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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Honorable 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 BRIEF OF RESPONDENT

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Columbia, South Carolina
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

STATEMENT OF THE CASE

This case arises out of an alleged slip-and-fall accident that occurred in a Columbia, SC Burlington Coat Factory retail store on July 31, 2015 when the Appellant, Lallie Qualls, fell in the checkout area near the front of the store. Appellant claims that she slipped on a liquid substance and fell onto her left knee. There is clear time-stamped video footage of the spill and the fall. Thus, the elapsed time between the spill and the fall can be calculated, and the video footage shows that the substance was placed on the floor by a third party less than four minutes and thirty seconds before Appellant fell.

On March 16, 2016, Appellant filed her complaint for negligence in Richland County naming Respondents Burlington Coat Factory of South Carolina LLC and Burlington Coat Factory Direct Corporation as Defendants (hereinafter referred to as "Respondent" or "Burlington"). (R. p. 16-22.) In her complaint, Appellant claims that the Respondent had actual or constructive notice of the wet substance prior to the Appellant's fall and that the substance was "on the floor for a sufficient amount of time for Burlington to take reasonable action to clean up the substance or place warning signs in a location to prevent a patron from being harmed by the hazardous condition." (R. p. 2, ¶7-¶11).

After the parties engaged in discovery, Burlington moved for summary judgment on March 9, 2017. (R. pp. 25-26). Burlington attached a Memorandum of Law to their Motion, (R. pp. 27-47), as well as an Affidavit of Pamela Arsenault, the store manager of the Burlington store where Ms. Qualls fell. (R. pp. 41-42). As an exhibit to Ms. Arsenault's Affidavit, Burlington attached the time-stamped DVR footage of the incident, (R. p. 43), as well as time-stamped screen captures showing the amount of time elapsing between the spill and the fall. (R. pp. 44-47). On May 19, 2017, Burlington filed two deposition transcripts with the circuit court: 1) the deposition of

Appellant/Plaintiff, Lallie Qualls, (R. pp. 99-170); and 2) the deposition of Burlington's 30(b)(6) corporate designee, Pamela Arsenault, (R. pp. 173-275). Ms. Qualls filed a Memorandum in Opposition to said Motion for Summary Judgment on May 31, 2017. (R. pp. 48-61). In her Memorandum, Ms. Qualls did not contest the authenticity or accuracy of the time stamped DVR footage submitted by Burlington. On June 6, 2017, Burlington filed a Reply to Qualls' Memorandum. (R. pp. 57-61). On June 6, 2017, the circuit court heard oral argument of the parties. (R. p. 83).

On August 28, 2017, the circuit court entered an order granting Respondents' Motion for Summary Judgment. (R. p. 1). On September 15, 2017, Ms. Qualls filed and served a motion to reconsider, alter, or amend the order granting summary judgment pursuant to Rule 59(e), SCRCP. (R. pp. 62-72). On or about September 21, 2017, Burlington filed its Return to Plaintiff's Motion. (R. pp. 73-82). On November 15, 2017, the circuit court summarily denied Ms. Qualls' Motion to Reconsider. (R. p. 15). Thereafter, Ms. Qualls appealed to this Court.

STATEMENT OF THE FACTS

On July 31, 2015, the Appellant, Lallie Qualls, fell in the checkout area near the front of Burlington's retail store located at 302 Bush River Road, Columbia, SC. Time-stamped DVR footage of the incident was captured on Burlington's DVR system and Burlington specifically preserved the 30 minutes before and after Ms. Qualls' fall. (R. p. 40). The footage specifically reveals that at 25:35, while a family is checking out, their young child throws a cup onto the ground. (R. p. 40; timestamp 25:35). Nine seconds later, at 25:44, an older child retrieves the cup from the floor. (R. p. 40; timestamp 25:44). The video does not reveal a spill of any significant size or color. The older child takes the cup to throw it away at 26:11. (R. p. 40; timestamp 26:11). While this is transpiring the cashier, Taylor Simon, can be seen ringing up the family's purchases.

In the DVR footage, the cashier can be seen standing in front of a computer screen at the time the child throws the cup. (R. p. 40; timestamp 25:35). The cashier does not witness either the cup being thrown or the cup being picked up. The family completes their checkout at 28:57. (R. p. 40; timestamp 28:57). The cashier leaves for her break and walks past the area of the spill without noticing it at 29:13. (R. p. 40; timestamp 29:13). Another customer walks past the area of the spill without noticing it or alerting anyone at 29:52. (R. p. 40; timestamp 29:52). Ms. Qualls falls at 30:00. (R. p. 40; timestamp 30:00). In summation, the DVR footage shows that no more than four minutes and twenty-five seconds elapsed between the time the child threw the cup on the ground and the Appellant's fall.

In her deposition, Appellant gave sworn testimony that the spill was not easy to see. (R. p. 122, lines 24-27). She also specifically testified that she did not know where the liquid came from, or how long it had been on the floor for. (R. p. 122, lines 5-24). She did not see any footprints in the liquid before she fell, or any shopping card tracks in the liquid. (R. p. 122, lines 13-25). Most importantly, when specifically asked whether she thought that a Burlington Employee saw the liquid before Ms. Qualls fell, Ms. Qualls repeatedly stated that she did not know:

"Q. Did [the employee] do anything that made you think she knew about the spill?

A. No

Q. She just walked by it?

A. Yes.

Q. Do you believe she did or didn't know about the spill?

A. I can't say. I can't say.

Q. Was the spill easy to see?

A. No.

Q. If it was easy to see, you would've avoided it; right?

A. Yes.

Q. Did anybody that worked for Burlington Coat Factory tell you they knew about the spill?

A. No."

(R. p. 126, lines 13-25; R. p. 127, line 1). Later in the Deposition, Appellant's counsel asked Ms. Qualls several follow up questions. Ms. Qualls first confirmed that before her deposition, she saw the video of the incident. (R. p. 156, lines 15-16). Appellant's counsel then asked the following leading question:

"Q. Okay. And is it your testimony that she [Burlington employee Simon] should have seen the spill when she walked past where it had occurred or –

A. Yes.

Q. All right. But she didn't did she?

A. No.

(R. p. 163, lines 12-18).

To be clear, Ms. Qualls testified that the spill was not easy to see, that no one from Burlington told her they knew about the spill, and the cashier, Taylor Simon "should have seen the spill", "but she didn't".

Burlington's 30(b)(6) corporate designee, Pamela Arsenault, also gave sworn testimony. (R. pp. 173-279). Arsenault was working as Burlington's Store Manager on the day of the incident. Arsenault, expressly confirmed that Burlington cashier, Taylor Simon, had no notice of the spill before it happened:

Q. Okay. And you agree, though, that a store employee literally walked within inches of the spill that was on the floor; correct? [...]

A. Yea.

Q. But instead of stopping, she kept on going; correct?

A. Because she didn't see it.

Q. Okay. How do you know she didn't see it?

A. She said she didn't see it.

(R. p. 259, lines 14-25).

STANDARD OF REVIEW

An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56(c), SCRCP. *Bovain v. Canal Insurance*, 678 S.E.2d 422, 383 S.C. 100, 105 (2009). Rule 56(c) states: "[t]he judgment sought shall be rendered forthwith if 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." Rule 56(c), SCRCP; *see also Calvert v. House Beautiful Paint and Decorating Center, Inc.*, 443 S.E.2d 398 (1994). Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact. *Baughman v. American Tel. & Tel. Co.*, 410 S.E.2d 537, 306 S.C. 101, 115 (1991). This standard "mirrors" the standard for a directed verdict under Rule 50(a), SCRCP. *Id* at 115 (*citing Main v. Corley*, 281 S.C. 525, 316 S.E.2d 406 (1984)).

In deciding whether Summary Judgment is proper, the court should construe all inferences arising from the evidence against the moving party. *Calvert*, 443 S.E. 2d 398 (1994). Nonetheless, a court "cannot ignore facts unfavorable to [the non-moving party] and [it] must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts." *Bloom v. Ravoira*, 529 S.E.2d 710, 713, 339 S.C. 417, 423, (2000); *see also Dawkins v. Fields*, 580 S.E.2d

433, 354 S.C. 58, 70 (2003). Moreover, "[i]t is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013) [emphasis added].

A genuine question of material fact exists where, after reviewing the record as a whole, the court finds that a reasonable jury could return a verdict for the nonmoving party. *See Bloom v. Ravoira*, 529 S.E.2d 710 (2000). Summary judgment should be granted when plain, palpable and undisputed facts exist on which reasonable minds cannot differ. *Trico Surveying, Inc. v. Godley Auction Co.*, 431 S.E.2d 565 (1993). Mere speculation does not create a material issue of fact warranting denial of a Motion for Summary Judgment. *Jackson v. Bermuda Sands, Inc.*, 677 S.E.2d 612, 383 S.C. 11 (Ct. App. 2009).

Furthermore, SCRCP Rule 56(e) clarifies the non-movant's responsibility: "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. Rule 56(e), SCRCP. "Once [the] moving party carries its initial burden, [the] opposing party must, under Rule 56(e), do more than simply show that there is some metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial." *Baughman v. American Tel. & Tel. Co.*, 410 S.E.2d 537 (1991); *see also Grimsley v. Law Enforcement Division*, 780 S.E.2d 897, 415 S.C. 33, 42 (2015) (*citing Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 220, 578 S.E.2d 329, 335 (2003)).

In order to escape Summary Judgment, the Plaintiff must come forth with clear evidence that the foreign substance was created by a specific act of the Defendant, or alternatively, that the

Defendant had actual notice, or constructive notice of the foreign substance for a sufficient length of time. *See Calvert v. House Beautiful Paint and Decorating Center, Inc.*, 313 S.C. 494, 443 S.E.2d 398, 399 (Ct. App. 1994) (affirming summary judgment where Plaintiff failed to produce affirmative evidence that any employee was aware of the foreign substance, or how long the substance had been on the floor); *Simmons v. Winn-Dixie Greenville, Inc.,* 457 S.E.2d 608 (1995) (same); *Gillespie v. Wal Mart Stores, Inc.,* 394 S.E.2d 24, 302 S.C. 90 (Ct. App. 1990) (same; noting that mere proximity of store employee to the spill is not sufficient to escape summary judgment); *Bessinger v. BiLo, Inc.*, 496 SE 2d 33 (Ct. App. 1998) (same; noting that the substance had been on the floor for up to fourteen minutes without being discovered).

ARGUMENT

In this case, both parties concede that the spill that caused Ms. Qualls to fall was created by a third party. (App. Initial Brief, p. 8). To be clear, this case involves a foreign substance that was placed on Burlington's floor by an infant. Specifically, a small child throws a cup at 25:35 and only nine seconds later, an older child retrieves the cup from the ground at 25:44. (R. p. 40; timestamp 25:35-25:44). The uncontradicted DVR footage shows that no more than four minutes and twenty-five seconds elapsed between the time the infant threw the cup and the time of Appellant's fall. (R. p. 40; timestamp 25:35-30:00).

"It has long been settled in South Carolina, and indeed in most jurisdictions, that one who operates a store is not an insurer of the safety of its customers, the duty owed to them is rather the duty of exercising ordinary care to keep parts of the store as are ordinarily used by customers in a reasonably safe condition." *Pennington v. Zayre Corporation*, 165 S.E.2d 627, 252 S.C. 117, 121 (1969). "[M]erchants are not required to continuously inspect their floors for foreign substances." *Legette v. Piggly Wiggly, Inc.,* 368 S.C. 578, 629 S.E.2d 375, 377 (Ct. App. 2006).

In the matter of *Wintersteen v. Food Lion, Inc.*, 542 S.E.2d 728, 344 S.C. 32 (2001), the South Carolina Supreme Court explained the limitations of a retailer's duty of care:

> "We find a very legitimate basis for adherence to our traditional slip and fall analysis. In such cases, although there may be a foreseeable risk that substances will wind up on the floor, there is no specific act of the defendant which causes the substance to arrive there, i.e., it generally arrives there through the handling of a third party. To require shopkeepers to anticipate and prevent the acts of third parties is, in effect, to render them insurers of their customers' safety. This is simply not the law of this state."

Id at 38. The Supreme Court clarified that retailers cannot be held liable for a "negligent method of operations" and do not have a "continuous duty to look out for the safety of patrons." *Id* at 39. "To date, we have not required storekeepers to take actions to prevent or minimize the foreseeable risk of a foreign substance on the floor of its premises." *Id* at 36.

"In order for a customer to prevail as a plaintiff in a foreign substance slip and fall case, it must be shown (1) that the material on the floor was placed there through an agency of the store, or (2) that the merchant had notice of its presence. This notice may be actual or constructive." *See Wimberly v. Winn-Dixie Greenville, Inc.*, 165 S.E.2d 627, 252 S.C. 117, 121 (1969); *see also Calvert v. House Beautiful Paint and Decorating Center, Inc.*, 443 S.E.2d 398, 399 (1994) (affirming summary judgment where plaintiff failed to produce affirmative evidence that any employee was aware of the foreign substance, or how long the substance had been on the floor); *Simmons v. Winn-Dixie Greenville, Inc.*, 457 S.E.2d 608 (1995) (same); *Gillespie v. Wal Mart Stores, Inc.*, 394 S.E.2d 24, 302 S.C. 90 (Ct. App. 1990) (same; noting that a spill within the field of vision of a store employee is not sufficient to escape summary judgment); *Bessinger v. BiLo, Inc.*, 496 S.E.2d 33 (Ct. App. 1998) (granting summary judgment in favor of defendant retailer and noting that the substance could have been on the floor for up to fourteen minutes without being discovered). The Court has expressly denied requests to depart from and/or expand this foreign

substance analysis. *See Simmons v. Winn-Dixie*, 457 S.E.2d 608 (1995); *see also Wintersteen v. Food Lion, Inc.*, 344 S.C. 32, 542 S.E.2d 728 (2001).

In the instant case, the parties do not dispute that the foreign substance on Burlington's floor was the result of the actions of a third party. (App. Initial Brief, p.8). Instead the parties dispute: 1) whether there is evidence that Burlington had actual notice of the spill, and 2) whether there is evidence that Burlington had constructive notice of the spill. Appellant argues that there exists a mere scintilla of evidence that Burlington knew or should have known of the spill and failed to rectify it; however, significantly, Appellant fails to present any caselaw on the subject of what South Carolina appellate courts have accepted as proof of constructive notice on the part of a defendant retailer such that the issue should be submitted to a jury. Before Respondent addresses Appellant's arguments regarding actual notice, Respondent must address this glaring deficiency in Appellant's Brief.

The South Carolina Supreme Court has described what kind of evidence is necessary to escape summary judgment or a directed verdict in a slip and fall case involving a foreign substance. First, in *Hunter v. Dixie Home Stores*, the Supreme Court stated that: "[i]n order for a customer to recover damages for injuries sustained by falling on some [foreign] matter in an aisle, there must be proof that the storekeeper had actual knowledge of the presence of debris upon the floor, or that it had been on the floor long enough to charge the storekeeper with constructive notice of its presence." *Hunter v. Dixie Home Stores*, 232 S.C. 139, 146, 101 S.E.2d 262 (1957) [emphasis added]. In *Hunter*, the Court reversed the denial of a retailer's motion for directed verdict, finding evidence that a store employee was facing the area where the plaintiff fell and stood 10 or 12 feet away and another employee worked 20 or 30 feet from where she fell was insufficient to charge the defendant with constructive notice. *Id.* Additionally, in support of their holding, the Supreme

Court discussed at length a Fourth Circuit case, wherein there was evidence of another customer's testimony that:

> "she saw the popcorn on the floor only a few minutes before [plaintiff] entered the store and fell; the popcorn looked fresh, crisp and white; that the popcorn appeared not to have been walked on, seemed to have been just dropped on the floor and that the floor around the popcorn was clean and had the semblance of having been very recently swept."

Id at 147 (*citing H.L. Green Co., Inc. v. Bowen*, 223 F.2d 523, 524 (4th Cir. 1955)). In that case, the Fourth Circuit held: "[w]e cannot attribute constructive notice of the presence of this popcorn to [defendant] on evidence proving merely that the popcorn had been there a very few minutes". *Id* (*citing H.L. Green Co., Inc. v. Bowen*, 223 F.2d 523, 524 (4th Cir. 1955). Similarly, the Supreme Court in *Hunter* cited to a Georgia case finding: "evidence that leaf [causing plaintiff's fall] could have 'been walked over, under foot' by some other customer a few minutes before patron fell was insufficient for jury on issue whether leaf had been on floor long enough to apprise owner of presence and to raise duty to remove it." *Id* at 148 (*citing Miscally v. Colonial Stores, Inc.*, 68 Ga. App. 729, 23 S.E.2d 860 (Ga. Ct. App. 1943)).

At this juncture, it is important to note that during oral argument before the lower court, Appellant's counsel blatantly mischaracterized the law regarding constructive notice as follows:

> "[t]he defense says that the law requires a significant amount of time on the ground for so long of a period. That is not what the law says. The law doesn't say that at all."

(R. p. 93, lines 3-13). Appellant's counsel then proceeded to quote a statement from the **dissenting** judge's opinion in the South Carolina Supreme Court matter of *Wimberly v. Winn-Dixie Greenville, Inc.*, 165 S.E.2d 627, 252 S.C. 117, 123 (1969). (R. p. 93, lines 3-13).[1] Contrary to Appellant's representations to the lower court, the **majority** opinion in *Wimberly* specifically held

[1] It is important that Appellant not be permitted to conflate the spirt of the dissenting judge's opinion in *Wimberly* with the actual holding of the South Carolina Supreme Court.

that: "[c]onstructive notice may be proved by showing in this case that the rice had been on the floor **sufficiently long** that the defendant should have discovered it". *Wimberly*, 252 S.C. at 123 (1969) (emphasis added). In fact, in *Wimberly*, when the Supreme Court was asked by the appellant to infer from the circumstances[2] that appellant had constructive notice of the spill and did nothing about it, the Supreme Court pointedly replied "[t]he tendency of the Florida cases is to eliminate the necessity of proof of actual or constructive notice. Such is not the rule in this state." *Id* at 122. Nowhere in Appellant's Brief or her filings with the lower court, has she asked this Court to depart from precedent and change the law regarding what constitutes proof of constructive notice.

In the 2001 South Carolina Supreme Court case of *Wintersteen v. Food Lion, Inc.*, the Court held: "[t]o date, we have not required storekeepers to take actions to prevent or minimize the foreseeable risk of a foreign substance on the floor of its premises." *Wintersteen v. Food Lion, Inc.*, 542 S.E.2d 728, 344 S.C. 32, 36 (2001). The Court then ventured to describe the specific evidence through which a party can establish constructive notice: "[p]rior to *Pinckney* and *Henderson*, it was generally held that constructive notice is established through evidence the foreign substance was on the floor for a sufficient length of time that the storekeeper should have discovered and removed it." *Id*, 344 S.C. at 36, FN1, second ¶ (2001) (*citing Wimberly*). However, in "certain factual patterns", constructive notice may also be established with evidence that "conditions were of such a **recurrent nature** that the defendants were chargeable with constructive notice on the day of the accident". *Id.* In such a scenario, "mere recurrence alone is insufficient to establish constructive notice"; recurrence "must be of such a nature as to amount

[2] The unsuccessful plaintiff in *Wimberly*, argued that "the store premises were not kept in a reasonably safe condition because of insufficient personnel, inadequate inspection, inadequate floor maintenance, appellant's pushcart obstructing view, and use of variegated floor" and as such, the "circumstances amply support the theory that appellant had constructive notice of the rice being on the floor and did nothing about it." *Id* at 122.

to a **continual condition**, and that factor, when coupled with other evidence, such as store employees' knowledge of [that continual condition] may be sufficient to create a jury issue as to defendant's constructive notice at the time of the accident." *Id.* Notably, Appellant does not acknowledge or even address the holding of *Wintersteen* in her Brief or her filings with the lower court.

In the face of the foregoing caselaw, Appellant posits that the length of time the foreign substance was on Burlington's floor is not a dispositive question in this case; this is simply an inaccurate reading of the law. On the contrary, the Supreme Court cases of *Hunter v. Dixie Home Stores* (1957), *Wimberly v. Winn-Dixie Greenville, Inc.* (1969), and *Wintersteen v. Food Lion, Inc* (2001), all state that constructive notice is proved with evidence showing that a spill was on the ground for a **sufficiently long** period of time such that the retailer should have known of the hazard. It was not until 2001, in *Wintersteen v. Food Lion*, that the Supreme Court acknowledged that constructive notice can also be proved in certain factual patterns with evidence of a continual condition. *Wintersteen*, 344 S.C. at 36, FN1, ¶ 2 (2001).

Here, evidence of a continual condition was not before the lower court[3], and therefore, with regards to constructive notice, the pertinent inquiry is whether Appellant presented evidence to the

[3] In the instant case, the Appellant did not raise any argument regarding a "continual condition" with the lower court and therefore, any argument on the grounds of a recurrent hazard was not preserved on the record for this appeal. Subject to the foregoing objection, Respondent would argue that in the instant case there is absolutely no evidence that the spill on Burlington's floor was the result of a continual condition, such as poinsettia plant leaves continually shedding and falling into a department store aisle or gumtree balls dropping off a sweet gum tree into a stairway of a hospital parking lot. *See Pinckney v. Winn-Dixie Stores, Inc.*, 311 S.C. 1, S.E.2d 327 (Ct. App. 1992)) (evidence showed the leaves secreted a milky substance which stuck to the ground so as to create a condition much like "a leaky faucet" and additional evidence showed that employees knew the poinsettia leaves were left on the floor until the next periodic sweeping); *see also Henderson v. St. Francis Community Hospital*, 303 S.C. 177, 399 S.E.2d 767 (1990) (evidence showed gumball trees were planted in 1971, the gumballs were shed from the trees seasonally, the gumballs were hard and round, and the hospital was advised to remove the gumball trees in 1982 due to the danger to pedestrians, and plaintiff's fall occurred in 1985). In the instant case, there is absolutely no evidence that Burlington knew an infant would come into the store and throw a cup on the day the Appellant fell. There is no evidence that patrons (let alone infants) had a recurrent history of throwing cups on Burlington's floor in the past. This case involves a spontaneous event. To charge Burlington with constructive notice based on evidence of a continual condition would effectively change the duty of a retailer to that of an insurer of customers' safety.

lower court that the subject spill was on the ground for a sufficiently long period of time such that Burlington could be charged with constructive notice of the spill?

I. Actual Notice

The entire incident in this case was captured on Burlington's time-stamped DVR footage. (R. p. 40). Neither party disputes the authenticity of the footage. The footage specifically reveals that at 25:35[4], while a family is checking out, their young child throws a cup onto the ground. (R. p. 40; timestamp 25:35). At this moment, Burlington employee, Taylor Simon (hereinafter "Burlington employee Simon"), can be seen ringing up the family's purchases behind a counter. (R. p. 40; timestamp 25:35). Burlington employee Simon is looking at a computer monitor at the moment child throws the cup. (R. p. 40; timestamp 25:35). Nine seconds after the child throws the cup, at 25:44, an older child retrieves the cup from the floor. (R. p. 40; timestamp 25:44). The video does not reveal a visible spill of any significant size or color. The older child takes the cup to throw it away at 26:11. (R. p. 40; timestamp 26:11). From 25:35 to 26:11, Burlington employee Simon can still be seen ringing up the family's purchases behind the counter. (R. p. 40; timestamp 25:35-26:11). She does not do anything to indicate that she saw the spill or a liquid on the floor. The family completes their checkout at 28:57. (R. p. 40; timestamp 28:57). Burlington employee Simon leaves for her break and walks past the spill at 29:13. (R. p. 40; timestamp 29:13). There is no evidence that she changes direction, slows down, looks at the spill, or otherwise reacts in any manner which would tend to indicate that she actually saw the spill. Another customer walks past the spill at 29:52. (R. p. 40; timestamp 29:52). The Appellant falls at 30:00. (R. p. 40; timestamp 30:00). Assuming that the spill occurred when the child threw the cup (the spill is not visible from

[4] 25:35 of the DVR video corresponds to 2:45:55 PM. The DVR footage includes a timestamp file showing the specific date and time when each event occurred. Notably, in her Initial Brief, the Appellant does not cite to any specific time demarcation in support of her arguments.

the DVR footage), the liquid was on the ground for a total of 4 minutes and 25 seconds before the Appellant fell.

A review of the video footage itself should be dispositive on the issue of actual notice. Appellant argues that "[a] reasonable jury could easily conclude that Ms. Simon chose to ignore the incident, despite having seen the child spill the liquid onto the floor." (App. Initial Brief p. 8). However, there is simply no record evidence that Burlington employee Simon saw or was aware of the spill prior to the Appellant's fall. "Even though courts are required to view the facts in the light most favorable to the nonmoving party, to survive a motion for summary judgment, 'it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Grimsley v. South Carolina Law Enforcement Division*, 780 S.E.2d 897, 415 S.C. 33, 39 (2015) (*citing Hollywood v. Floyd*, 744 S.E. 2d 161, 403 S.C. 466, 477 (2013). In Appellant's filings with the lower court, Appellant repeatedly asserts that Burlington employee Simon *could* have seen the spill, however Appellant does not point to any specific evidence showing Simon had actual notice of the spill.

For example, Appellant argues in her Return to Defendant's Motion for Summary Judgment:

> "the surveillance video shows the employee, Ms. Simon, leaving the area behind the registers, and walking right past the spot where the liquid has spilled, looking down towards where the drink was spilled as she walks ... Further, Defendant's 30(b)(6) designee admits that Ms. Simon 'had the opportunity to observe the spill on the floor.' (Arsenault Depo. p.87) [R. p. 259]."

(R. p. 52). Additionally, in her Motion for Reconsideration, Appellant argues: "[b]ecause there is at least a mere scintilla of fact that Ms. Simon failed to see the visible spill on the phone due to her being distracted by playing on her phone, summary judgment is not proper." (R. p. 65). This does not qualify as evidence of actual knowledge. Evidence of actual knowledge would be an admission

on the part of Burlington employee Simon that she saw the spill. Notably, Appellant did not seek to take the deposition of Burlington employee Simon. Appellant instead attempts to create an issue of material fact that is not genuine. She asks the Court to unreasonably infer from the DVR footage that because Simon walked by the spill, Simon had actual notice of the spill. The video simply does not show what Simon sees or what she is thinking. "[An] opposing party must, under Rule 56(e), 'do more than simply show that there is some metaphysical doubt as to the material facts' but 'must come forward with 'specific facts showing that there is a genuine issue for trial". *See Grimsley v. Law Enforcement Div.*, 780 S.E.2d 897, 415 S.C. 33 (2015). "Mere speculation does not create a material issue of fact warranting denial of a Motion for Summary Judgment." *Jackson v. Bermuda Sands, Inc.*, 677 S.E.2d 612 (Ct. App. 2009); *see also Barwick v. Celotex Corp.*, 736 F.2d 946, 953 (4th Cir. 1984) (a "party may rely only on those inferences of which the evidence is reasonably susceptible, and may not resort to speculation.").

Notably, Appellant ignores her own sworn testimony where she states that Burlington employee Simon did nothing to indicate she saw the spill. (R. p. 126, lines 13-25 - p. 127, line 1). Further, Appellant ignores record evidence that Burlington's store manager, Pamela Arsenault expressly confirmed that Burlington employee Simon had no knowledge of the spill before Appellant's fall. (R. p. 259, lines 21-25 - p. 260, line 1). Both Qualls' and Arsenault's deposition excerpts will be addressed in more detail below.

The matter of *Gillespie v. Wal-Mart Stores, Inc.* 394 S.E.2d 24, 302 S.C. 90 (Ct. App 1990), is directly on point. In *Gillespie*, the Court of Appeals specifically rejected the argument that an employee within the field of vision of a spill creates a genuine issue of material fact for a jury. In *Gillespie*, a customer slipped on water while entering a checkout lane at Wal-Mart. The customer sued Wal-Mart for negligence and summary judgment was entered in Wal-Mart's favor. On

appeal, the plaintiff/customer argued that the trial court erred in granting summary judgment because the wet floor was **"within the field of vision"** of Wal-Mart's checkout clerk and consequently, the clerk could have seen the wet floor "if she had been looking". *Gillespie v. Wal-Mart Stores, Inc.*, 302 S.C. at 91 (Ct. App. 1990). The Court of Appeals replied: "[t]he mere fact that water was on the floor of the store and was within the field of vision of a nearby store employee at the time Gillespie slipped upon it is not by itself enough to charge Wal-Mart with negligence." *Id* at 91-92 (*citing Kroger Grocery & Banking Co. v. Spillman*, 279 Ky. 366, 130 S.W. (2d) 786 (KY 1939) (reversing a verdict in favor of a customer who slipped on grapes lying on the floor within a few feet of where two or more employees were working where there was no proof regarding the length of time the grapes were on the floor); *see also Wilson v. Wal-Mart, Inc.*, No. 3:15-1157-JFA (D. SC June 2, 2016) (sitting in diversity jurisdiction and holding surveillance video showing employees in the general area prior to plaintiff's fall was insufficient to charge defendant with constructive knowledge of substance).

The South Carolina Supreme Court matter of *Pennington v. Zayre* Corp., 252 S.C. 176, 165 S.E.2d 695 (1969), is also analogous. In *Pennington*, the plaintiff slipped on a plastic bag and fell to the floor in the aisle of defendant's department store. Witnesses to the fall testified that a female employee of the defendant was in "**the immediate area**" at the time of the fall. *Id* at 178. Witness testimony from other customers also established that two or three more plastic bags were on the floor in the immediate area where the plaintiff fell. The South Carolina Supreme Court granted defendant's request for nonsuit, finding that the plaintiff did not present evidence from which a reasonable inference of negligence by the defendant could be drawn.

In light of the foregoing caselaw, Appellant's argument that Burlington had actual notice of the spill before Appellant's fall because Burlington employee Simon was in the immediate area of the spill simply fails as a matter of law.

Tellingly, Appellant ignores her own deposition testimony where she testifies that Burlington Employee Simon did nothing to indicate she saw the spill:

"Q. Did [the employee] do anything that made you think she knew about the spill?

A. No

Q. She just walked by it?

A. Yes.

Q. Do you believe she did or didn't know about the spill?

A. I can't say. I can't say.

Q. Was the spill easy to see?

A. No.

Q. If it was easy to see, you would've avoided it; right?

A. Yes.

Q. Did anybody that worked for Burlington Coat Factory tell you then knew about the spill?

A. No."

(R. p. 126 lines 13-25 - p. 127, line 1). Later, when asked the following leading question by Appellant's counsel, Appellant agrees that Simon should have seen the spill, but didn't:

"Q. Okay. And is it your testimony that she [Burlington employee Simon] should have seen the spill when she walked past where it had occurred or-

A. Yes.

Q. All right. But she didn't did she?

A. No."

(R. p. 163, lines 12-18).

In addition, as a practical matter, Burlington's DVR footage is clearly time-stamped during playback of the video. The DVR footage is 60 minutes in duration. (R. p. 40). Yet, despite the clear demarcation of time at the bottom of the footage, Appellant does not cite to any specific time point in the DVR footage to support her argument that the Burlington employee had actual notice of the spill. Instead, Appellant leaves the Court and the Respondent with no other option but to watch the entire video themselves and surmise which particular moments Appellant is referring to.[5] This is especially problematic, where there is record evidence that Appellant herself specifically testified that Burlington employee Simon did not do anything to indicate she knew about the spill. (R. p. 126, lines 13-25 - p. 127, line 1); (R. p. 163, lines 12-18) (R. p. 129, lines 1-13). In essence, Appellant claims that the trial court erred by failing to draw an inference that was directly contradicted by the Appellant's own sworn testimony. (R. p. 126, lines 13-25 - p. 127, line 1); (R. p. 163, lines 12-18) (R. p. 129, lines 1-13).

Appellant did not present any additional evidence tending to contradict the DVR footage or her own sworn testimony that Ms. Simon did nothing to indicate that she was aware of the spill. Instead, Appellant's counsel simply makes unverified arguments to the contrary. The Court should not recognize this as evidence. Rather, this unverified speculation constitutes an attempt to create

[5] By failing to cite to a specific time demarcation in the 60-minute DVR footage, Appellant has effectively failed to set forth specific facts showing that there is a genuine issue for trial. *See Baughman v. American Tel. & Tel. Co.*, 410 S.E.2d537, 306 S.C. 101, 115 (holding "[o]nce moving party carries its initial burden, opposing party must, under Rule 56(e), 'do more than simply show that there is some metaphysical doubt as to the material facts' but 'must come forward with 'specific facts showing that there is a genuine issue for trial'"); *see also Grimsley v. Law Enforcement Div.*, 780 S.E.2d 897, 415 S.C. 33 (2015).

a sham issue of material fact. *Cf. Cothran v. Brown*, 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004) (a court may disregard an affidavit submitted "to contradict that party's own prior sworn statement" in an attempt to create a sham issue of material fact for purposes of summary judgment); *McMaster v. Dewitt*, 767 S.E.2d 451 (Ct. App. 2014) (same). In effect, Appellant insists that her counsel's unreasonable interpretation of Ms. Simon's actions on the DVR footage should trump her own testimony. There is no record evidence that anyone other than Appellant's counsel thinks Ms. Simon saw the spill. The situation is similar to that of a sham affidavit. "If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact." *Barwick v. Celotex Corp.*, 736 F.2d 946, 960 (4th Cir. 1984).

Appellant also asserts that the deposition testimony of Burlington's 30(b)(6) designee, Pamela Arsenault, creates a genuine issue of material fact. However, in her Initial Brief, Appellant inaccurately quotes the substance of Ms. Arsenault's specific statements. To further compound the confusion, Appellant fails to cite to the deponent's specific lines of testimony in the Initial Brief. Specifically, Appellant states the following in her Initial 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.*" (Arsenault Depo. Pp 83, 87; Def. Ex. 2)."

(App. Initial Brief p. 9).

Appellant states that Ms. Arsenault "admitted Ms. Simon was **looking down towards the spill** on the floor as she walked by it" [emphasis added]; however, a hard read of pages 83 (R. p. 255) and 87 (R. p. 259) of Ms. Arsenault's deposition testimony reveals that Ms. Arsenault never admits that Ms. Simon was "looking down towards the spill". (R. pp. 255-260). In fact, the phrase

"looking down" is entirely absent from the deposition testimony. Ms. Arsenault never admitted that the Burlington employee looked down at the spill. By flouting the procedural requirement of citing to the specific page and lines of a deposition transcript, Appellant is able to contort and misrepresent the specific testimony of Burlington's 30(b)(6) designee. [6] Page 87 (R. p. 259) of Ms. Arsenault's deposition testimony reads as follows (with defense counsel's objections omitted):

> Q. Okay. And you agree, in fact, that Ms. Taylor Simon had the opportunity to observe the spill when she walked past?
>
> A: Not if she wasn't looking.
>
> Q: But she had the opportunity to observe it; didn't she?
>
> A: Yeah.
>
> Q: Okay. And you agree, though, that a store employee literally walked within inches of the spill that was on the floor; correct?
>
> A: Yeah.
>
> Q. But instead of stopping, she kept on going; correct?
>
> A. Because she didn't see it.
>
> Q. Okay. How do you know she didn't see it?
>
> A. She said she didn't see it.
>
> Q. Did you ask her?

(R. p. 259, lines 1-25 - p. 260, line 1, objections omitted).

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[6] Numerous federal circuit courts have held that in the context of a motion for summary judgment and Rule 56(e), failure to cite to the page and line numbers when referring to a deposition transcript constitutes a defect warranting exclusion of the evidence. *Orr v. Bank of America, NT & SA,* 285 F. 3d 764, 775 (9th Cir. 2002) (holding that "[t]he efficient management of judicial business mandates that parties submit evidence responsibly" and "when a party relies on deposition testimony in a summary judgment motion without citing to page and line numbers, the trial court may in its discretion exclude the evidence"); *see also Huey v. UPS, Inc.*, 165 F.3d 1084, 1085 (7th Cir. 1999) ("[J]udges need not paw over the files without assistance from the parties."); *Nissho-Iwai Am. Corp. v. Kline*, 845 F.2d 1300, 1307 (5th Cir.1988) (parties must designate specific facts and their location in the record when relying on deposition testimony).

Similarly, on page 83 (R. p. 255) of the deposition transcript, Ms. Arsenault never admits that Burlington employee Simon "**was looking down towards** the spill as she walked by it." (R. p. 255, lines 1-25). Instead Plaintiff's counsel asks Ms. Arsenault: "[o]n Photograph 3, 4, and 5, do you know what Taylor is looking at in these photographs?" (R. p. 255, lines 12-13). In response, Ms. Arsenault answers that "it appears to be a cell phone". (R. p. 255, lines 18-22). Significantly, said photographs do not appear to be in the lower court's file; accordingly, it does not appear that these photographs were before the lower court for consideration and as such, the particular photographs were not preserved for consideration on the record on appeal. Nevertheless, Appellant attempts to conflate the notion that Ms. Simon may have looked at her cell phone while on break with the notion that Ms. Simon *looked down* at her cell phone while walking past the spill. The record evidence simply does not contain an admission on the part of Arsenault that Burlington employee Simon looked down at the spill or saw the spill.

Appellant makes demonstrably false, untrue claims that Burlington's corporate designee, Arsenault, said Burlington employee Simon was "looking down at the spill". The record evidence simply does not support this; rather, Arsenault's deposition testimony states that Burlington employee Simon did not see the spill. (R. p. 259, lines 21-22; p. 260, line 1). Appellant also ignores Arsenault's sworn affidavit which again states that no employee saw the spill. (R. p. 41, ¶5). Specifically, Arsenault states in her Affidavit in Support of Defendant's Motion for Summary Judgment: "[n]o employee of Burlington Coat Factory knew that the liquid had been spilled before Mrs. Qualls fall." (R. p. 41, ¶5).

Finally, Appellant argues that the lower court erred in stating "there is no record evidence tending to show that the spill was visible". (App. Initial Brief, p. 8). The exact quote from the Court's Order states "there is no record evidence tending to show that the spill was visible **before**

the Plaintiff fell." (R. p. 10) (emphasis added). Appellant has not offered any evidence to show that the spill was visible **before** Plaintiff fell. Appellant only points to evidence that discusses the spill **after** Plaintiff's fall occurred.

First, Appellant cites to Burlington's Incident Report which was prepared by Pamela Arsenault *after* the Plaintiff fell. (App. Initial Brief, p. 8) (*citing* R. p. 264). As a preliminary matter, there is no indication that the lower court was ever presented with this Incident Report. Also, there is no indication that Appellant ever cited to "Exhibit 6" to Arsenault's Deposition in her filings with the lower court. In her Motion for Reconsideration, Appellant cites to deposition testimony from Pamela Arsenault regarding said Incident Report (R. pp. 66-67); however, the actual Incident Report does not appear to be filed with the lower court as an exhibit to Arsenault's deposition or otherwise. As such, since this matter was not before the lower court for consideration, it was not preserved for consideration on appeal. *See* Rule 210(c), SCACR; *see also I'on, LLC v. Town of Mt. Pleasant,* 526 S.E.2d 716, 338 S.C. 406, 422 (2010); *Roche v. South Carolina Alcoholic Beverage Control Comm'n,* 263 S.C. 451, 211 S.E.2d 243 (1975) (purpose of an appeal is to determine whether the trial judge erroneously acted or failed to act and when appellant's contentions are not presented or passed on by the trial judge, such contentions will not be considered on appeal).

However, even if the Incident Report were properly in the record, there is no record evidence that shows that the spill was visible **before the Plaintiff/Apellant fell**. First, Appellant is asking the Court to draw an inference contrary to her own sworn testimony that the spill was not visible before the fall. (R. p. 126, lines 13-25).[7] Second, the DVR footage does not show any

[7] "Q. Was the spill easy to see?
A. No.
Q. If it was easy to see, you would've avoided it; right?
A. Yes.

visible spill prior to the fall. (R. p. 40; timestamp 25:35-30:00). Third, any discussion of the spill in Burlington's Incident Report would address the shape of the spill after Appellant had already slipped through it since it was prepared after the fall. (R. p. 275, lines 24-25; p. 104, lines 1-20). Fourth, the caselaw in South Carolina simply does not attribute actual notice to a retailer with evidence showing that a foreign substance was visible, i.e., that it could have been detected. *Gillespie v. Wal-Mart Stores, Inc.* 394 S.E.2d 24, 302 S.C. 90 (Ct. App 1990). Moreover, South Carolina courts have explicitly held that it is improper to hold a retailer liable on the basis of *constructive notice* based on visibility of a foreign substance and the proximity of a store employee to the foreign substance. *Gillespie v. Wal-Mart Stores, Inc.* 394 S.E.2d 24, 302 S.C. 90 (Ct. App. 1990); *Pennington v. Zayre Corp.*, 252 S.C. 176, 165 S.E.2d 695 (1969); *Gilliland v. Pierce Motor Co.*, 111 S.E. 2d 521, 235 S.C. 268, 273 (1959) (holding that plaintiff did not present evidence of actual or constructive notice of oil spill, despite one witness's testimony that "he had no difficulty seeing the size of the oil and the color of it immediately after his uncle had fallen").

Appellant's other arguments regarding evidence of actual notice are misguided and confusing. In one breath Appellant, argues that when Burlington employee Simon was behind the cash register her view was not blocked by any barriers and as such she could have seen the child throw the cup or the spill on the ground. (App. Initial Brief, p. 8). Yet, in another breath, Appellant contests the accuracy of DVR footage which was taken from a camera mounted behind the **very same cash registers**. (App. Initial Brief, p. 8). Appellant also ignores the fact that on the DVR footage, Burlington employee Simon can be seen using a computer to check out the family at the moment the young child throws the cup. (R. p. 40; timestamp 25:35).

(R. p. 126, lines 20-23).

Finally, Appellant argues that three other customers "unmistakably noticed [the spill]" and "were presumably in a much more advantageous position to view the spill than a surveillance camera of limited quality mounted behind the cash registers". (App. Initial Brief, p. 8). Again, Appellant fails to denote the specific times on the time-stamped DVR footage that show the moments she is referring to. Nevertheless, this type of evidence is simply not evidence of **actual** notice. Moreover, this is not evidence of constructive notice. The operative question regarding constructive notice is whether the foreign substance was on the ground for a sufficiently long period of time such that the defendant retailer should have noticed it. *See Hunter v. Dixie Home Stores*, 232 S.C. 139, 147; 101 S.E.2d 262 (1957) (*citing H.L. Green Co., Inc. v. Bowen*, 233 F.2d 523, 524 (4th Cir. 1995)) (testimony from another customer that "she saw the popcorn on the floor only a few minutes before [the plaintiff] entered the store and fell" was not enough "to attribute constructive notice of the presence of the popcorn to the defendant on evidence proving merely that the popcorn had been there a very few minutes"); *see Miscally v. Colonial Stores, Inc.*, 68 Ga. App. 729, 23 S.E.2d 860 (Ga. Ct. App. 1943) ("evidence that leaf [causing plaintiff's fall] could have 'been walked over, under foot' by some other customer a few minutes before patron fell was insufficient for jury on issue whether leaf had been on floor long enough to apprise owner of presence and to raise duty to remove it.").

II. Constructive Notice

In the section of her argument entitled "Constructive Notice", Appellant argues that Burlington employee Simon "would have seen the spill – and *should* have seen the spill – through the exercise of reasonable diligence." (App. Initial Brief, p. 10). First, as discussed above, Appellant cites to the *dissenting* opinion in the matter of *Wimberly v. Winn-Dixie Greenville, Inc.*, 252 S.C. 117, 123 (1969) to support her argument. (App. Initial Brief, p. 9). Appellant attempts

to draw this Court's attention away from the cannon of caselaw regarding what constitutes evidence of constructive notice.

As discussed at length above, South Carolina courts have held that constructive notice can be proved with either: 1) evidence showing that a spill was on the ground for a sufficiently long period of time such that the retailer should have known of the hazard, *Hunter*, 232 S.C. 139 (1958), *Wimberly*, 252 S.C. 117, 121, *Pennington*, 252 S.C. 176 (1969), *Calvert*, 443 S.E.2d 398 (Ct. App. 1994); or 2) evidence of a continual condition and a defendant retailer's knowledge of such condition. *Wintersteen*, 344 S.C. at 36, FN1, ¶2 (2001). As stated above, Appellant has not made any arguments regarding a continual condition and therefore, the pertinent inquiry in this case is whether there is evidence that the spill was on the ground for a sufficiently long period of time such that Burlington should have noticed it.

Appellant also ignores clear South Carolina caselaw outlining the duty of a defendant retailer with regards to spills created by third parties:

> "We find a very legitimate basis for adherence to our traditional slip and fall analysis. In such cases, although there may be a foreseeable risk that substances will wind up on the floor, there is no specific act of the defendant which causes the substance to arrive there, i.e., it generally arrives there through the handling of a third party. To require shopkeepers to anticipate and prevent the acts of third parties is, in effect, to render them insurers of their customers' safety. This is simply not the law of this state."

Wintersteen v. Food Lion, Inc., 542 S.E.2d 728, 344 S.C. 32, 38 (2001). Retailers cannot be held liable for a "negligent method of operations" and do not have a "continuous duty to look out for the safety of patrons." *Id.* "To date, we have not required storekeepers to take actions to prevent or minimize the foreseeable risk of a foreign substance on the floor of its premises." *Id* at 36. Retailers simply do not have a duty to "continuously inspect their floors for foreign substances". *Legette v. Piggly Wiggly, Inc.*, 368 S.C. 576, 629 S.E.2d 375, 377 (Ct. App. 2006).

a. The uncontradicted evidence establishes that the alleged hazardous condition existed for less than four minutes and thirty seconds, which is insufficient to establish constructive knowledge as a matter of law.

In the instant case, the time-stamped DVR Burlington footage clearly shows that no more than four minutes and twenty-five seconds elapsed between the time the child threw the cup on the ground and the Appellant's fall. Furthermore, the DVR footage shows that only **nine seconds** elapsed between the time the child throws the cup (R. p. 40; timestamp 25:35) and the time the older child retrieves the cup from the ground (R. p. 40; timestamp 25:44). The video does not reveal a spill of any significant size or color. The older child takes the cup to throw it away at 26:11. While this is transpiring, the Burlington employee, Taylor Simon, can be seen ringing up the family's purchases behind the counter. The spill, which is not visible from the DVR footage, remains on the ground for a total of 4 minutes and 25 seconds. This is not a sufficiently long period of time to establish constructive notice as a matter of law.

Appellant ignores the case law concerning the length of time a foreign substance is present on the ground of a retail store. A systematic review of the slip and fall cases in South Carolina shows that many cases discuss the fact that a person or persons were in the vicinity of the spill for a certain period of time before the fall occurred and the courts use that information to infer the length of time a foreign substance is on the ground. In cases where there is no DVR footage showing the specific time of spill, many courts considering summary judgment calculate the length of time the spill was on the ground by drawing the most favorable inference possible: specifically, they infer that the spill could have occurred immediately after the last inspection of the area.[8]

[8] An explicit example of this reasoning is illustrated in the Illinois case of *Daleus v. Target Corp*, 2012 WL 3835836 (N.D. Ill., September 4, 2012). In *Daleus*, the Court found that a store employee was in the area where the plaintiff fell "ten minutes prior to the incident and that [the employee] did not see any liquid on the floor ... at that time." The Court went on to state that for purposes of summary judgment, the substance was "most likely on the floor for less than ten minutes." *Id* at *2 and *3. The Court went on to find that ten minutes was insufficient to establish constructive knowledge as a matter of law, and granted the retailer's motion for summary judgment.

For example, in *Bessinger v. Bi-Lo, Inc.*, 329 S.C. 617, 619, 496 S.E.2d 33 (Ct. App. 1998), a slip and fall case involving grapes on the floor, the appellate court specifically notes evidence that Bi-Lo's manager inspected the area where the accident occurred **fourteen minutes** before the accident and did not see any grapes on the floor at that time. Drawing all inferences in favor of the plaintiff/customer, the grapes could have been on the floor for as much as 13 minutes before the fall, yet the appellate court found that the record was completely devoid of evidence that Bi-Lo had constructive or actual notice that the grapes were on the floor. *Id* at 34.

Likewise, in *Wimberly v. Winn Dixie Greenville, Inc.*, 165 S.E.2d 627, 255 S.C. 117, 121 (1969), the South Carolina Supreme Court vacated a trial court verdict and held that a retailer could not be liable as a matter of law where the area of the fall was inspected every "10-15 minutes." There is no South Carolina opinion which would support Appellant's burden in this case: that constructive knowledge may be inferred where the substance is on the floor for less than five minutes. *See Hunter v. Dixie Home Stores*, 101 S.E.2d 262 (1957) (*citing H.L. Green Co., Inc., v. Bowen*, 223 F.2d 523, 524) (testimony evidence from another customer that "she saw the popcorn on the floor only a few minutes before [the plaintiff] entered the store and fell" was not enough to attribute constructive notice to defendant); *see also Gilliland v. Pierce Motor Company*, 111 S.E.2d 521, 235 S.C. 268, 274 (1959) (affirming order granting defendant's motion for judgment notwithstanding the verdict, where evidence showed that plaintiff and his nephew walked over the area of fall five minutes prior to fall).

Significantly, in a case involving similar facts to the instant matter, the District Court of South Carolina, sitting in diversity and applying South Carolina law, recently held that no reasonable juror could find that four minutes is a sufficient length of time to establish constructive notice. *Payne v. Wal-Mart Stores East, LP*, Civ. Action No. 8:16-02140-MGL (D. SC June 16,

2017). In *Payne*, a four-year-old child spilled milk on the floor of the defendant's store, which was captured by DVR footage. The footage revealed that the milk was on the floor for four (4) minutes prior to the Plaintiff's fall. The district court, applying South Carolina state law, granted summary judgment and specifically held that four minutes was an insufficient amount of time to establish constructive knowledge as a matter of law. *Payne v. Wal-Mart Stores East, LP*, Civ. Action No. 8:16-02140-MGL (D. SC June 16, 2017).

Note, further, that the District of South Carolina, has granted summary judgment under similar circumstances. *Norris v. Wal-Mart Stores East, L.P.*, Civil Action No. 1:12-02592-JMC (D. SC 2014) (grating summary judgment where the video revealed that substance was on floor for two minutes and 33 seconds); *Massey v. Wal-Mart Stores East, LP*, 2010 WL 3786056 (D. SC 2010) (granting summary judgment due to lack of constructive notice when video showed spill occurred less than three minutes before plaintiff's fall).

Numerous other jurisdictions have held that summary judgment is appropriate where the substance is on the floor for such a brief time as this case. *See e.g.*, *Miller v. Wal-Mart Stores East, LP*, 2011 WL 5023281 (E.D. Tenn. 2011) (granting summary judgment when grapes had been on floor for no more than five minutes and holding "[a] period of only a few minutes is not time, as a matter of law, for defendant to have discovered the alleged condition and to have repaired or warned of it."); *Daleus v. Target Corp.*, 2012 WL 3835236 (N.D. Ill) (holding that summary judgment is appropriate where the substance was on the floor for less than ten minutes, and noting that "no reasonable person could conclude that ten minutes was enough time to give [the retailer] constructive notice of the spilled substance") (quoting *Reid v. Kohl's Department Stores, Inc.*, 545 F.3d 479, 481 (7th Cir. 2008)).

In order to prove constructive knowledge, a party must prove that a foreign substance "was on the floor for such a length of time as to infer that [the retailer] was negligent in not discovering it and removing it." *Gillespie*, 394 S.E.2d at 25 (Ct. App. 1990); *Wimberly*, 252 S.C. 117, 121 (1969); *Pennington*, 252 S.C. 176 (1969); *Calvert*, 443 S.E.2d 398 (Ct. App. 1994); *Hunter*, 232 S.C. 139 (1958). There is not a single South Carolina case finding that five minutes is a sufficient amount of time to establish constructive knowledge.

Appellant, without citing to any authority, argues that constructive knowledge may be proven in a different fashion. Appellant argues that South Carolina law supports a finding of negligence in this case because a Burlington employee walked "within inches" of the spill without seeing it. These facts are almost identical to those addressed in *Gillespie*, *Pennington*, and *Hunter*; South Carolina law is settled on this point, and squarely controls here.

b. <u>The deposition testimony of Burlington's 30(b)(6) corporate designee Pamela Arsenault does not create a material issue of fact.</u>

Appellant also asserts that the deposition testimony of Burlington's 30(b)(6) designee, Pamela Arsenault, creates a genuine issue of material fact as to constructive knowledge because Arsenault agrees that "Ms. Simon had the opportunity to observe the spill". (App. Initial Brief, p. 10) (*citing* R. p. 259, p. 269).[9]

Courts in South Carolina have expressly rejected the theory that constructive notice can be established through evidence that an employee was within the "field of vision" of a spill or within "the immediate area" of a spill before a plaintiff's fall.[10] The question is not whether an employee

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[9] Arsenault explained that she did not notice the spill, until she bent down: "I mean, anybody walking by it – they said it was small. I remember that it was dark in color. I want to say in color tile, so black on black. I noticed it when I bent down and then I saw it." (R. p. 269, lines 4-7).

[10] *Gillespie v. Wal Mart Stores, Inc.*, 302 S.C. 90 (Ct. App. 1990) (affirming order of summary judgment and holding that the "mere fact that water was on the floor of the store and was within the field of vision of a nearby store employee at the time Gillespie slipped upon it is not by itself enough evidence to charge [Defendant] with negligence"); *Pennington v. Zayre Corp*, 252 S.C. 176 (1969) (evidence held insufficient to prove constructive notice where plaintiff

should have instantly noticed a foreign substance as soon as the foreign substance was within their plausible field of vision; rather, the question as outlined by the caselaw, is whether a foreign substance was on the ground for a **sufficiently long** period of time such that the defendant should have noticed it. *Hunter*, 232 S.C. 139 (1958); *Wimberly*, 252 S.C. 117, 121 (1969); *Pennington*, 252 S.C. 176 (1969); *Calvert*, 443 S.E.2d 398 (Ct. App. 1994); *Wintersteen*, 344 S.C. at 36, FN1, ¶2 (2001).

Specifically, in *Gillespie*, the Court of Appeals cited to six different slip and fall cases to support their holding that the mere fact that an employee was in the field of vision of a spill is not enough evidence to escape summary judgment. *Gillespie*, 302 S.C. at 91 (Ct. App 1990). In one of those cases, a Texas case, the plaintiff stated that when she fell, the produce manager was within one or two feet of her and assisted her in getting up after the fall. *H.E.B. Foods, Inc. v. Moore*, 599 S.W.2d 126, 128 (Tex. Ct. Civ. App. 1980). The produce manager did not testify. *Id.* Rather, the general manager testified. In his testimony, the general manager agreed that "since the produce manager saw the customer slip, he was also in a position to see what caused the customer to slip". *Id.* The Texas Court responded: "the mere fact that a foreign substance is on the floor of a store, which caused the floor to become slippery, and that a store employee is in the immediate vicinity at the time the plaintiff fell, is not sufficient evidence, standing alone, to raise an inference that the storekeeper either placed the substance there; knew that it was there and willfully or negligently failed to remove it; or that the substance had been there for a sufficient length of time that such store employee would or should have discovered and removed the substance, had he used ordinary

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while shopping slipped on a transparent plastic bag and fell and "a female employee of the defendant was apparently in the immediate area at the time of the fall"); *Hunter v. Dixie Home Stores*, 232 S.C. 139 (1957) (evidence held insufficient to charge storekeeper with constructive notice of presence of green beans that caused plaintiff to slip and fall even though employee faced area where plaintiff fell and stood 10 or 12 feet away and another employee worked 20 or 30 feet from where she feel).

care." *Id* at 129; *see also Anderson v. Winn-Dixie Greenville*, 184 S.E.2d 77 (1971) (post-accident statement of an employee "we should have had this place cleaned up but we just hadn't gotten around to it" does not support an inference of notice). In spite of this case law, Appellant continues to argue that Pamela Arsenault's testimony creates a genuine issue of material fact for trial.

In addition, Appellant makes arguments that Burlington employee Simon would have seen the spill had she not been looking at a cellphone while on break. (App. Initial Brief, p.10). This argument appears to concern Arsenault's deposition testimony wherein she speculates that the DVR footage shows employee Simon with a cellphone in her hand as she goes on break. (R. p. 256, line 22 – p. 257, line 1; p. 257, line 24 – p. 258, line 1). First, Simon was on break when she walked past the spill and when she is alleged to have looked at a cellphone. (R. p. 255, lines 12-25 – p. 256, lines 1-6). Second, Burlington does not have a policy prohibiting employees from having their cellphone on them at work. (R. p. 269, lines 14-25 – p. 270, lines 1-3).[11] Third and most importantly, as stated before, a retailer's duty with regards to foreign substances placed on the floor by third parties is clearly outlined by South Carolina caselaw: "[i]t is well settled that merchants are not required to continuously inspect their floors for foreign substances." *Legette v. Piggly Wiggly, Inc.*, 368 S.C. 576, 629 S.E.2d 375, 377 (Ct. App. 2006) (*citing Olson v. Faculty House of South Carolina, Inc.*, 580 S.E.2d 440, 442 (2003).

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[11] Arsenault expressly stated the following when asked:
"Q. Okay. What is the policy at Burlington Coat Factory for employees having their phone with them while employed?
A. There isn't one.
Q. There is nothing about a phone in - - or use of your personal phone in the associate handbook?
A. No.
Q. There is no policy or procedure at all about the use of a phone?
A. Just so that - - just not using it towards, you know, having company information on it.
Q. Isn't it the policy of Burlington that employees should not be using or looking at their phone while they're on the clock?
A. There is not a policy."
(R. p. 269, lines 14-25 – p. 270, lines 1-3).

Appellant's position is that an employee who is on break has a continuous duty to inspect the premises for foreign substances -- this is simply not the law of South Carolina. The *Wintersteen* Court was clear: retailers cannot be held liable for a "negligent method of operations". *Wintersteen*, 344 S.C. at 38 (2001). To hold that Burlington employee Simon's use of a cellphone while on break is evidence of constructive notice of a spill, would in turn elevate the duty of a retailer to that of "an insurer of a customers' safety" and as *Wintersteen* expressly held, "that is not the law of this state." *Id.* Retailers simply do not have a duty to "continuously inspect their floors for foreign substances". *Legette v. Piggly Wiggly, Inc.*, 629 S.E.2d 375, 377 (Ct. App. 2006).

Appellant next argues that "[Ms. Qualls'] 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". (App. Final Brief, p. 10). This type of reasoning is expressly rejected in both *Wintersteen v. Food Lion, Inc.* (as cited above) and *Wimberly v. Winn-Dixie Greenville, Inc.* In *Wimberly*, the plaintiff argued: "that the store premises were not kept in a reasonably safe condition because of insufficient personnel, inadequate inspection, inadequate floor maintenance, appellant's pushcart obstructing view, and use of variegated floor" and as such, "the circumstances amply support the theory that appellant had constructive notice of the rice being on the floor and did nothing about it." *Wimberly,* 252 S.C. at 121 (1969). The South Carolina Supreme Court explicitly rejected this theory of liability and stated: "[t]he Florida court has adopted a standard of care different from that enunciated in our cases. The tendency of the Florida cases is to eliminate the necessity of proof of actual or constructive notice. Such is not the rule in this state." *Id.*

Rather, appellant must come forward with evidence that the spill was on Burlington's floor for a sufficiently long period that Burlington should have known about it. Appellant, without citing

to any authority, argues that constructive notice may be proven in different fashion. Appellant's ultimate argument is that Burlington has a duty to continuously inspect its floor for foreign substances. The South Carolina Supreme Court and the South Carolina Court of Appeals have explicitly and unequivocally rejected this theory of liability. *See Wintersteen*, 542 S.E.2d 728 (2001); *see Legette v. Piggly Wiggly*, 629 S.E.2d at 377 (Ct. App. 2006).

c. <u>The fact that other customers walked through the area of the spill before Appellant's fall is not evidence of constructive notice.</u>

There is no case in South Carolina that attributes constructive notice to a retailer based on evidence that other customers either saw a spill or were in the vicinity of a spill before a fall. On the contrary, many cases have rejected such evidence as creating a genuine issue for trial. Specifically, in *Hunter v. Dixie Home Stores*, the Supreme Court cited to a Fourth Circuit Court of Appeals case, where a customer testified that "she saw the popcorn on the floor only a few minutes before [the plaintiff] entered the store and fell". *Hunter v. Dixie Home Stores*, 232 S.C. 139, 147; 101 S.E.2d 262 (1957) (*citing H.L. Green Co., Inc. v. Bowen*, 233 F.2d 523, 524 (4th Cir. 1995)). The Court squarely refused "to attribute constructive notice of the presence of the popcorn to the defendant on evidence proving merely that the popcorn had been there a very few minutes". *Hunter v. Dixie Home Stores*, 232 S.C. 139, 147; 101 S.E.2d 262 (1957) (*citing H.L. Green Co., Inc. v. Bowen*, 233 F.2d 523, 524 (4th Cir. 1995)).

Similarly, the Supreme Court in *Hunter* cited to a Georgia case that found: "evidence that leaf [causing plaintiff's fall] could have 'been walked over, under foot' by some other customer a few minutes before patron fell was insufficient for jury on issue whether leaf had been on floor long enough to apprise owner of presence and to raise duty to remove it." *Id* at 148 (*citing Miscally v. Colonial Stores, Inc.*, 68 Ga. App. 729, 23 S.E.2d 860 (Ga. Ct. App. 1943).

In her Initial Brief, Appellant argues that "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" and as such, Burlington should have seen the spill. (App. Initial Brief, p. 10). In support of her assertion, Appellant again generally cites to "Def. Ex. 2". As previously stated, Burlington's DVR footage is clearly time-stamped; nevertheless, Appellant does not cite to any specific time demarcation in the video to support her argument that three customers "noticeably changed their course or took abnormally large steps to avoid it." Further, Appellant asks the Court to ignore her own testimony that the spill was not easy to see. (R. p. 126, lines 20-23).

Pursuant to Rule 56(e) of the South Carolina Rules of Civil Procedure, a nonmovant to a motion for summary judgment, "must set forth specific facts showing that there is a genuine issue for trial". Rule 56(e), SCRCP. Appellant repeatedly insists that she has presented a mere scintilla of evidence presenting a genuine issue for trial, yet she fails to delineate the specific evidence she is referring to, forcing the Court and the Respondent to guess. The DVR footage is 60 minutes in length and clearly time-stamped, yet the Appellant could not be bothered to specify the time in the video she is referring to.

III. The Circuit Court did not err in failing to recite the phrase "mere scintilla of evidence" in its order

Under Appellant's theory, a mere scintilla of ***any kind*** of evidence, is enough to survive summary judgment. Appellant's assertion does not tie in the question of what constitutes evidence of actual notice or constructive notice of a foreign substance. Appellant's assertion does not tie in the question of what evidence constitutes a breach of a retailer's duty in cases involving foreign substances placed on a retailer's floor by a third party. As detailed above, there is simply no record evidence of Burlington's actual or constructive notice of the foreign substance on the floor before the Appellant fell on July 31, 2015.

Appellant, for the first time on appeal, cites to the matter of *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). Notably, this case was not cited in Appellant's Motion for Reconsideration or her Return in Opposition to Defendant's Motion for Summary Judgment. (R. pp. 62 – 72); (R. pp. 48-56.) However, if the Court were to consider any argument regarding this matter, Respondent would argue that the case of *Hancock* discusses a direct misquote of the law, specifically where a party improperly argued in a preponderance of the evidence case, that a non-movant must submit "more than a mere scintilla of evidence" in order to overcome summary judgment. *Hancock*, 381 S.C. at 330. Here, the Court's order does not misquote the law, the Court's order simply does not recite the phrase "mere scintilla". This does not mean that the lower court misapplied the summary judgment standard.[12]

A survey of the South Carolina court opinions involving slip and falls reveals that the phrase "mere scintilla of evidence" is not regularly cited. Although this phrase is often used in describing the motion for summary judgment standard, there is no indication in the caselaw that the phrase is **compulsory** language and should be stated in all trial court orders and appellate court opinions reviewing entries of summary judgment in slip and fall cases. *See Calvert v. House Beautiful Paint and Decorating Center, Inc.*, 443 S.E.2d 398, 399 (1994); *Bessinger v. Bi-Lo, Inc.*, 329 S.C. 617, 619-620 (Ct. App. 1998); *Cothran v. Brown*, 350 S.C. 352, 357 (Ct. App. 2002); *Gillespie v. Wal Mart Stores, Inc.*, 394 S.E.2d 24, 302 S.C. 90 (Ct. App. 1990); *Simmons v. Winn-Dixie Greenville, Inc.*, 457 S.E. 2d 608 (1995).

All of the cases cited by Appellant, with the exception of *Hancock*, do not concern a slip and fall. *Fisher v. Shipyard Village Council of Co-Owners, Inc.*, 781 S.E.2d 903 (2016) (a negligence

[12] The facts in *Hancock* are also distinguishable from this case since *Hancock* involved a newspaper office's failure to maintain its parking lot, allowing the lot to fall into a state of disrepair, where there was evidence that employees were aware of the disrepair and complained to management regarding the deteriorated state of the lot. This type of case concerned a defendant who created a dangerous condition that caused a plaintiff to fall.

action brought by condominium owners against their horizontal property regime for an alleged breach of the board's duty to investigate water intrusion damage to the common elements of the condominium); *Zurich Am. Ins. Co. v. Tolbert*, 387 S.C. 280, 283-284 (2010) (a summary judgment case concerning the application of a South Carolina Underinsured Motorist endorsement in an auto-insurance policy); *Murphy v. Tyndall*, 384 S.C. 50, 54 (Ct. App. 2009) (an agency case).

Notably, Appellant's own case, *Miller v. Blumenthal Mills, Inc.*, does not specifically use the phrase "mere scintilla of evidence" in reciting the motion for summary judgment standard, instead, the opinion cites to the same language utilized in this trial court's order: "when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted". *Miller v. Blumenthal Mills, Inc.*, 365 S.C. 204, 220 (Ct. App. 2005); *see also* R. p. 4. This is not to say that the "mere scintilla" phrase is not applicable, it is simply to state that the failure to recite the words is not an error.

IV. The Circuit Court construed all inferences in the light most favorable to the Appellant; however there was no material issue of fact that would create a jury question.

With respect to Summary Judgment, "[i]t is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013) [emphasis added]. Moreover, mere speculation does not create a material issue of fact warranting denial of a Motion for Summary Judgment. *Jackson v. Bermuda Sands, Inc.*, 677 S.E.2d 612 (Ct. App. 2009). Appellant makes multiple arguments that were previously addressed, *infra,* which are briefly summarized herein.

As set forth in great detail *infra*, Appellant's claims that the Court failed to draw the appropriate inferences in her favor are simply without merit. Many of Appellant's arguments simply misconstrue the evidentiary record in an entirely unreasonable manner or rely upon

evidence that has explicitly been held insufficient to create a jury question in similar cases. The court did not err in declining to infer that Ms. Simon had actual knowledge of the spill in the face of the DVR footage and Appellant's own sworn testimony to the contrary. (R. p. 126, lines 20-23). Appellant states that the court found that there was no evidence in the record that the spill was visible. What the court truly stated is that there was no evidence in the record that the "spill was visible *before the Plaintiff fell*". (R. p. 10). This is just one example of the Appellant deliberately misquoting the record to create a false impression of error. Moreover, the Court's conclusion that Ms. Simon was on break, and that Burlington has no policy prohibiting employee cell phone use, was based on the clear, uncontradicted sworn testimony of Ms. Arsenault. (R. p. 256, line 22 – p. 257, line 1); (R. p. 257, line 24 – p. 258, line 1); (R. p. 255, lines 12-25 – p. 256, lines 1-6).

Appellant also takes issue with the Court's footnote referencing Arsenault's testimony wherein Arsenault speculates that Simon had a phone in her hand. (App. Initial Brief, p. 19) (citing Order granting MSJ, R. p. 12, n.19). Appellant argues that this footnote ignores Appellant's primary theory of liability based on actual notice ("the video shows Simon walking past the spill and looking down at it"). (App. Initial Brief, p. 20 n.7). The Court clearly addressed Appellant's actual notice theory on page 10 of its Order. (R. p. 10). To be clear, Appellant is the party asserting that the cell phone testimony creates a material issue of fact with respect to constructive notice. Appellant insists that the lower court (in the constructive notice analysis) should have disregarded her own argument regarding the cell phone (R. p. 54), and circled back to the actual notice theory. This reasoning makes no sense and has no end in sight.

Again, Appellant's theory of actual notice is expressly contradicted by the Appellant's own testimony that "Simon did not do anything to indicate she saw the spill" and "the spill was not easy to see". (R. p. 126, lines 13-25 – p. 127, line 1). Appellant is asking the Court to draw two

inferences contrary to her own testimony. Indeed, the court should construe all inferences arising from the evidence against the moving party; however, a court "cannot ignore facts unfavorable to [the non-moving party] and [it] must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts." *Bloom v. Ravoira*, 529 S.E.2d 710, 713, 339 S.C. 417, 423, (2000); *see also Dawkins v. Fields*, 580 S.E.2d 433, 354 S.C. 58, 70 (2003).

If there is no actual notice, the Court can then address Appellant's alternative theory of constructive notice based on Arsenault's deposition testimony that Simon had a phone in her hand. The Court does this. The Court expressly finds that "Ms. Simon's proximity to the spill, and the allegation that Ms. Simon may have looked down at her cell phone after going off duty and walking past the spill, are not sufficient to create an issue of material fact as to constructive knowledge.". (R. p. 12). Retailers in South Carolina do not have a continuous duty to inspect the premises for foreign substances. *See Wintersteen* and *Legette infra.* Constructive notice is established with evidence that a substance was on the ground for a sufficiently long period of time such that a retailer should have noticed it. *See infra, Hunter*, *Pennington*, and *Gillespie*. The caselaw in South Carolina does not treat a time period of a very few minutes, namely 4 minutes and 25 seconds, as a sufficiently long period of time for purposes of raising an inference of constructive notice. *See Hunter* (citing "we cannot attribute constructive notice of the presence of this popcorn to Green on evidence proving merely that the popcorn had been there a very few minutes"); *see Pennington infra*; *see Gillespie infra.*

V. The Circuit Court properly applied the law in rejecting Appellant's argument that "the length of time for a substance to be on the floor before liability can be imposed is irrelevant".

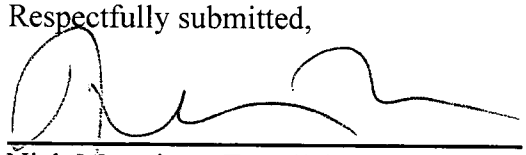
Appellant makes the brazen and entirely unsupported argument that, with respect to constructive notice, "the length of time for a substance to be on the floor before liability can be

imposed is **irrelevant** when an employee walks within inches of a spill and does nothing to clean it up." (App. Initial Brief, p. 23) (emphasis added). Appellant, in making this argument, is ultimately asking this Court to overrule *Gillespie, Pennington* and *Hunter*. The Circuit court properly rejected this argument and followed the squarely controlling case law.

CONCLUSION

In conclusion, this case involves a foreign substance that was placed on Burlington's floor by a third party, a young child. DVR footage captures the moment the child throws the cup and the moment an older child retrieves the cup from the floor. The cup is only on the ground for nine seconds. Four minutes and twenty-five seconds elapse between the time the child throws the cup and the time of Appellant's fall. The DVR footage and record evidence very clearly show that no Burlington employee had notice of the spill prior to the Appellant's fall. Controlling South Carolina case law is very clear that four minutes and twenty-five seconds is not a sufficiently long period of time to impose liability and that the mere proximity of an employee to a spill is insufficient to establish constructive notice as a matter of law. Appellant is asking this Court to overrule multiple clear and controlling appellate opinions. She is also asking the Court to disregard her own sworn testimony. The trial court did not err in following the controlling law. Summary judgment was properly granted.

Respectfully submitted,



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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Honorable 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.

CERTIFICATE OF COUNSEL

The undersigned certifies that Respondent's Final Brief complies with Rule 211(b), SCACR.

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