fall on the
6 floor, you don't have any evidence of a store employee coming
7 in and saying, "Yeah, I dropped it on the floor," or, "yeah, I
8 was working that counter and it was my responsibility to
9 maintain those bags." It's just the fact that she fell on the
10 floor, that your client fell, slipped on a grocery bag, had
11 Bi-Lo on it, it was at the end of the checkout counter,
12 therefore it was a bag that had to be under the control of the
13 store and the store's employees?

14 MR. BARTON: Well, it's - we go a little bit - the
15 answer is yes to everything you just said but we go a little
16 bit further. There is testimony from the Plaintiff that those
17 bags on the previous occasions when she went in there those
18 bags stayed in the control and use of the employees. There's
19 also testimony from her that there was - it was not crowded.
20 There was nobody in front of her in the line at the time. So
21 it's not like there was a customer there using the bags.

22 THE COURT: All right, I got it.

23 All right, anything further?

24 MR. BARTON: I think that's it, Your Honor. If you've
25 got any other questions I'll be glad to answer them.

1 THE COURT: I'm fine. Anything in reply?

2 MR. LUTHER: Your Honor, I think you hit the nail on
3 the head, the only evidence is that there was a bag on the
4 floor and it's conjecture to, I mean, it's pure speculation to
5 guess as to how long it had been there, who put it there. It
6 may have been in control of the Defendant at one point. That
7 doesn't mean it was in control of the Defendant when it was
8 placed there and this is all stuff that is not a jury
9 question.

10 THE COURT: Okay, all right, well, I'll take this
11 under advisement. I'm going to need to take a look at the, at
12 the case law to see or let me ask, ask the Defense counsel. I
13 see where you and I, I agree with you on the cases that I'm
14 familiar with, but the ones that I am familiar with generally
15 deal with fallen produce in the, in the vegetable or fruit
16 area or floors where the store has admitted that, yes, they
17 mopped it. Do you have anything that shows anything other
18 than produce or other than wet floors? I don't, I don't know
19 what the cases say and I - that's what I'm going to have to go
20 back and do my research on because I don't know of any off the
21 top of my head.

22 MR. LUTHER: Certainly, well, the Wintersteen case is
23 water. That was water that was near a - I think it was like a
24 Coke dispenser with an icemaker. What the Wintersteen case
25 does, does cite is sort of reaching its holding in the case

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1 that I was referring to, the Pennington case and that's the
2 case that actually dealt with plastic bags on the floor.

3 THE COURT: All right, so, Wintersteen, that was a
4 leaking drink machine?

5 MR. LUTHER: That's right.

6 THE COURT: So how would that be ---

7 MR. LUTHER: I think it was a self-service soda
8 fountain and ice dispenser.

9 MR. BARTON: Yeah, that's ---

10 THE COURT: Okay, so ---

11 MR. BARTON: --- it was self service. So that means
12 customer ---

13 THE COURT: Oh, it was self service.

14 MR. BARTON: Yes, sir.

15 THE COURT: Okay.

16 MR. BARTON: And if, again, all of these cases involve
17 cases where customers would have been - could have possibly
18 dropped, spilled, spilled the water or the liquid or - and in
19 that case even though it's a soda machine it's one that's a
20 self-service machine, self-service soda machine.

21 THE COURT: I got you. All right, well, I think I've
22 got a hold of the facts. I'll take it under advisement.

23 MR. LUTHER: Thank you, Your Honor.

24 THE COURT: Thank you.

25 (Adjourned.)

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C E R T I F I C A T E

I, the undersigned, Grace L. Hurley, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the hearing held in the case of Anne Lytle and Paris Lytle versus Bi-Lo, LLC, held in the Court of Common Pleas for Horry County, Horry County Courthouse, Conway, South Carolina, on June 4, 2013.

I do hereby certify that I am neither, of kin, counsel, nor interest to any party hereto.

Grace L. Hurley

Grace L. Hurley, CVR-CM-M

Official Reporter

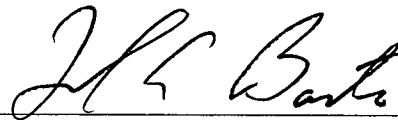
September 3, 2013.

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CERTIFICATE OF COUNSEL

The undersigned counsel does hereby certify the Record on Appeal contains all material designated by both parties and no other materials.

West Columbia, South Carolina
January 9, 2014



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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No.: 2012-CP-26-9164
2013-001550

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SC Court of Appeals

Anne Lytle and Paris Lytle.....Appellants,

v.

Bi-Lo, LLC,.....Respondent.

PROOF OF SERVICE

The undersigned does hereby certify three copies of the **RECORD ON APPEAL** was served in the foregoing action by depositing the same in the United States mail, with sufficient postage affixed thereon and return address clearly visible on January 9, 2014, addressed to the following:

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January 9, 2014



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