THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC 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.

FINAL REPLY BRIEF OF APPELLANT

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Columbia, South Carolina
August 22, 2018

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

As set forth in Appellant's Brief,[1] 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. *See Pringle v. SLR, Inc. of Summerton*, 382 S.C 397, 404, 675 S.E.2d 783, 787 (Ct. App. 2009) (holding the plaintiff facing summary judgment in a premises liability case 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").

1. Actual Notice

Burlington makes a lengthy argument regarding its alleged lack of actual notice, asserting "there is simply no record evidence that Burlington employee Simon saw or was aware of the spill prior to the Appellant's fall," (Resp. Initial Br. p. 14), but Burlington fails to refute the arguments set forth in Ms. Qualls' brief. Because a rote recitation of her prior arguments does not aid the Court in rendering its decision, Ms. Qualls again draws the Court's attention to two disputed facts

[1] While the undersigned counsel recognizes the adversarial nature of litigation, Burlington's numerous accusations that Ms. Qualls' counsel attempts to "deliberately" misguide the Court or "deliberately misquot[es]" the record is simply unnecessary. (*See e.g.*, Resp. Initial Br. p. 10 ("Appellant's counsel blatantly mischaracterized the law."); p. 22 ("Appellant makes demonstrably false, untrue claims."); p. 38 ("This is just one example of the Appellant deliberately misquoting the record to create a false impression of error.")). Attempts to impugn counsel only distract from the merits.

in the record: first, Ms. Simon looked down towards the spill before Ms. Qualls fell; and second, the spill was visible.

Burlington's surveillance video clearly shows Ms. Simon walking right past the spill and looking down towards the spill at approximately 29:13.[2] (R. p. 40, timestamp 29:13). The video does not merely show Ms. Simon near the spill or looking in the general direction of the spill; it appears to show her looking downward as she is walking within inches of the spilled drink. *Id.* Ms. Qualls respectfully contends it is very reasonable to infer from Ms. Simon looking at the spill that Ms. Simon saw the spill. Burlington asserts Ms. Simon was looking at her phone and argues there is no evidence of actual notice because Ms. Simon does not do anything visible on the video to affirmatively indicate that she saw the spill. (Resp. Initial Br. p. 19-21). However, neither Ms. Arsenault's speculation that Ms. Simon was looking at her phone, [3] nor Ms. Simon's failure to "react" can negate the evidence that Ms. Simon looked down while walking adjacent to the spill. Further, Ms. Arsenault's testimony that Ms. Simon told Ms. Arsenault she did not see the spill is inadmissible hearsay and cannot be considered by this Court. *See* Rules 801(c) and 802, SCRE; *Hall v. Fedor*, 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct. App. 2002) ("[M]aterials used to support or refute a motion for summary judgment must be those which would be admissible in

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[2] This time refers to the timestamp on Burlington's surveillance video. Burlington's claim that Ms. Qualls' failure to cite to the video timestamps in her Initial Brief "leaves the Court and the Respondent no other option but to watch the entire [60-minute] video themselves" (Resp. Initial Br. p. 18) is disingenuous because (1) it is clear from the record when the drink was spilled and when Ms. Qualls fell; (2) this type of specific citation is commonly added to final briefs; and (3) Burlington is familiar with the video and well aware of exactly when these events transpired. This argument only detracts from the merits of this case.

[3] Burlington admits that Ms. Arsenault's testimony regarding Ms. Simon looking at her phone is mere speculation. (Resp. Initial Br. p. 38). Mere speculation cannot create a genuine issue of material fact. *Jackson v Bermuda Sands, Inc.*, 677 S.E.2d 612 (Ct. App. 2009). It logically follows that Burlington cannot rely upon speculation to refute Ms. Qualls' assertion that this fact is in dispute.

evidence."). Thus, Ms. Qualls has presented evidence tending to show that Ms. Simon looked at the spill.

There is also evidence the spill was visible. As set forth in Ms. Qualls' brief, the video shows at least three customers took notice of the spill: (1) at approximately 26:39, a woman noticeably changes course to walk around the spill, (2) at approximately 28:04, another woman takes an unusually large step over the spill, and (3) at approximately 29:53, a young man walking in the opposite direction of the other customers significantly changes his course to walk around the spill. (R. p. 40). In addition, Ms. Arsenalt described the spill as "noticeable" in her report. (R. p. 268, lines 14-18; p. 424).[4] Burlington argues the report is only evidence the spill was visible after Ms. Qualls fell but fails to explain why or how the spill would suddenly become visible when Ms. Qualls fell. In the absence of such an explanation, the court must infer from this evidence, in combination with the actions of the customers seen on the video, that the spill was visible prior to the fall. Finally, this argument does not, as Burlington argues, require the Court to ignore Ms. Qualls' testimony. Ms. Qualls testified she did not see the spill, but she certainly does not testify the spill was invisible. (R. p. 121, lines 12-14; p. 125, lines 10-12).

Thus, taking all inferences in the light most favorable to Ms. Qualls, there is evidence that Ms. Simon saw a visible spill just inches away from where she stood yet failed to clean it up. Because Ms. Qualls presented more than a mere scintilla of evidence that Burlington had actual notice of the spill, summary judgment was inappropriate.

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[4] Burlington argues this report, as well as the other exhibits to Ms. Arsenault's deposition, cannot be considered by this Court because they were not before the circuit court. (Resp. Initial Br. p. 23). This issue was thoroughly briefed in response with Respondent's Motion to Strike Improperly Designated Material Which Was Not Presented to the Lower Court, which this Court denied with regard to the deposition exhibits. (Order filed June 14, 2018). Ms. Qualls would refer the Court to her Return to Respondent's Motion to Strike for a thorough analysis of the Court's proper consideration of the deposition exhibits.

2. Constructive Notice

The evidence that supports actual notice also supports constructive notice in this case. If Ms. Simon had been exercising reasonable diligence when walking within inches of a visible spill in a high traffic area, she would have noticed the spill. In addition, Ms. Arsenault's testimony that Ms. Simon had the opportunity to see the spill when she walked within inches of it supports the inference that Ms. Simon would have seen it if she was paying attention. (*See* R. p. 259, lines 9-18).

Burlington falsely accuses Ms. Qualls of "inaccurately quot[ing]" Ms. Arsenault's testimony in her brief. (Resp. Initial Br. p. 20). Burlington's accusation relates to the following statement in Ms. Qualls' brief: "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.' (R. p. 255, lines 12-22; p. 259, lines 9-18; R. p. 40, timestamp 29:12-29:15)." (Resp. Initial Br. p. 20) (emphasis removed).[5] This accusation is demonstrably false because Ms. Qualls only *quoted* the words, "literally walked within inches of the spill that was on the floor," which is an accurate quote from a statement with which Ms. Arsenault agreed. (R. p. 259; lines 15-16). Ms. Arsenault also agreed, in looking at still

[5] In response to Burlington's arguments relating to Ms. Qualls' Initial Brief citations, Ms. Qualls asserts that she has complied with the S.C. Appellate Court Rules Rule 208(b)(4), SCACR ("In the initial briefs, . . . references should be . . . by the page of the material to be referenced."); Rule 211(b)(1), SCACR ("The references in the initial brief shall be revised to indicate where the material appears in the Record on Appeal . . . and shall be in the form indicated by the following examples: (R. p. 15, line 4)."). This argument is merely an attempt to distract the court from the merits of this case. *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) (citing *Cox v. Cox*, 290 S.C. 245, 349 S.E.2d 92 (Ct. App. 1986)) ("[W]hatever doesn't make any difference, doesn't matter.").

shot photographs captured from the surveillance video, that as Ms. Simon walks past the location of the spill, she is looking away from the camera, which—as the Court can see from the photographs and video—also happens to be toward the spill. (R. p 255, lines 12-18; p. 258, line 23-p. 259, line 18; pp. 472-474). Ms. Arsenault speculates that Ms. Simon is on her cell phone. (R. p. 255, lines 12-22). Burlington criticizes Ms. Qualls for conflating "look[ing] at her cell phone" with "look[ing] down at her cell phone," (Resp. Initial Br. p. 21-22), but it is clear from the video that Ms. Simon is not holding a phone out in front of her face. (R. pp. 47-474; p. 40, timestamp 29:12-29:15). If Ms. Simon is using a cellphone, which cannot be clearly seen on the video, she *is* looking down at it. *Id.* Thus, as explained in Ms. Qualls' Brief, Ms. Arsenault's testimony supports Ms. Qualls' constructive notice claim: if Ms. Simon were exercising reasonable diligence, she would have seen the spill that caused Ms. Qualls' injury.

Based on the evidence in the record, a reasonable fact finder could conclude that Ms. Simon should have and would have seen the spill if she was paying attention, or in other words, exercising reasonable diligence. Thus, there is enough evidence to survive summary judgment. *See Wimberley v. Winn-Dixie Greenville, Inc.*, 252 S.C. 117, 121, 165 S.E.2d 627, 629 (1969) (holding a storekeeper is liable if an employee "knew or should have known, by the exercise of reasonable diligence" of a foreign substance on the floor creating a hazard).

II. Ms. Qualls Correctly Set Forth the Law on Premises Liability.

Burlington argues that "Appellant fails to present any caselaw on the subject of what South Carolina appellate courts have accepted as proof of constructive notice" and "blatantly mischaracterize[es] the law regarding constructive notice." (Resp. Initial Br. p. 9-10). These arguments are meritless. Ms. Qualls cites Justice Bussey's dissenting opinion in *Wimberley v.*

Winn-Dixie Greenville, Inc., 252 S.C. 117, 165 S.E. 2d 627 (1969) for a succinct statement of the black letter law regarding questions of constructive notice on a motion for summary judgment:

> 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. 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.

Id. at 123, 165 S.E.2d at 630 (emphasis added). It is permissible to cite to a dissenting opinion for this kind of black letter law summary; even our supreme court refers to dissenting opinions for statements on the law. *See Terry v. Terry*, 400 S.C. 453, 456 n.1, 734 S.E.2d 646, 647 n.1 (2012) (citing the dissenting opinion in *State v. Langford*, 400 S.C. 421, 446, 735 S.E.2d 471, 484 (2012) for a general principal of law). Justice Bussey does not disagree with the majority as to the law on this subject. His restatement of the law, as quoted above, is wholly consistent with the majority opinion in *Wimberley*, which states that a plaintiff must point to "evidence tending to show that [the defendant] or his agents knew or *should have known, by the exercise of reasonable diligence*, of the defect (in this case[,] rice on the floor)." *Id.* at 121, 165 S.E.2d at 629 (emphasis added). The majority goes on to explain that "Constructive notice *may* be proved by showing . . . that the rice had been on the floor sufficiently long that the defendant *should have discovered it*." *Id.* (emphasis added).

South Carolina law clearly provides that a retailer is liable to a person harmed by a hazard on the retailer's premises if the retailer *should have known* of the hazard's presence but failed to remedy it. *See e.g. Wimberly,* 252 S.C. at 121, 165 S.E.2d at 629; *Legette v. Piggly Wiggly, Inc.*, 368 S.C. 576, 579, 629 S.E.2d 375, 377 (Ct. App. 2006) (holding where no evidence of a retailer causing the hazard is presented, the court is "left to consider whether [the retailer] *should have*

known of the dangerous condition"). Ms. Qualls does not misstate or mischaracterize the law by quoting Justice Bussey's opinion.

Instead, Burlington's counsel misstated the law in arguments before the lower court, indicating that a substance "has to be on the ground and *remain undiscovered* for a *significant length of time*" to charge a retailer with constructive notice. (R. p. 87, lines 17-22). The law allows that "constructive notice *may* be proved by showing that the material had been on the floor *sufficiently long that the defendant was negligent in failing to remove it.*" *Pennington v. Zayre Corp.*, 252 SC. 176, 178, 165 S.E.2d 695, 696 (1969). However, this falls far short of Burlington's contention that a foreign substance must be on the floor for a "significant" amount of time for there to be constructive notice. The law only *requires* evidence tending to show the retailer should have known of the substance; it *allows* a plaintiff to meet this burden by showing that a substance was on the floor for a sufficient time that the retailer should have, through the exercise of reasonable diligence, discovered it. *See e.g. Wimberly,* 252 S.C. at 121, 165 S.E.2d at 629; *Pennington*, 252 SC. at 178, 165 S.E.2d at 696. South Carolina courts have not held, as Burlington argues, that a plaintiff can only show constructive notice by proving that a substance was on the floor for some minimum threshold of time.

In sum, Ms. Qualls properly set forth the law in her brief Appellant, and her arguments are based on a sound reading of the law.

1. Ms. Qualls is Not Asking This Court to Overrule Prior Cases or Create New Law.[6]

Burlington insists Ms. Qualls is asking this Court to overrule numerous premises liability cases (Resp. Initial Br. pp. 39-40), but Ms. Qualls is not seeking to overrule any precedent or create

[6] This argument relates to Ms. Qualls' alternative constructive notice theory.

new law. Instead, Ms. Qualls seeks a ruling that, in applying the law as it stands to the unique factual circumstances of this case, summary judgment is inappropriate. South Carolina courts have never held that there is a minimum threshold of time that a substance must be on the floor before a retailer can be charged with constructive notice of the same. The law is that "constructive notice may be proved by showing that the material had been o the floor sufficiently long that the defendant was negligent in failing to discover and remove it." *Pennington v. Zayre Corp.*, 252 S.C. 176, 178, 165 S.E.2d 695, 696 (1969). "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." *Wimberley v. Winn-Dixie Greenville, Inc.*, 252 S.C. 117, 123, 165 S.E. 2d 627, 630 (1969) (Bussey, J., dissenting).

In this case, there is evidence that four to five minutes was sufficiently long for Burlington to discover and remove the spill because at least one Burlington employee had ample opportunity to observe the spill in that time frame. In many of the cases that address the constructive notice issue, the only evidence relating to the retailer's opportunity to observe a foreign substance on the floor was the length of time the substance was present. *See, e.g., Gilliland v. Pierce Motor Co.*, 235 S.C. 268, 111 S.E.2d 521 (1959); *Payne v. Wal-Mart Stores East, L. P.*, No. 8:16-02140-MGL, 2017 WL 2618844 at *3 (June 16, 2017). However, in this case, we know significantly more about Ms. Simon's opportunity to discover the spill that led to Ms. Qualls' injuries; the length of time elapsed is simply not conclusive in these circumstances.

Under the facts of this case, the question of whether Ms. Simon would have discovered the spill in exercising reasonable diligence cannot be determined as a matter of law and must be submitted to a jury. *See Fortner v. Carnes*, 258 S.C. 455, 460, 189 S.E.2d 24, 27 (1972) ("What

is due care or ordinary diligence and what is to the contrary, negligence, are questions more of fact than of law.").

2. The Cases Respondent Burlington Relies Upon Are Distinguishable From This Case and Do Not Support the Grant of Summary Judgment.

Burlington cites to several cases for the proposition that Ms. Qualls cannot, as a matter of law, show constructive notice because the substance on which she fell was on the floor for less than five minutes. First, none of these cases hold there is a minimum threshold of time a hazard must exist before a shopkeeper may be charged with constructive notice. Second, each of these cases is distinguishable from the present case, and they do not support the circuit court's grant of summary judgment.[7]

In *Winterstein v. Food Lion*, 344 S.C. 32, 542 S.E.2d 728 (2001), the plaintiff fell on ice spilled near a self-service soda fountain, and her theory of liability was that the retailer created a foreseeable risk that third parties (customers) would create a hazard by spilling ice on the floor. *Id.* at 34, 542 S.E.2d at 729. In that case, the plaintiff agreed that there was no evidence the retailer had actual or constructive notice of the spill that caused her fall. *Id.* at 35, 542 S.E.2d at 730. Citing to *Bessinger v. Bi-Lo,* 329 S.C. 617, 496 S.E.2d 33 (Ct. App. 1998) and *Simmons v. Winn-Dixie Greenville, Inc.*, 318 S.C. 310, 457 S.E.2d 608 (1995), the court declined to extend the law to require shopkeepers to anticipate and prevent the acts of third parties.[8] *Winterstein*, 344 S.C. at

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[7] In the interest of judicial economy, Ms. Qualls would refer the Court to Appellant's Brief for an analysis explaining how the following cases are distinguishable from the one at bar: *Wimberly v. Winn-Dixie Greenville, Inc.*, 252 S.C. 117, 165 S.E.2d 627 (1969), *Gilliland v. Pierce Motor Co.*, 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). (*See* Br. at pp. 22-23).

[8] Burlington criticizes Ms. Qualls for failing to "address the holding of *Winterstein* in her Brief." (Resp. Initial Br. p. 12). However, Ms. Qualls fails to see how Winterstein's holding—that shopkeepers are not required to anticipate and prevent the actions of third parties—is relevant to

37, 542 S.E.2d at 731. Ms. Qualls, on the other hand, does not contend that Burlington is liable for her fall because it should have anticipated children throwing drinks and done something to prevent it. Rather, Ms. Qualls asserts Burlington had actual and/or constructive notice of the foreign substance on the floor and failed to remedy it. Thus, *Winterstein* does not preclude Ms. Qualls from recovery.

Similarly, in *Payne v. Wal-Mart Stores East, L. P.*, Civ. Act. No. 8:16-02140-MGL, 2017 WL 2618844 (June 16, 2017),[9] the surveillance video showed a child dropping a milk jug and spilling milk on the floor about four minutes before the plaintiff slipped in it, and the plaintiff claimed that the store created a hazard by placing heavy items like milk jugs within reach of children and failing to warn parents of this danger. *Id.* at *2. The plaintiff did not present any evidence that Wal-Mart employees knew or should have known of the spill, but argued that reasonable minds could differ as to whether four minutes was sufficient time for Wal-Mart to discover and address the hazard. *Id.* at *3. The court rejected this argument, stating, "Plaintiff neglects to point to any evidence in the record or any other materials showing four minutes would and should have been sufficient time for Defendant to discover and address the spill." *Id.*

Again, Ms. Qualls is not claiming that Burlington created a hazard by failing to stop the child on the video from throwing the cup. Ms. Qualls asserts the four to five minutes the liquid was on the ground would and should have been sufficient time for Burlington to discover and address the spill if Ms. Simon had been exercising reasonable diligence. In support of her claim,

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this case. Further, the Court's discussion of recurrent conditions, which Respondent explains on page 12 of its brief, is also irrelevant. Ms. Qualls does agree, however, that footnote 1 supports Ms. Qualls' position that the circumstances of each particular case must be considered when determining whether there is evidence of constructive notice in a premises liability case.

[9] This Court is not bound by federal court decisions on state law, but for the sake of completeness, Ms. Qualls will briefly address these cases.

Ms. Qualls cites several pieces of evidence, including that the spill was not discreet but resulted from a cup being thrown in front of at least two employees, that the spill was in a high traffic area, and that Ms. Simon looked at the spill as she walked within inches of it prior to Ms. Qualls' fall. The existence of these circumstances distinguishes the current case from *Payne*. Because the *Payne* plaintiff did not set forth similar evidence showing why four minutes should have been sufficient time to remedy the spill, the *Payne* court saw fit to grant summary judgment. *Id.*

Burlington also cites to *Massey v. Wal-Mart Stores East, L.P.*, No. 4:09-CV-01694-RBH, 2010 WL 3786056 (Sept. 22, 2010) and *Norris v. Wal-Mart Stores East, L.P.*, No. 1:12-02592-JMC, 2014 WL 49610 (Feb. 6, 2014) in support of its position. The plaintiff in *Massey* slipped on water in the check-out area. Just a few minutes before the fall, the plaintiff passed over the relevant area twice without issue but fell when he walked through a third time. *Id.* at *1. Between the second and third time he walked through the relevant area (approximately three minutes), several other customers walked through without issue, and the plaintiff testified that he had no idea how long the water was on the floor. *Id.* The court found, "Plaintiff has submitted no evidence to establish constructive notice or otherwise establish the amount of time that the water had been on the floor prior to [his] fall." *Id.* at *4. Thus, there is no evidence of any opportunity for the defendant to discover the spill. *Massey* is clearly distinguishable from the current case because the plaintiff in *Massey* pointed to no evidence that a Wal-Mart employee saw or should have seen the spill. As discussed above, Ms. Qualls has pointed to numerous facts that would allow a reasonable juror to find that Burlington should have discovered the hazard. Therefore, even if *Massey* were controlling precedent, it could not support the circuit court's grant of summary judgment in this case.

In *Norris*, the plaintiff asserted that Wal-Mart did not have "reasonable inspection procedures" in place and argued that if employees were required to inspect the aisles more frequently, the plaintiff would not have slipped on an oily substance while shopping. *Norris*, 2014 WL 49610 at *6. The defendant averred that the surveillance video showed the oily substance being spilled two minutes and thirty-three seconds before the plaintiff fell. *Id.* The plaintiff disputed the surveillance video showed the incident causing the spill but offered no other evidence regarding the cause or length of time the substance was on the floor. *Id.* Under these circumstances, the plaintiff could not show constructive notice. *Id.* In contrast, Ms. Qualls does not dispute the accuracy of the surveillance video or the amount of time the liquid was on the floor, but maintains that, under the circumstances presented in this case, the liquid was on the floor for a sufficient length of time that Burlington should have discovered and removed it. Indeed, any length of time is sufficient for an employee to discover a noticeable spill when walking within inches of it.

In conclusion, neither the cases the circuit court relied upon nor the additional cases Burlington cites in its brief preclude Ms. Qualls from presenting her case to a jury. There is far more than a mere scintilla of evidence of actual and constructive notice in this case, and each of the cases Burlington cites where summary judgment was granted is distinguishable from the present matter.

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

1. The Circuit Court Did Not Apply the Mere Scintilla of Evidence Standard.

The summary judgment standard in South Carolina is clear. "[I]n 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).[10] Ms. Qualls respectfully asserts the circuit court erred by failing to apply this standard. Ms. Qualls does not claim, as Burlington argues, that "mere scintilla of evidence" is "compulsory language" or that the circuit court's failure to include this language in its order is, by itself, grounds for reversal. However, the circuit court's failure to acknowledge the very low burden the non-moving party must carry at the summary judgment stage supports Ms. Qualls' contention that the court failed to *apply* the correct standard. The circuit court did not find a complete lack of evidence tending to show that Burlington had actual or constructive knowledge, but rather found "the evidence of record does not support" liability on the part of Burlington. (R. pp. 9-10). Determining whether the evidence establishes liability is not the proper analysis for a summary judgment motion; that analysis must be left to the jury. *Fisher v. Shipyard Vill. Council of Co-Owners, Inc.*, 415 S.C. 256, 274, 781 S.E.2d 903, 912 (2016) (holding "the jury should have decided whether the [defendant] breached its duty" where there was a "scintilla of evidence in the record to indicate an issue of material fact"). Because the circuit court did not apply the proper standard, its decision to grant summary judgment should be reversed.

2. The Facts Must Be Considered in the Light Most Favorable to Ms. Qualls as the Plaintiff.

As presented in Appellant's Brief and earlier herein, the circuit court erred in failing to "view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party" in granting Burlington's Motion for Summary Judgment. *Evening Post Publ. Co. v. Berkeley Cnty. Sch. Dist.*, 392 S.C. 76, 81-82, 708 S.E.2d 745, 748

[10] Burlington criticizes Ms. Qualls for citing this case for the first time on appeal. (Resp. Initial Br. p. 35). Ms. Qualls believes parties are free to cite additional well-settled authorities in appellate briefs that were not cited to the circuit court, and Burlington has not cited any authority to the contrary.

(2011) (internal quotation marks omitted); *see also Shirley's Iron Works, Inc. v. City of Union*, 387 S.C. 389, 397, 693 S.E.2d 1, 4 (Ct. App. 2010) ("At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact.") (emphasis added); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) ("At the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for circuit.").

Burlington does very little to refute the arguments set forth in the Brief of Appellant regarding the circuit court's failure to consider the facts in the light most favorable to Ms. Qualls. Its primary attack is to accuse Ms. Qualls of "deliberately misquoting the record to create a false impression of error" in arguing "that the court found that there was no evidence in the record that the spill was visible" rather than "there was no evidence in the record that the 'spill was visible *before the plaintiff fell.*'" (Resp. Initial Br. pp. 37-38) (emphasis in original). However, on page 21 of her brief, in the section addressing the court's failure to take all inference in the light most favorable to the non-moving party, Ms. Qualls includes the entire quote. (App. Br. p. 21 ("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.'")). Again, the undersigned is disconcerted by the numerous times Burlington falsely accuses Ms. Qualls and her counsel of deliberately misleading the Court. Further, as already set forth herein, there is no evidence in the record even suggesting why or how the spill would suddenly become visible when Ms. Qualls fell.

As discussed above, Burlington also claims that Ms. Qualls' testimony "expressly contradict[s]" her actual notice theory (Resp. Initial Br. p. 38), but this is not the case. Ms. Qualls testifies that she "can't say" whether Ms. Simon saw the spill and admits that she herself did not

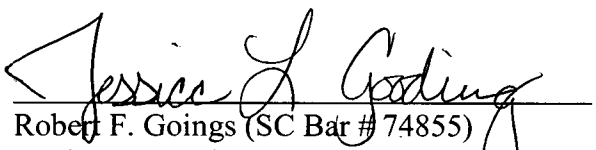
see it, but she does not testify that the spill was invisible or absolve the possibility of actual notice. (R. p. 121, lines 12-16; p. 126, lines 18-19).

Viewing the evidence in the light most favorable to Ms. Qualls, there is far more than a mere scintilla of evidence that Burlington knew or should have known of the spill that caused Ms. Qualls to fall. The circuit court failed to properly view the evidence, as is evident from its order, and therefore, the grant of summary judgment must be reversed.

CONCLUSION

Under the circumstances of this case and the law of South Carolina, there is more than a mere scintilla of evidence that Burlington had actual or constructive knowledge of the substance on the floor that caused Ms. Qualls to fall but failed to remedy the hazard, resulting in Ms. Qualls' severe injury. 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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