STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE THIRD JUDICIAL CIRCUIT
COUNTY OF SUMTER	)	
	)	Civil Action No.: 2018-CP-43-00851
Wanda V. Berry and Gary A. Berry,	)	
	)	
Plaintiffs,	)	
	)	**ORDER GRANTING SUMMARY JUDGMENT**
Vs.	)	
	)	
Scott Richardson d/b/a Chick-fil-A of Sumter Mall,	)	
	)	
Defendant.	)	

Defendant Scott Richardson d/b/a Chick-fil-A of Sumter Mall ("Defendant") filed this motion for summary judgment, arguing there is no evidence that Defendant had actual or constructive notice of an alleged dangerous condition necessary to support a premises liability claim. Defendant's motion is granted.

FACTS/PROCEDURAL BACKGROUND

This premises liability matter arises out of Plaintiff Wanda Berry's February 4, 2014 fall at the Chick-fil-A restaurant ("Chick-fil-A") located within the Sumter Mall in Sumter, South Carolina. (Complaint at ¶2, 3). Plaintiff Wanda Berry alleges that around 2:00 p.m., she placed her order at the counter of the subject Chick-fil-A, rounded the corner into the dining area, and walked to the nearby condiment station within the restaurant to pick up her condiments. Her food was ready quickly, and she then proceeded further into the dining area to receive her tray of food. (**Ex. A**, Deposition of Wanda Berry, p. 33, line 3 – p. 34, line 15). Upon receiving her tray of food, Plaintiff alleges she stepped forward and slipped on the floor, falling and injuring her left shoulder. (**Ex. A**, p. 34, lines 2-15; p. 46, lines 6-13). Surveillance footage of

Plaintiff's accident was retained following the incident. (**Ex. B**, February 4, 2013 Incident Recording).

Plaintiff testified that the flooring "in the dining room side when you walk around the corner and where all the chairs and tables are" was slippery. (**Ex. A**, p. 35, lines 9-13). Plaintiff denies she could see any substance on the floor, but, "[y]ou could just feel it under your shoes," in the area she described as "across the entire floor." (**Ex. A**, p. 34, line 24 – p.35, line 4.) In traversing the area, Plaintiff testified that "it's all greasy all the way around but it was—I would say when you walk you can feel your feet pivot." (**Ex. A**, p. 36, lines 22-23). Before her fall, Plaintiff was walking carefully on the floor, "because your feet were like pivoting. When you can walk and you can feel your shoe pivot." (**Ex. A**, p. 42, lines 8-17). Plaintiff believed her shoes were pivoting on the floor prior to her fall because the floor was greasy. (**Ex. A**, p. 42, lines 15-17). When asked directly as to what evidence Plaintiff had to support that Defendant was aware of any slippery condition on the subject floor, Plaintiff asserted, "I just know that it was slippery under my feet." (**Ex. A**, p. 56 line 21 – p. 57, line 12).

Plaintiff Wanda Berry and her husband Gary Berry filed their Complaint against Defendant Scott Richardson d/b/a Chick-fil-A of Sumter Mall, alleging a premises liability claim sounding in negligence. Plaintiff Gary Berry asserts a loss of consortium claim.

STANDARD OF REVIEW

A court will grant a moving party's motion for summary judgment when there exists no genuine issue of material fact, and that party is entitled to judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the court must view both the evidence and all reasonable inferences able to be drawn from the evidence in the light most favorable to the non-moving party. Simmons v. Tuomey Regional Medical Center, 341 S.C. 32,

533 S.E.2d 312 (2000). Nonetheless, the trial court, "cannot ignore facts unfavorable to [the nonmoving] party and [it] must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts." Bloom v. Ravoira, 339 S.C. 417, 423, 529 S.E.2d 710, 713 (2000). Accordingly, the court must search the proof to ascertain whether it discloses a real issue, rather than a formal, perfunctory or shadowy one. Saluda Motor Lines v. Crouch, 300 S.C. 43, 46, 386 S.E. 2d 290, 292 (Ct. App. 1989).

The plain language of Rule 56(c), SCRCP, mandates the entry of summary judgment 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. Bray v. Marathon Corp., 347 S.C. 189, 553 S.E.2d 477 (Ct. App. 2001). With respect to an issue on which the non-moving party has the burden of proof, the moving party may point out to the trial court that there is an absence of evidence to support the non-moving party's case. Hedgepath v. AT&T, 348 S.C. 340, 354, 559 S.E.2d 327, 335 (Ct. App. 2001). The non-moving party must then "do more than simply show that there is some metaphysical doubt as to the materials facts[,]" but "must come forward with specific facts showing that there is a genuine issue for trial." Id. "[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." Moore v. Barony House Restaurant, LLC, 382 S.C. 35, 40, 674 S.E.2d 500, 503 (Ct. App. 2009).

LAW/ANALYSIS

It is well-settled in South Carolina that a merchant is not the insurer of the safety of its customers. Rather, a merchant who invites the public to his premises owes them a duty to exercise due care to keep the premises in a reasonably safe condition. Garvin v. Bi-Lo, Inc., 343 S.C. 625, 541 S.E.2d 831 (2001). A merchant is responsible for the consequences of conditions

arising from his own negligence, "provided he has actual or constructive notice of an unsafe condition and a reasonable opportunity to correct it." Mullen v. Winn-Dixie Stores, Inc., 252 F.2d 232, 233 (4th Cir. 1958) (applying South Carolina law).

To establish a prima facie case for negligence under South Carolina law, Plaintiffs must show: (1) defendants owed them a duty of care; (2) defendants breached this duty of care by a negligent act or omission; (3) defendants' breach was the proximate cause of their injuries; and (4) they suffered injury or damage. Dorrell v. S.C. Dep't of Trans., 361 S.C. 312, 318, 605 S.E.2d 12, 15 (2004) (citation omitted). Specifically, to establish liability under a premises liability theory, plaintiffs must meet the test established in Wintersteen v. Food Lion, 344 S.C. 32, 542 S.E.2d 728 (2001).

In Wintersteen, the South Carolina Supreme Court again reiterated the elements that must be proven to recover in a negligence action based on a defective condition of the premises: In South Carolina, to recover damages for injuries caused by a dangerous condition or defective condition on a landowner's premises, the plaintiff must show either: (1) the injury was caused by a specific act of the landowner that created the dangerous condition; or (2) the landowner had actual or constructive knowledge of the dangerous condition and failed to remedy it. Anderson v. Racetrac Petroleum, 296 S.C. 204, 371 S.E.2d 530 (1988); Pennington v. Zayre Corp., 252 S.C. 176, 165 S.E.2d 695 (1969); Hunter v. Dixie Home Stores, 232 S.C. 139, 101 S.E.2d 262 (1957). Id. at 35, 542 S.E.2d at 729. "A plaintiff seeking to recover for injuries sustained in a fall caused by a foreign substance on a storekeeper's floor must prove that the storekeeper had actual or constructive notice that the foreign substance was on the floor." Gosnell v. U.S. Postal Service, 2007 WL 10344997 (D.S.C. 2007) (citing Calvert v. House Beautiful Paint & Decorating Center, 313 S.C. 494, 496, 443, S.E.2d 398, 399 (1994)).

Mrs. Berry admitted in her deposition that she had no evidence that Defendant or any of its employees were aware of any slippery condition on the floor:

Q: Ms. Berry, we're back on the record after a brief break. I have just a few more questions. The – in your Complaint, which is the formal lawsuit brought against my client, Scott Richardson, you indicate that the Defendant knew or should have known that the slippery conditions were present. What evidence do you have to support that they were aware of any slippery condition on the floor?

A: I just know that it was slippery under my feet.

(**Ex. A**, p. 56, line 21-- p. 57, line 4).

Plaintiff submitted the affidavit of Howard Cannon in support of its request that the court deny Defendant's motion for summary judgment. Cannon is a restaurant expert with considerable training and expertise in the areas of restaurant management and food service standards. Mr. Cannon states that he has reviewed the documents, the discovery responses, the deposition testimony, and the video footage of the dining room before, during, and after the fall. Mr. Cannon states, based on his review of these items, "It is my opinion that Chick-fil-A's employee(s) had, or should have had, actual and/or constructive knowledge of a hazardous condition on the floor of the dining room where Plaintiff fell in the form of a slippery, wet substance before Plaintiff's fall and the employee(s) did not meet the industry standard of care in remedying or eliminating the hazardous condition, and that the hazardous condition was the proximate cause of Plaintiff's fall."

Cannon further opines that, based on his review of the video, "a slippery, wet substance was on the floor where Plaintiff fell causing her to fall, that a Chick-fil-A employee was cleaning in the area of the fall minutes prior to the fall and was aware, or should have been aware, of the

substance, and the hazard, but did not remedy the hazardous condition, and that after the fall the employee acknowledged the slippery, wet substance on the floor by looking at the substance, placing a wet floor sign over the substance, and altering her walking gait to step over the substance."

This court has likewise reviewed the videos, which show the exact area of the fall in the twenty-minute period immediately preceding the fall. During this twenty-minute period, workers and customers walk across the exact same spot where Plaintiff slipped some fourteen times with no discernible slipping and nothing visible on the floor. Immediately following Plaintiff's fall, a customer helps Plaintiff to her feet while stepping in the exact same spot, again without any sign of slipping or any sign that a liquid was on the floor. Approximately one minute after the fall and again several minutes after the fall, a worker walks across the exact spot where Plaintiff's foot slipped with no slipping and no problems.

While a worker does come out and place a "wet floor" sign in the adjacent area immediately after the fall, it seems clear to the court that Plaintiff spilled her drink during the fall, causing a spill several feet from where Plaintiff's foot slipped.

Plaintiff's testimony and Cannon's expert opinion fall squarely within the definition of the doctrine of *res ipsa loquitur*. Because Plaintiff slipped, the expert opines that the floor must have been slippery and Chick-fil-A must have been negligent. The expert reviewed the same documents and videos that the court has reviewed before making his conclusory statements. He does not, however, point out how Chick-fil-A could have had actual or constructive knowledge of the invisible substance that no one slipped on prior to the fall, no one complained about to Chick-fil-A employees, and where no spills occurred in the twenty minutes preceding the fall. Nor does the expert opine how Chick-fil-A failed to meet industry standards, other than to make

his conclusory statement that because Plaintiff fell, Defendant must have failed to meet industry standards.

Accordingly, because *res ipsa loquitur* is not legally cognizable under South Carolina law, Plaintiffs' claims fail as a matter of law. Plaintiff may not rely on the doctrine of *res ipsa loquitor* to establish actionable negligence because it is well-settled that South Carolina does not recognize the doctrine of *res ipsa loquitur*. Hunter v. Dixie Home Stores, 232 S.C. 139, 101 S.E.2d 262, 265 (1957) (stating "[i]t is elementary that in order for a plaintiff to recover damages there must be proof not only of injury, but also that it was caused by the actionable negligence of the defendant. It should be kept in mind that the doctrine of res ipsa loquitur does not apply in this State."). Rather, "the party alleging negligence has the burden of proving actionable negligence. This burden cannot be met by relying upon the theory that the thing speaks for itself or that the very fact of injury indicates negligence." King v. J.C. Penney Co., 238 S.C. 336, 120 S.E.2d 229 (1961) (dismissing case where plaintiff failed to present evidence that escalator on which she was injured jerked due to defendant's negligence).

Assuming, arguendo, that Plaintiff fell because of a slippery surface, she has not established any evidence whatsoever that Defendant had actual or constructive knowledge of the existence of any dangerous condition and failed to remedy it. Accordingly, Defendant's motion for summary judgment is granted.

Mr. Berry's loss of consortium claim is likewise barred. Defendant owes no duty to Mr. Berry that would give rise to a claim for loss of consortium. See Lee v. Bunch, 373 S.C. 654, 647 S.E.2d 197 (2007) ("Generally, a plaintiff spouse's claim for loss of consortium fails if the impaired spouse's claim fails, whether the claim is considered separate and independent from the

impaired spouse's claim or derivative in nature.") (quoting 41 Am.Jur.2d Husband and Wife § 227 (2007)); cf. Williams v. APAC Atl., Inc., 2010 WL 569735 (D.S.C. 2010) (dismissing loss of consortium claim where summary judgment was granted for defendant on injured spouse's claim because loss of consortium claim "necessarily depends on plaintiff proving defendants' liability for his injuries"). Accordingly, Scott Richardson d/b/a Chick-fil-A of Sumter Mall is also entitled to summary judgment in its favor as a matter of law on Mr. Berry's loss of consortium claim.

IT IS SO ORDERED.

_____
Kristi Curtis, Circuit Court Judge

May _____, 2019

Sumter Common Pleas

Case Caption: Wanda Berry , plaintiff, et al VS Scott Richardson , defendant, et al

Case Number: 2018CP4300851

Type: Order/Summary Judgment

So Ordered

s/ Kristi F. Curtis, Circuit Court Judge, No. 2762