

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

2013-001550

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

v.

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

BRIEF OF APPELLANTS

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

1. In granting summary judgment, did the lower court err in concluding there were no genuine contested issues of material fact as to whether or not the Defendant created the dangerous condition which injured the Plaintiff Anne Lytle?

STATEMENT OF THE CASE

This slip and fall action was filed by Plaintiffs on January 6, 2009. In the complaint, the Plaintiff Anne Lytle alleged the Defendant was liable for injuries she sustained in a slip and fall accident at Defendant's store located in Myrtle Beach. The Plaintiff Paris Lytle, as husband of the Plaintiff Anne Lytle, brought an action for loss of consortium. By Answer filed May 11, 2009, the Defendant denied any responsibility for the injuries of the Plaintiffs.

The action was stricken from the active trial roster pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure and subsequently restored on November 26, 2012. Thereafter, Defendant filed a Motion for Summary Judgment dated March 11, 2013. By Order dated June 17, 2013, the lower court concluded the Defendant Bi-Lo was entitled to summary judgment. Plaintiffs confirmed entry of the Order on June 26, 2013, and filed their notice of appeal on July 16, 2013. The Plaintiffs respectfully submit the lower court erred in granting summary judgment and concluding there were no genuine contested issues of material fact to show the Defendant Bi-Lo created or had knowledge of the dangerous condition which caused the fall of the Plaintiff Anne Lytle and her injuries.

STATEMENT OF FACTS

The Plaintiff Anne Lytle alleged in her Complaint she visited the Defendant Bi-Lo Store on March 4, 2006. At that time she slipped on a plastic bag on the floor in the check-out aisle and as a result suffered substantial injuries. The Plaintiff Paris Lytle is the husband of Anne Lytle, and brought a loss of consortium action as a result of the incident.

The Defendant Bi-Lo denied it was liable for the injuries of Plaintiffs and filed a Motion for Summary Judgment. The motion was supported by the Affidavit of Angel Jackson, the Store director of the Bi-Lo Store. In her affidavit Angel Jackson acknowledged a plastic bag was on the floor at the time of Anne Lytle's injury, but alleged the floors were last inspected approximately an hour before the accident. Jackson's affidavit further stated Bi-Lo received no complaints about a plastic bag on the floor prior to the accident and that Bi-Lo had no notice a bag had fallen on the floor in the area in which the Plaintiff fell. Jackson's Affidavit, however, does not state Jackson personally inspected the floors. It does not reference any records to confirm the floors were inspected or at what time. Furthermore, Jackson's Affidavit does not give any explanation as to how she has personal knowledge employees of Bi-Lo did not drop the bag on the floor or how she knows of any lack of complaints about a plastic bag being on the floor. (Transcript of Record, p. 28).

In response to Bi-Lo's Motion, Plaintiff submitted the Affidavit of Anne Lytle. Her affidavit showed she lived in Myrtle Beach, South Carolina, and visited the Bi-Lo Store in question one to two times per week over a period of ten years. She further stated

on her visits to Bi-Lo, she observed the grocery bags which were similar to the bag that caused her to slip and fall were kept near the cashier or at the end of the check-out counter for the use of the store's bagging employees. On her prior visits to the store the bags were always within the control of the cashiers and baggers who were responsible for bagging groceries. Ms. Lytle further stated at the time of her fall on March 4, 2006, the store was not crowded. There were no customers in the check-out lane in which she fell as she was approaching the check-out area. (Transcript of Record, p. 30).

In moving for summary judgment the Defendant contended there was no evidence the Bi-Lo Store was responsible for causing the grocery bag to be on the floor. Bi-Lo further argued there was no evidence to show it had actual or constructive knowledge the grocery bag was on the floor prior to the fall of Anne Lytle. Plaintiffs contended the grocery bags at the check-out counter were at all times within the sole custody and control of Bi-Lo Store employees. Anne Lytle was a frequent visitor to the store and on those occasions the plastic grocery bags were kept at the check-out counter under the control of the cashiers and baggers. Plaintiffs respectfully submit the evidence submitted showed the grocery bags were under the exclusive control of store employees and created sufficient issues of contested material facts to deny summary judgment to Bi-Lo.

ARGUMENT I

IN GRANTING SUMMARY JUDGMENT THE LOWER COURT ERRED IN CONCLUDING THERE WERE NO GENUINE ISSUES OF MATERIAL FACT TO SHOW THE DEFENDANT CREATED THE DANGEROUS CONDITION WHICH INJURED THE PLAINTIFF ANNE LYTLE. (ISSUE 1).

The Court of Appeals is well aware of the standards to be used by the trial courts in determining a motion for. In order to be entitled to summary judgment the moving party must show there is no genuine issue as to any material fact and it is entitled to judgment as a matter of law. The moving party has the burden of showing there are no genuine issues of material fact. In reviewing a grant of summary judgment, the evidence and inferences therefrom must be viewed in the light most favorable to the non-moving party. Summary judgment should be invoked cautiously to avoid improperly denying a party a trial on the disputed facts or issues. S.C. Rules of Civil Procedures Rule 56; Quality Towing, Inc. v. City of Myrtle Beach, 340 S.C. 29, 530 S.E.2d 369 (2000); Piedmont Engineers, Architects & Planners, Inc. v. First Hartford Realty Corp., 278 S.C. 195, 196, 293 S.E.2d 706, 707 (1982); Bishop v. South Carolina Dept. of Mental Health, 331 S.C. 79, 85-86, 502 S.E.2d 78, 81 (1998); Baughman v. American Telephone & Telephone Co., 306 S.C. 101, 410 S.E.2d 537 (1991).

In moving for summary judgment, the Defendant bore the burden of showing there were no genuine controverted issues of material facts and it was entitled to judgment as a matter of law. In support of its motion Bi-Lo submitted an affidavit of the store director at the time Angel Jackson. The affidavit of Jackson states the floors of the store were last inspected approximately an hour before Ms. Lytle fell. The affidavit, however, does not state Jackson personally inspected the floors and does not reference or incorporated any documentation, or other proof, to show the stores were actually

inspected. Jackson's affidavit further states the store received no complaints about a plastic bag being on the floor prior to Plaintiff's fall, and that Bi-Lo had no notice a bag had fallen on the floor prior to Plaintiff's fall. Again, however, Jackson's conclusory affidavit provides no basis for her knowledge of those purported facts.

The affidavit of Anne Lytle shows she was a resident of Myrtle Beach, South Carolina, and regularly visited the Bi-Lo Store in question once or twice a week over a period of ten years. On the occasions when she visited the Bi-Lo Store, grocery bags such as the one that caused her fall and injuries, were located on the check-out counter in the control of the cashiers and baggers. At all times, the plastic grocery bags remained under the control of store employees. Furthermore, at the time of her fall the store was not crowded and there were no customers in the check out aisle as Anne Lytle approached it.

Although it is true a store keeper is not an insurer of his customers' safety, a store keeper does owe a duty to keep the premises in a reasonably safe condition. Pennington v. Zayre Corp., 252 S.C. 176, 165 S.E.2d 695 (1969); Wintersteen v. Food-Lion, Inc., 344 S.C. 32, 542 S.E. 2d 728 (2001). A store keeper is liable for injuries caused by unsafe conditions which were created by the store keeper. Cook v. Food-Lion, Inc., 328 S.C. 324, 491 S.E. 2d 690 (S.C. App. 1997); Wimberly v. Winn-Dixie Greenville, Inc., 252 S.C. 117, 165 S.E. 2d 627 (1969).

Plaintiffs respectfully submit the Affidavit of Anne Lytle provided evidence the Store's plastic grocery bags were at all times kept on the check-out counter near the cashiers and baggers. The bags were at all times within the sole control of Bi-Lo employees.

Although South Carolina does not recognize the doctrine of res ipsa loquitor, circumstantial evidence can be considered in determining the negligence or liability of a store keeper. Negligence may be established by circumstantial evidence. In determining the sufficiency of such evidence the facts and circumstances shown should be considered in light of ordinary experience and conclusions may be deduced there from as common sense dictates. Barnwell v. Elliott, 225 S.C. 62, 80 S.E. 2d 748 (1954); Shepherd v. United States Fidelity and Guaranty Company, 233 S.C. 536, 106 S.E. 2d 381 (1958).

Plaintiffs respectfully submit the evidence provided in opposition to Defendant Bi-Lo's Motion for Summary Judgment provided sufficient circumstantial evidence, which without further contradiction, constituted sufficient genuine contested issues of fact in regard to the liability of Bi-Lo. Therefore the lower court erred in granting summary judgment.

CONCLUSION

A store owner can be held liable for injuries caused by dangerous conditions which were created by the store keeper. Plaintiffs provided sufficient evidence in opposition to Defendant's Motion for Summary Judgment to show the grocery bags at the check-out counter were maintained under the sole custody and control of Bi-Lo employees. Plaintiffs respectfully submit sufficient circumstantial evidence was provided to show the Defendant Bi-Lo created the hazardous condition which caused her fall and injuries. Therefore, the lower court was in error in granting summary judgment to the Defendant.

Respectfully submitted,

January 30, 2014
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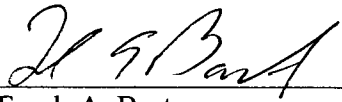
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PROOF OF SERVICE

The undersigned does hereby certify one copy each of the **BRIEF OF APPELLANTS** 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 30, 2014, addressed to the following:

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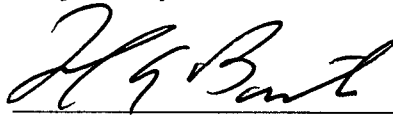
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CERTIFICATE OF COUNSEL

The undersigned certifies that the **BRIEF OF APPELLANTS** dated January 30, 2014, and filed on January 30, 2014, complies with Rule 211(b) of the South Carolina Appellate Court rules.

Respectfully submitted,



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