THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
George M. McFaddin, Jr., Circuit Court Judge

Circuit Court Case No. 2016-CP-40-01699
Appellate Case No.: 2017-002433

Lallie Qualls .....Appellant,

v.

Burlington Coat Factory of South Carolina, LLC
and Burlington Coat Factory Direct Corp. ..... Respondents.

INITIAL BRIEF OF APPELLANT

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INTRODUCTION

Appellant Lallie Qualls ("Ms. Qualls") appeals the circuit court's grant of summary judgment in favor of Respondents Burlington Coat Factory of South Carolina, LLC and Burlington Coat Factory Direct Corporation (collectively, "Burlington"). The circuit court improperly granted summary judgment because Ms. Qualls presented more than a mere scintilla of evidence that Burlington possessed the requisite actual or constructive notice that a hazardous condition existed on its premises. As a result, Ms. Qualls presented a jury question as to whether Burlington breached a duty to her by failing to remedy the hazardous condition to prevent Ms. Qualls's injuries.

On appeal from a grant of summary judgment, this Honorable Court is bound by law to review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to Ms. Qualls—as the non-moving party—when determining whether summary judgment was proper. As more fully discussed below, Ms. Qualls presented genuine factual issues that were material to whether Burlington possessed the requisite notice to create a duty of care for Ms. Qualls's safety. Accordingly, Ms. Qualls is entitled to present this evidence to a jury and respectfully requests this Court to reverse the circuit court's order and remand for a trial on the merits of her claim for negligence against Burlington.

ISSUES ON APPEAL

Did the circuit court improperly grant summary judgment when (1) Ms. Qualls presented more than a mere scintilla of evidence that Burlington possessed actual or constructive notice of a hazardous condition on its premises yet failed to take appropriate action to prevent Ms. Qualls's injuries; and (2) the court misapplied the summary judgment standard by improperly viewing the evidence and resolving disputed factual issues?

STATEMENT OF THE CASE

Ms. Qualls instituted this civil suit against Burlington on March 16, 2016, asserting a claim for negligence. (Complaint). Ms. Qualls was seriously injured when she fell on a foreign wet substance on Burlington's floor. (Comp. ¶ 12). Ms. Qualls claimed Burlington possessed either actual or constructive notice that a hazardous condition existed on its premises, yet it failed to remedy this condition, and its failure to do so resulted in extensive injuries to Ms. Qualls.

After the parties engaged in preliminary discovery, Burlington moved for summary judgment on March 9, 2017. (MSJ). The circuit court heard the parties' motions on June 6, 2017. (Hrg. Transcript). On August 28, 2017, the circuit court entered an order granting Burlington's motion for summary judgment. (Order Granting Defendants' MSJ). Ms. Qualls timely filed a motion to reconsider, alter, or amend the order granting summary judgment pursuant to Rule 59(e), SCRCP, on September 15, 2017. (Plaintiff's Motion to Reconsider). On November 15, 2017, the circuit court summarily denied Ms. Qualls's motion to reconsider. (Order on Plaintiff's Motion to Reconsider). Ms. Qualls timely appealed to this Court.

STATEMENT OF THE FACTS

On July 31, 2015, Ms. Qualls went shopping with her daughter at Burlington Coat Factory in Columbia, South Carolina. (Deposition of Plaintiff, Lallie Qualls, taken March 15, 2017, hereinafter "Pl. Depo.," p. 17). Ms. Qualls selected a dress and went to the front of the store to check out. (Pl. Dep. 19). She then waited in line for instruction on which register she should use. (Pl. Depo. 19). Ms. Qualls was carrying her purse on her shoulder and the dress she intended to buy. (Pl. Depo. 21). While walking to the second register, Ms. Qualls slipped on a liquid substance on the floor, severely injuring her left knee. (Pl. Dep. 24-25, 29). There was no caution sign or other warning to draw a shopper's attention to this hazard in the checkout area. (Pl. Depo. 54). The manager on duty, Ms. Pamela Arsenault, was nearby and went to assist Ms. Qualls, kneeling beside her and apologizing for what happened. (Pl. Depo. 20). When Ms. Arsenault reached Ms. Qualls, she noticed a dark liquid substance on the floor. (30(b)(6) Deposition of Pamela Robin Arsenault, taken March 15, 2017, hereinafter "Arsenault Depo.," p. 60, 65). An ambulance transported Ms. Qualls to the emergency room at Palmetto Health Richland Hospital where she was diagnosed with a severely fractured patella and required to undergo surgery. (Pl. Depo. 32-33).

Burlington's surveillance camera captured Ms. Qualls's fall and the events precipitating it. (*See* Exhibit 2 to Defendants' Memorandum in Support of its Motion for Summary Judgment, hereinafter "Def. Ex. 2"). While Ms. Qualls was shopping, Taylor Simon, a Burlington employee, was working behind the register. (Def. Ex. 2). She was assisting two adult women who had two young children with them, one of whom was sitting in the shopping cart. (Def. Ex. 2). While Ms. Simon was facing the customers and ringing up the women's purchases, the child sitting in the cart threw a drinking cup several feet across the store. (Arsenault Depo. p. 60; Def.

Ex. 2). The cup hit the ground and a liquid spilled onto the tile floor. (Arsenault Depo. p. 60). A moment later, the older child picked up the cup, but he did not clean up the spill. (Def. Ex. 2). Burlington's 30(b)(6) designee, Pamela Arsenault, testified that the spill was about ten feet in front of at least two employees[1] working the registers. (Arsenault Depo. 92-93; *see also* Pl. Depo. p. 60, 66). Video surveillance confirms that between the time the spill occurred and the time Ms. Qualls fell, at least three customers noticed the spill when passing by it. (Def. Ex. 2). Surveillance footage also clearly shows these patrons conspicuously altered their paths or took exaggerated steps to avoid the spill. (Def. Ex. 2).

When Ms. Simon finished assisting these customers, she walked out from behind her register and within inches of the spill on the way to take her break. (Arsenault Depo. 87). Surveillance footage also shows Ms. Simon looking down and away from the surveillance camera towards the spill. (Pl. Depo. 58-59, 64; Arsenault Depo. p. 86). Ms. Arsenault agreed that Ms. Simon was looking down while walking by the spill, but ***testified that she did not see the spill because she was instead looking at—and distracted by—her personal cell phone.*** (Arsenault Depo. p. 87-89, 102). Although Burlington asserted to the circuit court Ms. Simon was taking her break when she was looking at her phone, Ms. Arsenault admitted that breaks were flexible and dictated by "the needs of the business," and employees were technically still on the job during their breaks. (Arsenault Depo. 84). When questioned, Ms. Arsenault conceded Ms. Simon was still on the clock, and store policy dictates employees should not use their personal cell phones while working. (Arsenault Depo. 85-87).

[1] Presumably other employees witnessed this incident; however, the angle of the camera only conclusively shows two employees behind the registers at the time the child threw the cup onto the floor.

In addition, the incident report Ms. Arsenault completed immediately following Ms. Qualls's fall noted, "***noticeable*** spill, ***heavy traffic*** area." (emphasis added) (Arsenault Depo. p. 96). Burlington's own policies state that "[i]t is a responsibility of all Burlington Coat Factory employees to actively participate in efforts to improve the safety of our stores." (Arsenault Depo. p. 24). However, Ms. Simon did nothing to warn customers of the hazard created by the spill or to cure it.[2] (Arsenault Depo. p. 87).

STANDARD OF REVIEW

The summary judgment standard in South Carolina is clear. When reviewing the grant of a summary judgment motion, this Court applies the same standard as the circuit court applies pursuant to Rule 56(c), SCRCP. *Cowburn v. Leventis*, 366 S.C. 20, 30, 619 S.E.2d 437, 443 (Ct. App. 2005). Rule 56(c), SCRCP, provides summary judgment shall be granted when "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."

"In a negligence case, whe[n] the burden of proof is a preponderance of the evidence standard, the non-moving party must only submit a *mere scintilla of evidence* to withstand a motion for summary judgment." *Fisher v. Shipyard Vill. Council of Co-Owners, Inc.*, 415 S.C. 256, 270, 781 S.E.2d 903, 910 (2016) (emphasis added). "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Id.* at 329-30, 673 S.E.2d at 802. Further, summary judgment is not appropriate when further inquiry into the facts

[2] "If an associate observes a potentially unsafe or hazardous condition, . . . they should take immediate action to try to warn any potential customers of that condition or take action to remedy it immediately." (Arsenault Depo. p. 41).

of the case is desirable to clarify the application of the law. *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000). "Generally, negligence claims are not susceptible of summary adjudication because of the many questions normally present in such cases concerning the reasonableness of a party's conduct, foreseeability, and proximate cause." *Folkens v. Hunt*, 290 S.C. 194, 199, 348 S.E.2d 839, 842 (Ct. App. 1986). "Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." *Miller v. Blumenthal Mills, Inc.*, 365 S.C. 204, 220, 616 S.E.2d 722, 729 (Ct. App. 2005). Where reasonable minds can differ, summary judgment is inappropriate. *Id.*

ARGUMENT

In South Carolina, a property owner owes business visitors or invitees the duty of exercising reasonable and ordinary care for their safety and is liable for any injuries resulting from a breach of this duty. *Sides v. Greenville Hosp. Syst.*, 362 S.C. 250, 256, 607 S.E.2d 362, 365 (Ct. App. 2004). "To establish a cause of action for negligence, a plaintiff must prove the following three elements: (1) a duty owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; and (3) damages proximately resulting from the breach." *Shaw v. City of Charleston*, 351 S.C. 32, 40, 567 S.E.2d 530, 534 (Ct. App. 2002). "The question of negligence is a mixed question of law and fact. First, the court must resolve, as a matter of law, whether the law recognizes a particular duty." *Burnett v. Family Kingdom, Inc.*, 387 S.C. 183, 189, 691 S.E.2d 170, 173 (Ct. App. 2010) (citation omitted). If a duty exists, it is for the jury to then determine whether the defendant breached the duty, resulting in damage to the plaintiff. *Fisher v. Shipyard Vill. Council of Co-Owners, Inc.*, 415 S.C. 256, 272-74, 781 S.E.2d 903, 912 (2016) (finding "at least a scintilla of evidence in the record to indicate an issue of material fact"

as to breach and holding "the trial court erred in granting Petitioners' motion for summary judgment").

I. Ms. Qualls Presented Evidence of Actual and Constructive Notice.

In a premises liability case, the plaintiff may meet her burden by putting forth evidence showing "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." *Pringle v. SLR, Inc. of Summerton*, 382 S.C 397, 675 S.E.2d 783 (Ct. App. 2009). As more fully discussed below, the circuit court's ruling should be reversed because Ms. Qualls presented at least a mere scintilla of evidence that Burlington had actual—or at the very least—constructive notice, that a foreign substance was on its floor, yet it failed to take reasonable measures to warn patrons or remedy the hazard.

1. Actual Notice

Neither party contests a third party spilled the liquid on the floor that resulted in Ms. Qualls's injuries. As a result, the dispositive question for purposes of this appeal is whether Burlington had actual or constructive notice of the presence of the liquid on its floor. *Gillespie v. Wal-Mart Stores, Inc.*, 302 S.C. 90, 91, 394 S.E.2d 24, 24 (Ct. App. 1990). ("[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 the foreign substance was placed on the floor by the storekeeper or that the storekeeper had actual or constructive notice of its presence on the floor and failed to remove it.").

Burlington's own incident report and video surveillance as well as Ms. Arsenault's admissions confirm Ms. Qualls presented at least a mere scintilla of evidence that Burlington had actual knowledge of the spill yet failed to take the appropriate action. First, Burlington's

incident report—recorded immediately after the accident—states the spill was "noticeable" and occurred in a "heavy traffic" area. (Arsenault Depo. 92, Depo Ex. 6). Despite Burlington's admission regarding the visibility of the spill immediately following the accident, the circuit court erroneously states, "there is no record evidence tending to show that the spill was visible." (Order p. 10). Burlington denies that any of its numerous employees who were working behind the nine nearby cash registers could have seen the spill; however, it is uncontested the spill occurred approximately ten feet from the registers where at least two Burlington employees were working. (Arsenault Depo. 82, 92-93, Def. Ex. 2). The circuit court emphasized the "DVR footage d[id] not show any visible spill whatsoever" in support of its conclusion that Burlington lacked actual knowledge. (Order p. 10). This conclusion is respectfully misplaced because three customers—who were within inches of the spill—unmistakably noticed it and were presumably in a much more advantageous position to view the spill than a surveillance camera of limited video quality mounted behind the cash registers. (Def. Ex. 2). The circuit court again erroneously holds in support of its conclusion that "Ms. Simon did not witness the child throwing the cup, [sic] because her view was blocked as she was checking out the child's family." (Order p. 7). However, the surveillance footage *undeniably* shows there were *no visible barriers or distractions* that would have precluded Ms. Simon from seeing the child—who was directly in front of Ms. Simon—throw the cup. (Def. Ex. 2). To that end, the cup was thrown in the *middle* of the aisle, *not* under the checkout counter—which would have arguably been more difficult to see—further belying the court's misplaced conclusion. (Def. Ex. 2). A reasonable jury could easily conclude that Ms. Simon chose to ignore the incident, despite having seen the child spill the liquid onto the store's floor.

Five minutes after the spill occurred, video surveillance depicts Ms. Simon leave the area behind the registers, walk right past the location where the liquid spilled, and look directly down towards the spill as she walked past it. (Def. Ex. 2). Additionally, **Ms. Arsenault—as Burlington's 30(b)(6) designee—admitted Ms. Simon was looking down towards the spill on the floor as she walked by it and *"literally walked within inches of the spill that was on the floor."*** (Arsenault Depo. p. 83, 87; Def. Ex. 2). However, instead of stopping to clean it up, she continued to walk past it. Because Ms. Simon "had the opportunity to observe [the spill] on the floor," a reasonable jury could find Burlington actually observed the spill—and therefore had notice of it—but failed to take the appropriate action.

2. Constructive Notice

Ms. Qualls contends there is more than a mere scintilla of evidence to establish *actual* notice as to Burlington. Assuming *arguendo* that Burlington did not possess the requisite actual notice, Ms. Qualls presented more than a mere scintilla of evidence that Burlington possessed constructive notice. When, as here, a party moves for summary judgment based on the alleged lack of notice, "[t]he pivotal question . . . is whether there [i]s evidence from which the jury might reasonably infer that the defendant, by the exercise of reasonable diligence, *should have known* of the hazard on the floor which caused the injury to the plaintiff. In determining this question, it is elementary that all of the evidence and the inferences reasonably deducible therefrom have to be viewed in the light most favorable to the plaintiff." *Wimberly v. Winn-Dixie Greenville, Inc.*, 252 S.C. 117, 123, 165 S.E.2d 627, 630 (1969) (emphasis added).

Burlington argued to the circuit court that Ms. Simon did not have notice of the spill because she did not see the child—sitting only a few feet away from her—throw the cup, which landed less than ten feet away and within Ms. Simon's direct line of sight. Further, Burlington

claims that when Ms. Simon subsequently walked within inches of the spill, she did not see it because she was looking at her phone and was distracted. However, Burlington does not have conclusive proof to support either of these suppositions regarding what Ms. Simon did or did not observe, as Ms. Simon's testimony is not in the record. (Order p. 10, n. 15). What ***is*** in the record is video surveillance showing both of these incidents *and* the actions of other customers upon approaching the spill. This evidence demonstrates that Ms. Simon would have seen the spill—and *should* have seen the spill—through the exercise of reasonable diligence. *See id.* ("The pivotal question . . . is whether there [i]s evidence from which the jury might reasonably infer that the defendant, by the exercise of reasonable diligence, *should have known* of the hazard on the floor which caused the injury to the plaintiff."). Importantly, at least three customers passed by the spill before Ms. Qualls fell and noticeably changed their course or took abnormally large steps to avoid it. (Def. Ex. 2). Ms. Qualls also presented evidence that her fall occurred in a high traffic area that was constantly occupied with numerous Burlington employees, making it reasonable to monitor this area more closely than less populated portions of the store. (Pl. Ex. Arsenault Depo. 92).

If Ms. Simon were exercising reasonable diligence, store policy would have required her to stop immediately and take prompt action to prevent a slip or trip hazard. (Arsenault Depo. 45, 51, 89). **By Burlington's own admission, *Ms. Simon had the opportunity to observe the spill*; as a result, she should have seen the spill.** (Arsenault Depo. p. 87, 97). Burlington also agreed that its employees generally should be watchful for potential hazards, and Ms. Simon should not have been using a personal cell phone outside the break room. **When questioned, Ms. Arsenault agreed (1) Ms. Simon was "distracted because she was on her phone or playing with her phone when she walked past the spill on the floor"; (2) she "possibly" would have**

seen it if she were not distracted; and (3) anyone walking by the spill would have noticed it if he or she was paying attention. (Arsenault Depo. 102, 89, 97). These concessions do not negate Ms. Simon's responsibility. Rather, taking all reasonable inferences in a light most favorable to Ms. Qualls, these statements confirm Burlington should have discovered the hazard that caused Ms. Qualls's injuries.

The circuit court cursorily relied upon several cases in support of its ruling that Ms. Qualls failed to present a genuine issue of material fact on the issue of constructive knowledge. These cases are not controlling on this issue, and each case is easily distinguishable from the facts at hand. Specifically, the circuit court cites to *Wimberly v. Winn-Dixie Greenville, Inc.*, 252 S.C. 117, 165 S.E.2d 627 (1969), *Gilliland v. Pierce Motor Company*, 235 S.C. 268, 111 S.E.2d 521 (1959), *Hunter v. Dixie Home Stores*, 232 S.C. 139, 101 S.E.2d 262 (1957), and *Bessinger v. Bi-Lo*, 329 S.C. 617, 496 S.E.2d 33 (Ct. App. 1998), and holds that these cases "have held that five minutes is insufficient to establish constructive knowledge as a matter of law." (Order p. 11).

The circuit court first cites to *Bessinger*, in which the plaintiff slipped and fell on grapes that had fallen out of a vented bag from a grocery cart onto the floor. 329 S.C. at 619, 496 S.E.2d at 34. (Order p. 11). In affirming the grant of summary judgment to Bi-Lo, this Court held "the record is completely devoid of evidence that Bi-Lo had constructive or actual notice that the grapes were on the floor. There is no evidence that the grapes were on the floor through an act of Bi-Lo, or that any employee was aware that the grapes were on the floor, or how long the grapes were on the floor before the accident." *Id.* at 620, 496 S.E.2d at 34-35. Unlike the plaintiff in *Bessinger*, Ms. Qualls presented more than a mere scintilla of evidence that Burlington should have known the liquid was on the floor. First, Ms. Simon was present and

interacting with the customers when one of their children spilled a drink onto the floor, yet took no action. Ms. Simon then had the opportunity, as she continued to check customers out, to observe the spill and observe other customers who noticeably took efforts to avoid the spill. The spill occurred within her line of sight and within a reasonable distance for purposes of noticing it. Last, and perhaps most importantly, Ms. Simon walked within *inches* of the spill yet did nothing about it, despite her responsibility to do so. Unlike in *Bessinger*, Ms. Qualls presented more than a mere scintilla of evidence that Ms. Simon possessed the requisite notice to submit her claim to the jury.

Next, the circuit court relies upon *Wimberly*. In *Wimberly*, the plaintiff was shopping in a Winn-Dixie supermarket and fell on rice that was on the store floor for an indeterminate amount of time. 252 S.C. at 120, 165 S.E.2d at 628. Winn-Dixie appealed after the jury returned a verdict for the plaintiff. The Supreme Court reversed, entered judgment for Winn-Dixie, and held,

> No evidence is pointed out which reasonably tends to prove that the rice was on the floor at any particular time prior to the actual fall. The jury should not be permitted to speculate that it was on the floor for such a length of time as to infer that defendant was negligent in failing to detect and remove it.

Wimberly, 252 S.C. at 122, 165 S.E.2d at 629. The circuit court inaccurately extrapolated that Winn-Dixie was not liable as a matter of law because the "area was inspected every '10-15 minutes'." (Order p. 11). A closer reading of *Wimberly* reveals the Supreme Court declined to speculate as to the length of time the spill was on the floor and whether a Winn-Dixie employee even had an opportunity to discover the spill because the plaintiff failed to present any evidence to prove either actual or constructive notice. *Id.* Importantly—and in contrast to the employees at Burlington—the assistant store manager and the produce manager in *Wimberly* also testified

that despite exercising reasonable diligence by routinely walking the aisles, they saw no rice on the floor prior to the spill. *Id.* It was this testimony and the complete lack of evidence as to the amount of time the hazard was on the floor that prompted the Supreme Court to reverse the jury verdict. *See id.* Unlike *Wimberly*, the circuit court was presented with proof as to the exact amount of time the liquid was on the floor prior to Ms. Qualls's fall. Further, Ms. Qualls offered concrete evidence, by way of video surveillance, that Ms. Simon, a Burlington employee, had both the opportunity and inclination to observe the spill yet failed to do so because she was distracted by her cell phone. This evidence is more than sufficient to survive the summary judgment threshold as to constructive knowledge.

The circuit court next misapplies the holding from *Gilliland* in support of its decision. (Order p. 11-12). In *Gilliland*, the Supreme Court affirmed the circuit court's grant of judgment notwithstanding the verdict when a laundry truck driver was injured because he slipped on oil in an automobile service garage while picking up soiled employee uniforms. 235 S.C. at 272-73, 111 S.E.2d at 522-23. As in *Wimberly*, the Supreme Court held the length of time the oil was on the ground was subject to conjecture and speculation because the plaintiff failed to submit any evidence the oil was present for a sufficient length of time to charge the garage with constructive notice of its presence, particularly when "the service manager went over the area where Gilliland later fell and all of the mechanics and other employees went over this same area going to and from the locker room." *Id.* at 274, 111 S.E.2d at 523-24. The plaintiff presented no evidence to indicate the oil spill was present when these employees passed through the area. *Id.* The circuit court again misinterprets the Supreme Court's holding from *Gilliland* in its order by stating "[the] store [in *Gilliland*] could not be liable as a matter of law whe[n] the foreign substance may have been on the floor for up to five (5) minutes." (Order p. 12). Although the Supreme Court

mentioned the plaintiff crossed through an area of the garage and then back again "some five minutes later," the Supreme Court never held the spill was on the floor for this amount of time or that this time frame was insufficient to establish constructive notice. *Id.* at 273, 111 S.E.2d at 523. Accordingly, *Gilliland* is not a case that has "held that five minutes is insufficient to establish constructive knowledge as a matter of law" as the circuit court erroneously found. Therefore, *Gilliland* cannot not be relied upon by this Court for that proposition. (Order p. 11).

The circuit court goes on to cite three additional South Carolina cases in support of its conclusion that even if the spill was visible and within Ms. Simon's line of sight, Ms. Qualls still would be unable to present a genuine issue of material fact to withstand summary judgment. Again, Ms. Qualls respectfully contends these cases are not controlling on the issue of constructive knowledge based upon the foregoing relevant factual dissimilarities.

In *Gillespie v. Wal-Mart*, 302 S.C. 90, 91, 394 S.E.2d 24, 24 (Ct. App. 1990), Judge Goolsby, writing for this Court, held summary judgment was appropriate when a customer slipped and fell on water in a checkout line, despite the plaintiff's claim that the checkout clerk could have seen the water "'if she had been looking.'" This Court held the record did not show (1) the Wal-Mart employee actually knew the floor was wet; (2) how long the water had been on the floor; or (3) how long the water was within the checkout clerk's field of vision. *Id.* at 91, 394 S.E.2d at 25. Here, however, Ms. Qualls presented—at the very least—a scintilla of evidence that Ms. Simon actually knew the floor was wet (*see supra,* subsection (I)(1)). Further, video surveillance shows (1) the spill was within Ms. Simon's line of vision for *almost five minutes* when she was behind the register; (2) the spill was within *inches* of Ms. Simon's line of vision when she walked past it, looking down towards the spill and the floor; and (3) at least three other customers saw the spill and took overt maneuvers to sidestep it. (Def. Ex. 2). Last, Ms.

Arsenault, Burlington's 30(b)(6) designee, stated that Ms. Simon would have seen the spill if she had been paying attention and was not distracted by her improper cell phone use.

In *Pennington v. Zayre Corporation*, 252 S.C. 176, 177, 165 S.E.2d 695, 696 (Ct. App. 1996), this Court affirmed the grant of summary judgment in favor of a department store when the plaintiff slipped and fell on a transparent blouse bag. This Court declined to hold the department store possessed constructive notice, despite the testimony of three witnesses that other bags were laying in the same area. *Id.* at 179, 165 S.E.2d at 696. Similar to the preceding cases relied upon by the circuit court, there was no evidence regarding how long the bags had been on the floor and whether a store employee was presented with an opportunity to discover the bags prior to the plaintiff's injury. Again, as noted *supra*, Ms. Qualls presented more than a mere scintilla of evidence to establish the length of time the spill was on the floor as well as Burlington's numerous opportunities to discover and remedy the hazard to prevent Ms. Qualls's injuries.

Last, the circuit court cites to *Hunter v. Dixie Home Stores*, 232 S.C. 139, 101 S.E.2d 262 (1957), for both the proposition that the spill was not on the ground for long enough and that two store employees' presence in the vicinity of the spill was insufficient to establish constructive notice. In *Hunter*, the plaintiff slipped and fell on green beans in the produce aisle and brought suit against the grocery store for actual and punitive damages for her ensuing injuries. *Id.* at 141, 101 S.E.2d at 263. The plaintiff acknowledged that two store employees were in the vicinity of her fall, but unlike the instant case, the plaintiff admitted that at least one of the employees was not even facing the same direction as the plaintiff immediately before and during her accident. *Id.* at 142-43, 101 S.E.2d at 264. Further, the plaintiff in *Hunter* neglected to produce any evidence regarding how the beans got on the floor or how long they had been there prior to the

plaintiff's injuries. *Id.* at 143, 101 S.E.2d at 264. The Supreme Court supported its decision by stating there was also no evidence "other customers had previously been in the store and used the aisle where the [plaintiff] was walking." *Id.* at 144, 101 S.E.2d at 265. In *Hunter,* the plaintiff failed to present any evidence (1) the beans were in a high traffic area; (2) an employee saw or should have seen the spilled green beans; (3) any employees or other customers walked by the green beans; or (4) any customers saw the green beans while shopping on that aisle. Dissimilar to *Hunter*, Ms. Qualls presented video surveillance showing (1) how the spill occurred; (2) how long the spill was on the floor; and (3) the presence of numerous other customers and employees in the same area during the relevant time frame. Further, in the case at bar, Burlington's 30(b)(6) representative testified that the clerk had the opportunity to see the spill and would have seen it if she was not distracted by her personal cell phone. (Depo of Burlington).

All of these cases are factually distinguishable from that of Ms. Qualls. Because Ms. Qualls presented genuine issues of material fact as to whether Burlington should have acted to remedy the situation, it is more proper for a jury—not the court—to determine whether Ms. Qualls's injuries could have been prevented with the exercise of due care. To that end, Ms. Qualls does not seek to hold Burlington liable merely because employees were in close proximity to the spill or because the substance was on the floor for approximately five minutes before she fell. Rather, Ms. Qualls asserts Burlington should have known of the spill because of the conspicuous way in which the spill occurred – a cup being thrown in front of *at least* two employees.[3] Reasonable diligence would require an employee who witnessed a similar scenario to investigate whether any liquid was actually spilled onto the floor. The employees also had the

[3] Two employees are visible on the video footage, but there are eight other registers not shown on the video, and arguably, those employees were at their cash registers during the relevant time frame as well.

opportunity to notice other customers moving around the spill, as the spill location was within their line of sight from the time it was spilled until Ms. Qualls fell.[4] In addition, the surveillance video shows Ms. Simon walking right next to the spill and looking down towards the admittedly "noticeable" spill as she passed. Even assuming Ms. Simon did not see the spill, according to Burlington, Ms. Simon *could have seen* the spill if she had been looking and paying attention, and by exercise of reasonable diligence, she should have been doing just that. Given the high traffic area and Burlington employees' obligation to promote a safe environment, Ms. Simon had the opportunity to observe the spill and take corrective action. Based on the foregoing, Ms. Qualls avers the circuit court erred in concluding she failed to present a mere scintilla of evidence on the issue of constructive knowledge; thus, the circuit court's grant of summary judgment was in error.

II. The Circuit Court Improperly Applied the Summary Judgment Standard.

The summary judgment standard in South Carolina is clear. However, the circuit court's order denies Ms. Qualls the right to a jury trial in spite of the numerous disputed issues of material fact in this action. Simply put, disputed evidence exists that Burlington either knew or should have known of the hazard on the floor, which caused Ms. Qualls's injuries. Respectfully, the circuit court's order granting summary judgment omits crucial elements of the standard and fails to view the evidence in a light most favorable to Ms. Qualls, as it is required to do by longstanding precedent. As more fully discussed below, these legal errors require reversal on appeal.

[4] Ms. Simon left the area just before Ms. Qualls fell; however, the other employee on the video was still at the register.

1. The circuit court failed to acknowledge or apply the mere scintilla of evidence standard.

In cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a ***mere scintilla of evidence*** to withstand a motion for summary judgment pursuant to Rule 56(c), SCRCP. *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). "In a negligence case, whe[n] the burden of proof is a preponderance of the evidence standard, the non-moving party ***must only submit a mere scintilla of evidence*** to withstand a motion for summary judgment." *Fisher v. Shipyard Vill. Council of Co-Owners, Inc.*, 415 S.C. 256, 270, 781 S.E.2d 903, 910 (2016) (emphasis added); *Zurich Am. Ins. Co. v. Tolbert*, 387 S.C. 280, 283, 692 S.E.2d 523, 524 (2010) ("Summary judgment should be denied where the non-moving party submits a mere scintilla of evidence."); *Murphy v. Tyndall*, 384 S.C. 50, 54, 681 S.E.2d 28, 30 (Ct. App. 2009) (denying summary judgment because the plaintiff's testimony regarding his recollection of a conversation was at least a mere scintilla of evidence, even though statements made therein were subject to multiple interpretations).

Respectfully, the circuit court failed to apply the mere scintilla standard in the present case. The circuit court's order is completely void of the phrase "mere scintilla." The section pertaining to the summary judgment standard discusses genuine questions of material facts, but it fails to note the low burden the non-moving party must carry at the summary judgment stage. (Order, p. 4). Further, although it references evidence set forth by Ms. Qualls, the circuit court finds "the evidence of record does not support" liability on the part of Burlington. (Order, p. 9-10). The determination of whether the evidence rises to the level necessary to hold Burlington liable is for the jury's determination. The court's role is to determine whether there is any

evidence at all to support Ms. Qualls's theory of recovery. Because the circuit court did not apply the proper standard, its decision to grant summary judgment should be reversed.

2. The circuit court failed to take all inferences in the light most favorable to Ms. Qualls.

When determining whether any genuine issues of fact exist under Rule 56(c), "the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." *Evening Post Publ. Co. v. Berkeley County Sch. Dist.*, 392 S.C. 76, 81-82, 708 S.E.2d 745, 748 (2011) (internal quotation marks omitted). "[E]ven where there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should not be granted." *Hill v. York County Sheriff's Dep't*, 313 S.C. 303, 305, 437 S.E.2d 179, 180 (Ct. App. 1993). If reasonable minds may differ on how a fact is to be interpreted, summary judgment is inappropriate. *Miller v. Blumenthal Mills, Inc.*, 365 S.C. 204, 220, 616 S.E.2d 722, 729 (Ct. App. 2005).

In granting summary judgment, the circuit court did not view all facts in the light most favorable to Ms. Qualls. For example, in footnote 19, the court states,

> The surveillance footage does not clearly show whether Ms. Simon is looking at a phone. Viewed in the light most favorable to the Plaintiff, the video footage and record evidence can be interpreted to show that Ms. Simon briefly looks at a phone in her pocket after going on break, likely to check the time. It is undisputed that Ms. Simon was off-duty when this occurred. The mere fact Ms. Simon, while off duty, failed to detect a spill[,] which could have been in her field of vision, is not sufficient to escape summary judgment.

(Order, p. 12 n.19). Ms. Qualls submits that in the light most favorable to her, the video shows Ms. Simon walking past the spill and looking down at it, giving her actual notice of the spill. As the Court notes, it is not clear from the video that Ms. Simon has a phone at all. It is, however, clear from the video that Ms. Simon looks down as she walks past the place where Ms. Qualls

fell.[5] Further, the court's conclusion that Ms. Simon was "likely" checking the time is an inappropriate conclusion and one which insinuates the purpose behind her distraction was rational and excusable. It is improper for the circuit court to make this unjustified conclusion of fact. At the very least, this is an argument most properly argued to a jury, not a fact for the court to summarily conclude.

The 30(b)(6) deponent, Ms. Arsenault, agreed that she knew Ms. Simon was "distracted because she was on her phone or playing with her phone when she walked past the spill on the floor" and would have possibly seen the spill except for being distracted.[6] (Arsenault Depo pp. 102, 89). Instead of walking through the store distracted while playing on her phone, a jury could easily conclude Ms. Simon should have been paying attention. Alternatively, a reasonable jury could view the footage and determine Ms. Simon was *not* carrying a phone, which could lead them to infer Ms. Simon was actually looking at the floor where the spill was located.[7] When viewing the evidence in a light most favorable to Ms. Qualls, there is at least a mere scintilla of fact that Ms. Simon failed to see a visible spill due to a self-induced personal distraction; therefore, the circuit court erred in granting summary judgment.

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[5] The parties do not dispute that a substance was spilled onto the floor where Ms. Qualls fell. (Arsenault Depo. 65, 96) (noting a "noticeable spill" where Ms. Qualls fell); (Pl. Dep. 24-25, 29) (testifying that she slipped on a liquid).

[6] Pamela Arsenault served as Defendant's sole 30(b)(6) witness. She admitted in her deposition that she had not spoken with Ms. Simon regarding what—if anything—was in her hand on the video. (Arsenault Depo. p. 85).

[7] Ms. Qualls submitted the alternative argument that a jury could find Ms. Simon was most probably checking her phone, but she should not have been, and her failure to pay diligent attention caused her to miss the spill. Ms. Qualls argues this would give Burlington constructive notice of the spill. However, Ms. Qualls's primary theory of liability is that Ms. Simon, and therefore Burlington, had actual notice of the spill.

In addition, the circuit court gives a recitation of the facts beginning on page seven of its order that is heavily in Burlington's favor.[8] The court asserts, "Ms. Simon did not witness the child throwing the cup, [sic] because her view was blocked as she was checking out the child's family." (Order p. 7). There is no evidence in the record that Ms. Simon's view was blocked. To the contrary, it appears from the video that Ms. Simon could easily see the child in the cart, and therefore, she could have seen him throw the cup. This is not an instance when a child standing right in front of the counter spills a drink below counter level. Rather, the child tossed the cup, it sailed several feet through the air, and then it landed about ten feet away from the counter and Ms. Simon. (Arsenault Depo. p. 92-93; *see also* Pl. Depo. p. 60, 66). Thus, to infer Ms. Simon's view of the spill was blocked runs counter to the summary judgment standard and its requirement to consider these facts in the light most favorable to Ms. Qualls.

On page ten of its order, the circuit court misstates the evidence presented when it stated, "there is no record evidence tending to show that the spill was visible before the Plaintiff fell." (Order p. 10). This holding dismisses the three customers shown on the surveillance video who noticeably changed their gait or path when walking past the spill. The circuit court notes these customers' actions when summarizing Ms. Qualls's argument but fails to address it in the analysis portion of its order. (*See* Order pp. 9-13). Additionally, Burlington's 30(b)(6) witness, Ms. Arsenault, testified that anyone "paying attention" would have noticed the spill. (Arsenault Depo. p. 96-97). She also admitted that Ms. Simon "had the opportunity to observe the spill" because she "walked within inches of the spill." (*Id.* at p. 86-87). Further, the circuit court's

[8] To the extent the circuit court intended these facts to be a summary of Burlington's arguments—which is unclear from the order—Ms. Qualls is concerned these facts were not considered in the light most favorable to her, as is required when reviewing a summary judgment motion. In addition, the circuit court did not explain how it reconciled the countervailing arguments of the parties to ensure all facts were considered in the light most favorable to Ms. Qualls.

order concludes an older child removed the cup from the floor, "leaving no visible evidence that a spill had occurred." (Order p. 7). However, Burlington's own witness, Ms. Arsenault, testified she noticed the spill as soon as she reached Ms. Qualls and documented the spill as "noticeable" in her incident report. (Arsenault Depo. p. 65, 96, Pl. Ex. 6). Respectfully, these findings run counter to Burlington's post-accident admission and beg explanation as to how the court arrived at these conclusions. Thus, there is at least a "mere scintilla" of evidence that the spill was noticeable both prior to and after Ms. Qualls's fall, and the circuit court's failure to recognize this disputed issue in its order was in error.

Similarly, the circuit court concluded "there is no policy against employees using their cell phones." (Order, p. 8). However, Ms. Arsenault admits employees are ***not*** supposed to be on their phones while working, and Ms. Simon is technically still working at the point she is depicted on the surveillance video. (Arsenault Depo. p. 84-85). Ms. Arsenault's testimony about the lack of a written company policy to prohibit personal cell phone use while working is irrelevant for purposes of this motion. Common sense dictates employees should not be walking around the store playing on their phones—this fact is something a jury would easily relate to and understand. Nevertheless, the circuit court appears to have made great effort to construe these facts in the light most favorable to the *moving* party, Burlington, which Ms. Qualls contends was in error.

3. The circuit court mischaracterizes Ms. Qualls's argument and misapplies case law in rendering its decision.

The circuit court, citing to case law, holds Burlington is entitled to summary judgment as a matter of law in this case because (1) the substance on which Ms. Qualls slipped was not on the floor for a sufficient amount of time to show constructive notice; and (2) Ms. Qualls cannot show notice through mere proximity. However, as extensively discussed *supra* in section (I)(2), the

authorities cited[9] are not controlling because Ms. Qualls is not attempting to prove notice merely by showing the substance was on the floor for a long time or employees were in close proximity to the spill. In this case, the length of time for a substance to be on the floor before liability can be imposed is irrelevant when there is evidence a store employee walks within inches of the spill and does nothing to clean it up. The law does not, and should not, impose a timeframe setting a rigid demarcation for what length of time a substance must be on the floor before liability can attach. To hold otherwise could arguably establish law that would permit an employee to ignore a noticeable spill after it was on the floor for only "x" amount of minutes because the law says it must be on the floor for "x" minutes before anyone has to act with reasonable diligence. This court has never set a bright line rule for the amount of time that a substance can be on the floor without liability. Otherwise, a store owner would be able to legally ignore a known hazard on the floor and be immune from liability for endangering the public. Because the law requires a business to take reasonable efforts to prevent an injury once an employee or storekeeper notices a hazardous condition or has the *opportunity* to notice a hazardous condition, these cases are not controlling and should not have been relied upon by the court in its summary judgment decision.

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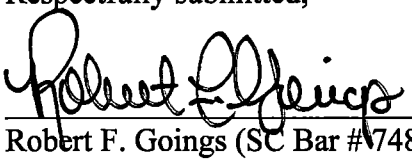
[9] The court cites to *Bessinger, Wimberly, Hunter*, and *Gilliland* for the proposition the spill was not on the floor for a sufficient amount of time to establish constructive notice as a matter of law. The court also cites to *Hunter, Gillespie*, and *Pennington* for the proposition that an employee's proximity is irrelevant for purposes of summary judgment in a premises liability case. For the sake of brevity, Ms. Qualls reinstates and reiterates her arguments relating to the distinctions in these cases from subsection (I)(2). Of significance, none of these cases included any evidence of constructive knowledge. Although the law allows a plaintiff to show constructive notice of a foreign substance by showing the substance was on the floor for an unreasonable amount of time, it does not hold this is the only way a party may prove constructive notice. The law only requires, at this stage, that Ms. Qualls set forth a scintilla of evidence "from which the jury might reasonably infer that the defendant, by the exercise of reasonable diligence, *should have known* of the hazard on the floor which caused the injury to the plaintiff." *Wimberly*, 252 S.C. at, 123, 165 S.E.2d at 630.

CONCLUSION

Ms. Qualls presented genuine issues of material fact to the circuit court to substantiate her claims that Burlington possessed actual or constructive notice of a hazard in its store yet failed to take the appropriate corrective action. The circuit court's order fails to reflect that it considered these facts in its application of the law, and thus, the court erred in granting summary judgment. For the foregoing reasons, Ms. Qualls respectfully requests this Court reverse the ruling of the circuit court and remand this case for a trial on the merits.

Respectfully submitted,

By: 

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February 12, 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
George M. McFaddin, Jr., Circuit Court Judge

Case No. 2016-CP-40-1699
Appellate Case No.: 2017-002433

Lallie Qualls.....Appellant,

v.

Burlington Coat Factory of South Carolina, LLC and
Burlington Coat Factory Direct Corp .....Respondents.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant on Respondents by mailing a copy of the same, via United States Mail, on February 12, 2018, to the following:

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Respectfully submitted,

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February 12, 2018

VIA HAND-DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

Re: Lallie Qualls v. Burlington Coat Factory of South Carolina, LLC and Burlington Coat Factory Direct Corp.
Appellate Case No.: 2017-002433

Dear Ms. Kitchings:

Please find enclosed for filing the original and two (2) copies of the Initial Brief of Appellant and the Appellant's Designation of Matter to be Included in the Record on Appeal in the above-referenced matter. Please return the filed, stamped copy to me via my courier.

Thank you for your time and attention. Should you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

Robert F. Goings

RFG:lcc
Enclosures
cc: Nicholas D. Mermiges, Esquire