

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM SUMTER COUNTY  
Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge

Case No.: 2018-CP-43-00851  
Appellate Case No. 2019-000877

**RECEIVED**  
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SC Court of Appeals

Wanda V. Berry and Gary A. Berry, Appellants

v.

Scott Richardson d/b/a Chick-Fil-A of Sumter Mall, Respondent.

INITIAL BRIEF OF APPELLANTS

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## STATEMENT OF ISSUES ON APPEAL

1. **DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGEMENT ON THE DOCTRINE OF RES IPSA LOQUITUR WHEN APPELLANTS RELIED ON ACTUAL FACTS AND THE INFERENCES THEREFROM IN THE RECORD?**
2. **DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGEMENT IN FAVOR OF RESPONDENTS WHEN THE EVIDENCE AND INFERENCES THEREFROM CREATED A GENUINE ISSUE OF MATERIAL FACT AS TO RESPONDENTS NEGLIGENCE?**
3. **DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGEMENT IN FAVOR OF RESPONDENTS ON APPELLANT GARY A. BERRY'S LOSS OF CONSORTIUM CLAIM WHEN THERE WAS EVIDENCE OF A GENUINE ISSUE OF MATERIAL FACT AS TO RESPONDENTS NEGLIGENCE?**

## STATEMENT OF THE CASE

On December 30, 2014, Wanda V. Berry and Gary A. Berry (Appellants) brought this action alleging negligence and loss of consortium against Scott Richardson d/b/a Chick-Fil-A (Respondent). On February 23, 2015, Appellant filed a Summons and Amended Complaint to properly name Respondent as Scott Richardson d/b/a Chick-Fil-A of Sumter Mall. Respondent served an Answer on March 10, 2015 denying negligence and alleging assumption of a known risk, contributory negligence, comparative negligence and the doctrine of unavoidable accident. On November 20, 2018, Respondent filed a Motion for Summary Judgment along with a Memorandum in Support of Summary Judgment. Appellants filed a Memorandum of Law in Opposition to Respondent's Motion for Summary Judgment. On January 22, 2019, Respondent filed a Reply to Appellant's Memorandum of Law in Opposition. On February 5, 2019, a hearing on Respondent's Motion for Summary Judgment was held before the court and Respondent's Motion for Summary Judgment was granted by the court. An Order granting Respondent

summary judgment was filed on May 7, 2019. Appellants filed a Notice of Appeal on May 21, 2019.

### **STANDARD OF REVIEW**

When reviewing a grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRPC. *Hansson v. Scalise Builders of South Carolina*, 374 S.C. 352, 650 S.E.2d 68 (2007); *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). Summary judgment is appropriate when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), SCRPC. When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. *David*, 367 S.C. at 247, 626 S.E.2d at 3. Moreover, since it is a drastic remedy, summary judgment should be cautiously invoked so that a litigant will not be improperly deprived of a trial on disputed factual issues. *Conner v. City of Forest Acres*, 348 S.C. 454, 560 S.E.2d 606 (2002). “The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder.” *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Baugus v. Wessinger*, 303 S.C. 412, 401 S.E.2d 169 (1991).

### **FACTS**

On or about February 4, 2013, Wanda Berry was an invitee of Chick-Fil-A of Sumter Mall, when she slipped and fell on a greasy foreign substance on the floor in Respondent’s

dining room. The fall was video recorded by Respondent's security camera. The fall occurred when an employee of Respondent came out of the Kitchen to give Mrs. Berry a tray with her order and Mrs. Berry slipped on a foreign substance that was on the floor. The employee assisted Mrs. Berry in getting up off of the floor but as she was doing so her feet began to slide on the floor.

Approximately thirteen minutes (13) minutes prior to Mrs. Berry's fall, the employee was sweeping the floor in the exact area where Mrs. Berry fell. Immediately after the fall the employee is seen on video altering her gait to step over the spot where Mrs. Berry fell and then placed a wet floor sign on the spot where Mrs. Berry fell. The video shows that during the intervening 13 minutes from the time the employee was sweeping the spot of the fall until the time of the fall, no foreign substances were placed on the floor.

#### **ARGUMENTS**

**1. BECAUSE APPELLANTS RELIED ON FACTS AND INFERENCES THEREFROM IN THE RECORD, THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGEMENT ON THE BASIS THAT APPELLANTS' EVIDENCE FELL WITHIN THE DOCTRINE OF RES IPSA LOQUITUR.**

The lower court erred in concluding that Appellants' evidence fell within the doctrine of res ipsa loquitur by failing to distinguish the doctrine of res ipsa loquitur from the principal that negligence may be established by circumstantial evidence. In the case at bar there was circumstantial evidence upon which Respondent's negligence could have been inferred. Therefore, Respondents summary judgement motion should have been denied.

The court in Eickhoff v. Beard-Laney, Inc., 199 S.C. 500, 20 S.E.2d 153, 154-55 (1942) recognizes the distinction citing 38 Am. Jur. 989 which provides as follows:

“It is important in considering the res ipsa loquitur doctrine and its application and effect in given cases, to distinguish that doctrine from the principle that negligence may be established by circumstantial evidence. Failure to observe this distinction has led to some uncertainty \*\*\*.

“In other words, in the situation to which res ipsa loquitur as a distinctive rule applies, there is no evidence, circumstantial or otherwise, at least none of sufficient probative value, to show negligence, apart from the postulate, which rests on common experience and not on specific circumstances of the instant case, that physical causes of the kind which produced the accident in question do not ordinarily exist in the absence of negligence, that is, in the absence of a breach of duty such as defendant owed to plaintiff. *Rejection of the doctrine of res ipsa loquitur does not mean that negligence may not be established by circumstantial evidence as well as by direct evidence.*” (Emphasis added.)

The doctrine of res ipsa loquitur, as this Court has repeatedly held, is not a part of the law of this State; and hence is wholly irrelevant. It scarcely needs to be added, however, that obviously this does not mean that negligence may not be established by circumstantial evidence as well as direct evidence. Gantt v. Columbia Coca-Cola Bottling Co., 193 S. C. 51, 7 S.E.2d 641, 645, 127 A.L.R. 1185

“Res ipsa loquitur and circumstantial evidence have been distinguished upon the question whether the circumstances proved point merely to the physical cause of the occurrence, without having any tendency to indicate the responsible human agency, or, upon the other hand, have some tendency to indicate some fault of omission or commission upon the part of the defendant. If the former, it is necessary to invoke the rule of res ipsa loquitur, which is applicable

to the fact of negligence only, in order to make out a prima facie case of negligence; if the latter, the general principle, which is applicable to all matters of fact, that a fact may be established prima facie by circumstantial evidence, suffices, without invoking the distinctive doctrine of res ipsa loquitur.”Eickhoff v. Beard-Laney, Inc., 199 S.C. 500, 20 S.E.2d 153, 154–55 (1942), Gantt v. Columbia Coca-Cola Bottling Co., 193 S. C. 51, 7 S.E.2d 641, 645, 127 A.L.R. 1185

In this case, Appellants have not posited their case on res ipsa loquitur; on the contrary they have alleged numerous acts upon which a jury could infer Respondents’ negligence.

First, Appellant Wanda V. Berry testified that the floor was greasy when she fell. (Wanda V. Berry Deposition Transcript Page 36 Lines 8-25) This fact alone takes this case out of the realm of res ipsa loquitur. In addition to these facts, video evidence shows Wanda V. Berry falling and after the fall, the video shows Respondent’s employee’s feet sliding and altering her gait to step over the spot where Wanda V. Berry fell before placing a wet floor sign in the exact location of the fall. (Video)

From the above facts constituting circumstantial evidence, res ipsa loquitur does not apply in this case because there is a factual basis for the negligence allegation. As a result, the lower court erred in granting summary judgement based on res ipsa loquitur.

**2. BECAUSE THE EVIDENCE AND INFERENCES THEREFROM CREATED A GENUINE ISSUE OF MATERIAL FACT, THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGEMENT TO RESPONDENTS.**

The lower court erred in granting summary judgement to Respondents because the court failed to recognize that the inferences arising in and from the evidence in a light most favorable to Appellant created a genuine issue of material fact as to Respondents’ actual and/or constructive notice.

Summary judgment is appropriate when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), SCRPC. When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. *David v. McLeod Regional Medical Center*, 367 S.C. at 242, 626 S.E.2d 1 (2006). Moreover, since it is a drastic remedy, summary judgment should be cautiously invoked so that a litigant will not be improperly deprived of a trial on disputed factual issues. *Conner v. City of Forest Acres*, 348 S.C. 454, 560 S.E.2d 606 (2002). “The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder.” *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Baugus v. Wessinger*, 303 S.C. 412, 401 S.E.2d 169 (1991).

“[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 in order to withstand a motion for summary judgment.” *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

In the case at bar there was more than a scintilla of circumstantial evidence upon which it could be inferred that Respondent was negligent. As stated above, Wanda V. Berry testified that the floor was greasy. (Wanda V. Berry Deposition Transcript Page 36 Lines 8-25) Moreover, the video evidence shows that at 13:15:37, Respondent’s employee is sweeping the floor in the exact spot where Wanda V. Berry falls approximately 13 minutes later at 13:28:52. Also, the video confirms that no foreign substance is placed on the floor during the 13 minute interval. In addition, the video shows that after Wanda V. Berry’s fall the said employee’s feet also slid on

the spot where Mrs. Berry fell and she also altered her gait to step over the spot where Appellant fell and then placed a wet floor sign on the exact spot.(Video)

Based on these facts, it could be inferred that a greasy substance was on the floor based on Appellants testimony and the fact that the employee's feet slid. From the fact that the employee altered her gait and stepped over the spot where Mrs. Berry fell it could be inferred that the employee acknowledged something on the floor. The fact that the employee placed a wet floor sign on the spot where Appellant fell could lead to the inference that something wet was on the floor. It could be further inferred that since the video does not show any foreign substance being placed on the floor during the thirteen minute interval from the time the fall location was being swept by the employee until the time of the fall, that the slippery substance was on the floor when the employee was sweeping the spot and she did not adequately eliminate the dangerous condition.

Finally, the Appellants submitted uncontested expert testimony that Respondent was negligent.(Affidavit of Howard Cannon)

Considering the above facts constituting circumstantial evidence of negligence, Summary Judgment should have been denied.

**3. BECAUSE THERE WAS EVIDENCE OF A GENUINE ISSUE OF MATERIAL FACT AS TO RESPONDENTS NEGLIGENCE THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGEMENT ON APPELLANT GARY A. BERRY'S LOSS OF CONSORTIUM CLAIM.**

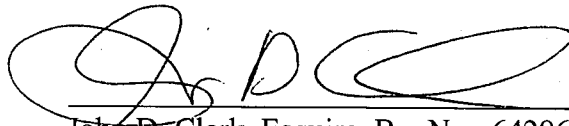
Based on the fact that there was a genuine issue of material fact as to Respondent's negligence, Summary Judgment on Appellant Gary A. Berry's loss of consortium claim should have been denied.

**CONCLUSION**

For the reasons stated, this Court should reverse the order of the Circuit Court granting summary judgment.

January 6, 2020

Respectfully submitted,

A handwritten signature in black ink, appearing to read "J. D. Clark", written over a horizontal line.

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In The Court of Appeals

APPEAL FROM SUMTER COUNTY  
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Appellate Case No. 2019-000877

Wanda V. Berry and Gary A. Berry, Appellants

v.

Scott Richardson d/b/a Chick-Fil-A of Sumter Mall, Respondent.

**PROOF OF SERVICE**

I certify that I have served Appellants' Initial Brief and Designation of Matter to be Included in the Record on Appeal on Respondent by depositing a copy of it in the United States Mail, postage prepaid, on January 6, 2020, addressed to their attorneys of record, Joseph S. McCue, Esquire, Post Office Box 12487, Columbia, South Carolina 29211.

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January 6, 2020

The Honorable Jenny Abbott Kitchings  
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Re: Wanda V. Berry and Gary A. Berry vs. Scott Richardson d/b/a Chick-fil-A of Sumter Mall  
Docket No.: 2014-CP-43-2776  
Appellate Case No.: 2019-000877

Dear Ms. Kitchings:

Enclosed please find Appellants' Initial Brief and Designation of Matter to be included in the Record on Appeal in referenced to the above case along with Proof of Service of same.

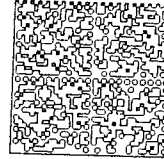
If you have any questions or concerns, please feel free to contact me.

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