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

2012-CP-26-09164

Anne Lytle and Paris Lytle, ...Appellants,

v.

Bi-Lo, LLC, ...Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

ISSUES ON APPEAL

I) WHETHER SUMMARY JUDGMENT FOR BI-LO SHOULD BE AFFIRMED WHEN APPELLANTS FAILED TO PRODUCE ANY EVIDENCE BI-LO CREATED THE DANGEROUS CONDITION WHICH CAUSED LYTLE'S FALL.

II) WHETHER APPELLANTS FAILED TO PRESENT ANY EVIDENCE THAT BI-LO KNEW OR SHOULD HAVE KNOWN OF ANY DANGEROUS CONDITION THAT CAUSED LYTLE'S FALL.

STATEMENT OF THE CASE

This appeal arises out of a slip and fall incident that occurred at a Myrtle Beach area Bi-Lo store when Appellant Anne Lytle (hereinafter "Lytle") slipped on what she claims was a Bi-Lo grocery bag. (Lytle Dep. 35.) Respondent Bi-Lo moved for summary judgment based on the absence of any evidence it created the dangerous condition or had actual or constructive notice of the dangerous condition which caused Lytle's fall. (R. Mem. Sum. Jgt. 3-7.) By Order dated June 17, 2013, the trial court granted Bi-Lo's motion holding Appellants failed to produce any evidence Bi-Lo placed the bag on the floor or had actual or constructive knowledge of the bag on the floor. (Order 3.) The trial court also held that Appellants' argument that Bi-Lo had to have created the dangerous condition because the grocery bag was in the exclusive control of Bi-Lo was insufficient to create an issue of fact because it was based on *res ipsa loquitor* rather than circumstantial evidence. (Order 4.) Appellants filed their Notice of Appeal challenging the trial court's Order on July 16, 2013.

STATEMENT OF THE FACTS

On March 4, 2006, Lytle 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. (Lytle Dep. 35.) There is no dispute that a plastic bag was on the floor where Lytle fell. (Lytle Dep. 35; Jackson Aff. 1.) Lytle did not see the bag before she fell, but she believes the bag was on the floor at the front of the checkout aisle where the customer enters and not the back of the aisle where the groceries are bagged. (Lytle Dep. 36.) Lytle has no idea how the bag got on the floor or who put it on the floor. (Lytle Dep. 36, 37.) Lytle does not know how

Prior to Lytle's fall, Bi-Lo had not received any complaints about a plastic bag on the floor. (R.p.29.) There is no evidence that any Bi-Lo employee knew the bag was on the floor before the Lytle fell. (R.pp.26, 28.) Lytle does not know whether anyone from Bi-Lo knew the bag was on the floor or had a chance to see the bag on the floor before her fall. (R.pp.25, 26.)

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the Court of Appeals applies the same standard that governs the circuit court under Rule 56(c), SCRCP. Nelson v. Piggly Wiggly Cent., Inc., 390 S.C. 382, 387-88, 701 S.E.2d 776, 779 (Ct. App. 2010). "Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law." Rule 56(c), SCRCP. However, neither the trial court nor the Court of Appeals is "required to single out some one morsel of evidence ... to create an issue of fact that is not genuine." Englert, Inc. v. Netherlands Ins. Co., 315 S.C. 300, 302, 433 S.E.2d 871, 873 (Ct. App. 1993) (Main v. Corley, 281 S.C. 525, 527, 316 S.E.2d 406, 407 (1984)).

ARGUMENT

I) SUMMARY JUDGMENT FOR BI-LO SHOULD BE AFFIRMED BECAUSE APPELLANTS FAILED TO PRODUCE ANY EVIDENCE BI-LO CREATED THE DANGEROUS CONDITION THAT CAUSED LYTLE'S FALL AND APPELLANTS' ATTEMPT TO CREATE ISSUES OF FACT SOUND IN *RES IPSA LOQUITOR*, WHICH IS NOT RECOGNIZED IN THIS STATE.

The trial court correctly found that Appellants failed to offer any evidence that Bi-Lo created the dangerous condition on the floor that caused Lytle's fall. It is well established in South Carolina that a merchant 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, a merchant

established in South Carolina that a merchant 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, a merchant 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.C.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 merchant's floor must prove either (1) that the foreign substance causing the fall was placed on the floor by the merchant, or (2) that the merchant 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).

The trial court correctly rejected Appellants' argument that Lytle's testimony regarding her prior observations of similar plastic bags constitutes circumstantial evidence that Bi-Lo created the dangerous condition. Lytle has no idea how the bag got on the floor. (Lytle Dep. 36, 37.) At best, Lytle could only speculate that perhaps the bag was dropped from the checkout counter by "someone," but she did not know whether it was a Bi-Lo employee or a customer who dropped the bag. (Lytle Dep. 38.) The mere existence of the bag on the floor is insufficient to establish liability and Appellants' arguments to the contrary are meritless when, as the trial court correctly concluded, such arguments sound in *res ipsa loquitor* rather than circumstantial evidence. (Order 4.)

South Carolina does not recognize the doctrine of *res ipsa loquitor*. Poliakoff v. Shelton, 193 S.C. 398, 8 S.E.2d 494 (1940). Thus, Appellants may not rely on conjecture or speculation as to how the bag ended up on the floor when it may have occurred as a result of the act of another customer, an employee, or many other ways. See, e.g.,

loquitur does not prevail in South Carolina; and the court cannot speculate as to how the suitcase came to fall, as its fall may have been the result of an act of a fellow passenger, or it may have occurred in many other ways.").

In addition, although a plaintiff may rely on circumstantial evidence to establish negligence and ensuing liability, a plaintiff must show such circumstances as would justify the inference that the injuries were due to a negligent act on the part of the defendant; the matter may not be left to mere conjecture or speculation. Leggette v. Smith, 265 S.C. 573, 577, 220 S.E.2d 429, 430 (1975). In the instant case, Appellants are essentially asking the factfinder to speculate that because Lytle had, on prior occasions, observed similar plastic bags in the control of Bi-Lo employees, a Bi-Lo employee must have created the dangerous condition of a plastic bag being on the floor on this specific occasion. However, Lytle could only speculate that perhaps the bag was dropped from the checkout counter, but she did not know whether it was a Bi-Lo employee or a customer who dropped the bag. (R.p.27.) Such speculation is wholly inadequate to establish that Bi-Lo created the dangerous condition.

II) APPELLANTS FAILED TO PRESENT ANY EVIDENCE THAT BI-LO KNEW OR SHOULD HAVE KNOWN OF ANY DANGEROUS CONDITION THAT CAUSED LYTLE'S FALL.

Appellants have not challenged the trial court's ruling that Bi-Lo had neither actual nor constructive notice of the plastic bag on the floor which caused Lytle's fall. As such, Appellants have abandoned this issue on appeal, and the trial court's ruling regarding notice is law of the case and requires affirmance. First Union Nat. Bank of S. Carolina v. Soden, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) (quoting Lindsay v. Lindsay, 328 S.C. 329, 491 S.E.2d 583 (Ct.App.1997) ("It is a fundamental

rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling.").

Although Appellants failed to challenge the trial court's ruling that Bi-Lo had neither actual nor constructive notice, Bi-Lo addresses this argument as an additional sustaining ground for affirming the grant of Summary Judgment in its favor. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) ("Under the present rules, a respondent—the "winner" in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court.").

A) APPELLANTS FAILED TO PRODUCE ANY EVIDENCE THAT BI-LO HAD ACTUAL NOTICE OF THE PRESENCE OF THE PLASTIC BAG ON THE FLOOR.

Appellants offered no evidence establishing that any store employee knew that the bag was on the floor before Lytle's fall. Lytle admits that she does not know if any Bi-Lo employee knew the bag was on the floor before she fell. (R.pp.25-27). 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. (R.p.29.) The incident occurred at 7:25 p.m., and the floors had last been inspected at 6:30 p.m. (R.p.29.) Prior to Lytle's fall, Bi-Lo had not received any complaints about a plastic bag on the floor, neither the Store Director nor any other Bi-Lo employee was aware that a plastic bag was on the floor, and Bi-Lo had no notice that a bag had fallen on to the floor in the area where the Lytle fell. (R.pp.28, 29.) In other words, there is no evidence that Bi-Lo had any knowledge that the bag was on the floor prior to her fall. Thus, Appellants cannot show that Bi-Lo had actual notice of the bag on the floor.

B) APPELLANTS FAILED TO PRODUCE ANY EVIDENCE THAT BI-LO HAD CONSTRUCTIVE NOTICE OF THE PRESENCE OF THE PLASTIC BAG ON THE FLOOR.

Appellants offered no evidence that the plastic bag had been on the floor for a sufficient length of time that the storekeeper would or should have discovered the plastic bag and removed it in the exercise of ordinary care. Gillespie v. Defendant Stores, Inc., 302 S.C. 90, 394 S.E.2d 24 (Ct. App. 1990). 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 92, 394 S.E.2d at 25. In this case, Lytle admits that she does not know how long the bag was on the floor. (R.p.25.)

In Wintersteen, the plaintiff allegedly slipped and fell in a puddle of clear liquid near a self-service soda fountain with an ice dispenser. Wintersteen, 344 S.C. 32, 542 S.E.2d 728. Because the plaintiff had no evidence showing 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. Id. at 36, 542 S.E.2d at 730. In its opinion, which was upheld by the Supreme Court, this Court 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, 830 (Ct. App. 2000).

The rule of Wintersteen is long established. In Pennington v. Zayre Corporation, 252 S.C. 176, 165 S.E.2d 695 (1969), a case cited with approval in Wintersteen, the plaintiff allegedly slipped on a clear plastic bag on the floor of a

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, Appellants in the instant case are unable to show how long the bag was on the floor prior to Lytle's fall. (R.p.25.) This evidence, or lack thereof, is insufficient to establish constructive notice. In effect, Appellants are asking a jury to impermissibly speculate as to the length of time the bag was on the floor before Lytle's fall, but such speculation is specifically prohibited under the holdings of Pennington and Wintersteen. Therefore, Appellants' evidence, or lack thereof, is insufficient to establish constructive notice of the existence of the bag on the floor.

C) THE TRIAL COURT DID NOT ERR IN CONSIDERING THE UNCONTROVERTED AFFIDAVIT OF ANGEL JACKSON TO SUPPORT BI-LO'S MOTION FOR SUMMARY JUDGMENT BECAUSE IT WAS BASED ON PERSONAL KNOWLEDGE AND ADMISSIBLE AS EVIDENCE.

Appellants appear to argue on appeal that the trial court erred in relying on the Affidavit of Bi-Lo's Co-Customer Service Manager, Angel Jackson, because the affidavit is "conclusory" and provides no supporting "documentation or other proof" in support of the affiant's testimony. This argument is entirely without merit. Rule 56(e) provides, "affidavits shall be made on personal knowledge, [and] shall set forth such facts as would be admissible in evidence." Jackson's affidavit was made on personal knowledge and sets forth facts that are admissible as evidence.

Jackson's Affidavit states that she approached Lytle after the fall and noticed a plastic bag on the floor. (Jackson Aff. 1.) According to Jackson, neither she nor any other Bi-Lo employee was aware of the plastic bag on the floor prior to Lytle's fall. (Jackson Aff. 1.) She explained that 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 floor at the time of inspection. (Jackson Aff. 2.) Prior to Lytle's fall on March 4, 2006, at 7:25 p.m., the floors were last inspected at 6:30 p.m. (Jackson Aff. 2.) She testified that Bi-Lo did not receive any complaints about a plastic bag on the floor and had no notice that a bag had fallen onto the floor prior to Lytle's fall. (Jackson Aff. 2.)

Statements as to a routine practice of an organization are admissible to prove what was done in a given situation was in conformity with routine practice. S.C. Labor Ltd., LLC v. Eastern Tree Serv., Inc., 362 S.C. 654, 609 S.E.2d 305 (Ct. App. 2005). Jackson

SCRCP. More importantly, Jackson's affidavit testimony is uncontroverted, and Appellants have provided no evidence showing any genuine issue of material fact as to Jackson's testimony.

CONCLUSION

Appellants failed to present any evidence establishing Bi-Lo created the dangerous condition which caused Lytle's fall. Appellants also failed to challenge the ruling that Bi-Lo had neither actual nor constructive notice of the dangerous condition which caused Lytle's fall. Based on the arguments presented above, Bi-Lo respectfully requests this Court affirm the trial court's ruling granting summary judgment in its favor.

Respectfully submitted,

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CERTIFICATE

I, Ashley B. Stratton, Esquire, attorney for Respondent, certify that the Final Brief of Respondent complies with Rule 211(b) of the South Carolina Court Rules.

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PROOF OF SERVICE

I certify that I have served the Brief of Respondent on Anne Lytle and Paris Lytle by depositing a copy of it in the United States Mail, postage prepaid, on January 15, 2014, addressed to their attorneys, Frank A. Barton, Esquire, 1611 Augusta Road, West Columbia, SC 29169-5629 and H. Wayne Floyd, Esquire, P.O. Box 3972, West Columbia, SC 29170.

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