THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

The Honorable Robert E. Hood, Circuit Court Judge

Case No.: 2017-CP-40-05549

Vanessa Wiggins,.....Appellant,

v.

ALDI, Inc.....Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Plaintiff Vanessa Wiggins ("Plaintiff") filed suit in Richland County Court of Common Pleas against Respondent ALDI, Inc. ("ALDI" or "Respondent") on September 14, 2017 alleging she sustained injuries arising out of a fall on June 17, 2017 in an ALDI store located at 1240 Longreen Parkway in Columbia, South Carolina. (Summons and Complaint, filed Sept. 14, 2017, R. pp. 24-29). ALDI filed its Answer on October 20, 2017, denying the allegations and raising a number of affirmative defenses. (Answer, filed Oct. 20, 2017, R. pp. 30-35).

Following discovery, ALDI moved for summary judgment, which was denied on November 20, 2018. (Order Denying Defendant's Motion for Summary Judgment, filed Nov. 20, 2018, R. pp 15-21). Pursuant to a Consent Scheduling Order, issued that same day, the matter was set for hearing for the week of December 10, 2018. (Consent Scheduling Order, filed Nov. 20, 2018, R. pp. 22-23).

At a December 10, 2018 roster meeting, Plaintiff's counsel requested a one week continuance, to the week of December 17, 2018, because Plaintiff was not feeling well. (*See* Email from Brett Bayne to Catherine Ortmann, Hon. Robert Hood's law clerk, re: Vanessa Wiggins v. ALDI, Dec. 10, 2018 11:10AM, R. p. 343). On Wednesday, December 12, 2018, Plaintiff's counsel sent out trial subpoenas – one to Vivian Ashford and another to Carol Rice, who is an ALDI employee. (R. p. 117, line 22 – p. 118, line 1). On Friday, December 14, 2018, Plaintiff moved to continue and/or dismiss the suit without prejudice. (Notice of Motion and Motion to Continue, filed Dec. 14, 2018, R. pp. 33-35).

Plaintiff's motion was heard and denied on Monday, December 17, 2018. (R. pp. 106-131). Judge Hood indicated that he had received an email from Plaintiff's counsel that morning seeking a voluntary dismissal without prejudice. (R. p. 108, lines 6-9). Plaintiff's counsel

argued that the dismissal was necessary because: 1) Plaintiff had advised that she was scheduled for another surgery in the spring, 2) they needed to depose additional expert witnesses,[1] and 3) Plaintiff had just "retained co-counsel, Mr. Jake Moore in this matter." (R. p. 108, line 20 – p. 109, line 11). Mr. Moore had not filed a notice of appearance and was not present at the December 17 hearing. (R. p. 110, lines 16-21). Defense counsel discussed the December 10, 2018 roster meeting and noted that both parties had agreed to postpone the trial until the week of December 17. Defense counsel also stated that, "[o]n Thursday night, the – that would be 13th, I received a phone call from Ms. Burnside who at that time stated that she just realized that they had not deposed any of the doctors in the case and that they needed to do that before they could proceed to trial," despite the fact that they had had 18 months in which to do so. (R. p. 115, lines 5-23; p. 116, lines 12-23). Defense counsel argued that the parties had agreed to a trial date, they had flown people (clients) in from out of state and were prepared for trial. (R. p. 122, lines 17-20). Defense counsel also noted that some expert witnesses were out of state. (R. p. 129, lines 8-15). Defense counsel explained, "we're ready to go. We are here, cleared the scales for the second week in a row. The evidence is ready, and that's where we stand." (R. p. 130, lines 13-15).

In denying Plaintiff's motion to continue the case or for a voluntary dismissal without prejudice, Judge Hood advised Plaintiff's counsel that he could either proceed to trial, or he could dismiss the case with prejudice and allow Plaintiff to appeal it immediately. Plaintiff's counsel indicated she would need to discuss the options with Plaintiff. (R. p. 130, line 23 – p. 131, line 13). Plaintiff made the decision at that time to proceed with trial. (*See* Email from

[1] *See* (R. p. 108, line 25 – p. 109, line 7 (Plaintiff's counsel explaining she could not confirm that Plaintiff's treating physician would be able to testify during the week of December 17); p. 130, lines 10-22 (Plaintiff's counsel explaining that Plaintiff was scheduled for another surgery and "one of our biggest concerns [is] that we don't have a full scope of the damages")).

Kelly Burnside to Catherine Ortmann, Hon. Robert Hood's law clerk, re: Vanessa Wiggins v. ALDI, Dec. 17, 2018 12:52PM, R. p. 344 (advising the court "[m]y client has decided she does want to move forward with trial on Wednesday, December 19, 2018 because her motion for voluntary dismissal has been denied")).

Trial in this matter was commenced on December 20, 2018.[2] Two witnesses testified on Plaintiff's behalf, Vivian Ashford and Plaintiff. At the close of Plaintiff's case, Defendant moved for a directed verdict pursuant to Rule 50, SCRCP, on all causes of action. (R. p. 325, line 21 – p. 335, line 20). Following argument by Plaintiff's counsel, (R. p. 335, line 23 – p. 338, line 9), Judge Hood ruled from the bench granting Defendant's motion for a directed verdict. (R. p. 338, line 16 – p. 342, line 13).

On January 25, 2019, the Court filed a formal Order Granting Directed Verdict. The Court noted that the facts of this case are substantively similar to those in Ford v. Bank of America, 277 Ga. App. 708, 627 S.E.2d 376 (Ga. Ct. App. 2006), and concluded that Plaintiff failed to establish that the wheeled chair in this case constituted a dangerous condition. To the extent the chair on wheels could be construed to constitute a dangerous condition, however, such condition was open and obvious and Plaintiff had a duty to exercise ordinary care for her own safety. Plaintiff also failed to produce any evidence that ALDI was or should have been aware of any dangerous or defective condition with the chair or that it did anything to create a dangerous or defective condition with the chair. (Order Granting Directed Verdict, filed January 25, 2019, R. pp. 1-14).

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[2] In denying a late motion by Plaintiff to add an expert witness, at the hearing Judge Hood pointed out that the parties had agreed to the trial date. He explained that he had "created a system over this past year in this county ... where the judge essentially was letting the parties pick the weeks they wanted to go to court .... And last week was picked." (R. p 146, lines 12-22).

Plaintiff timely appealed to this Court.

FACTUAL BACKGROUND

Plaintiff testified that she was a customer at an ALDI store on June 17, 2017. After shopping for about an hour, there was a problem completing her check-out transaction. (R. p. 251, lines 3-24). After standing at the checkout for approximately 20 minutes, Plaintiff "asked the cashier to get me a chair because my knees was hurting," which the cashier did. (R. p. 252, lines 2-17). The chair was an office chair with wheels. (R. p. 253, lines 5-6; p. 309, lines 16-20). Plaintiff could not sit on the first chair the cashier brought because it was too high. The cashier got a second chair for Plaintiff which also was an office chair on wheels. (R. p. 253, lines 18-21). Plaintiff attempted to sit on the chair but she fell. She testified, "[s]o when I felt the chair hit [the back of my leg], I thought she was standing there with the chair. And so I proceeded to sit down. And when I proceeded to sit down, I ended up hitting the floor." (R. p. 253, line 24 – p. 254, line 10).[3]

Although Plaintiff testified that, as she began to sit down on the chair, she thought the cashier was standing behind her, holding the chair, (R. p. 254, lines 4-14; p. 263, line 24 – p. 264, line 4), a video surveillance tape, which Plaintiff agreed fairly and accurately reflects what happened, (R. p. 267, lines 7-20), reveals otherwise. (Defendant's Trial Exh. No. 3). At about 0:44, the video surveillance tape shows Plaintiff and the cashier talking, at which point the cashier gets a chair for Plaintiff. Around the 1 minute mark, the cashier is attempting to adjust

[3] Plaintiff's suggestion that the allegations that the cashier "began to assist her in sitting down," but that "unknown to Plaintiff, however, and without warning the [cashier] walked away" appear in the Complaint, (App. Br. p. 5), is plainly contradicted by the Complaint itself, which merely alleges that Plaintiff was shopping at the ALDI on the date in question, that "an employee of defendant provided a chair to Plaintiff," and that "Plaintiff attempted to take a seat on the chair provided, but the chair came from beneath Plaintiff, causing Plaintiff to fall to the ground ..." (Complaint, R. p. 5, ¶¶ 3-5).

the first chair and, at around 1:13 goes in search of another chair. Plaintiff can be seen with her hand on the first chair, which rolls a little bit. At approximately 1:20, the cashier places the second chair behind Plaintiff. The cashier is seen turning to speak to Plaintiff, who is facing the cashier while the cashier wheels the first chair away. At approximately 1:25-1:28, Plaintiff, after another look in the direction of the cashier, backs into the chair and falls, pulling a cart over with her.

At the hearing, Plaintiff was asked:

Q: You know chairs on wheels, they roll, don't you?

A: I would assume so.

Q: Well, you testified that you know, not only do they roll, but they roll when you try to sit down in them, didn't you?

A: Yes.

Q: So you were aware, on that day in the ALDI, that if you tried to sit in a chair with wheels on it, it would move as you tried to sit down, weren't you?

A: Yes. It – it has wheels. It will –

Q: It's –

A: -- move.

Q: It's common sense, isn't it?

A: Yes.

(R. p. 310, lines 7-20). Plaintiff acknowledged specifically that she knew the second chair had wheels on it. (R. p. 311, line 15 – p. 312, line 2). Plaintiff testified that she did not ask the cashier for help sitting down nor did she tell the cashier she needed help. In fact, she agreed she did not need help in order to sit in a chair:

Q: Right. When you – when she brought you that chair, you didn't ask her for help sitting down in the chair, did you?

A: No.

Q: You didn't tell her you needed help with sitting down in the chair, did you?

A: No.

Q: You didn't need help sitting down in a chair at that time, did you?

A: In my opinion, it's a chair with wheels on it that has no arms. I personally, with common sense, would stand there and hold a chair for a person until they sat down.

Q: Were you physically able to sit down in a chair with wheels on in June of 2017?

A: Yes.

. . .

Q: And at no time during that process did you say, "Hey, miss cashier, I have trouble sitting down; I need you to help me." You never said that, did you?

A: No.

Q: Because you didn't need help.

A: No. I didn't ask her for help to sit down.

(R. p. 312, line 17 – p. 313, line 18). Plaintiff confirmed the cashier did not give her any instruction to sit down, nor did Plaintiff tell the cashier, "Hey hold the chair for me; I need help sitting down in this chair." (R. p. 313, line 22 – p. 314, line 8).

Plaintiff also agreed that she had no reason to believe the chair was defective or dangerous in any way. (R. p. 315, line 21 – p. 316, line 16). She also stated that, as far as she knew, there was nothing wrong with the shopping cart that she pulled on top of herself when she fell. (R. p. 317, lines 15-24). She testified that she did not examine either the chair or the floor. (R. p. 316, line 25 – p. 317, line 14). Plaintiff testified that, although she saw the cashier bringing the second chair, she did not turn to verify that the chair was behind her or to make sure it was in the right spot before sitting down. (R. p. 182, lines 9-19).[4]

Vivian Ashford, an acquaintance of Plaintiff's, testified that she was shopping at the ALDI's on the day Plaintiff fell. She could not overhear the conversation between Plaintiff and the cashier. (R. p. 232, line 10 – p. 233, line 1; p. 238, lines 10-18). Ms. Ashford testified that the chair had wheels but no arms. (R. p. 233, lines 11-15). She testified that the cashier walked

[4] Plaintiff acknowledged that, at her prior deposition, she testified that the cashier actually pulled the chair out from under her, but she later changed her story because, "[w]ell, I didn't find out till – how it actually happened till I saw the video." (R. p. 318, line 15 – p. 319, line 3).

away from the chair and that, when Plaintiff went to sit down, the chair began to roll and Plaintiff fell. (R. p. 233, line 16 – p. 234, line 8). Ms. Ashford testified that Plaintiff was looking down right before she fell, but said she could not see whether Plaintiff was talking with the cashier as she walked away "[b]ecause like I said, the store was crowded." (R. p. 235, lines 14 – p. 236, line 1). As noted above, the video shows Plaintiff and the cashier looking at each other as the cashier walked away with the first chair, prior to Plaintiff attempting to sit on the chair. (Defendant's Trial Exh. No. 3, Video at 1:25-1:28).

At the end of Plaintiff's testimony, she rested her case. (R. p. 323).

STANDARD OF REVIEW

On appeal of a directed verdict, the reviewing court applies the same standard as the circuit court "by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party." Richardson v. Piggly Wiggly Cent., Inc., 404 S.C. 231, 233, 743 S.E.2d 858, 859 (Ct. App. 2013). However, "[a]n appellate court will reverse the trial court's ruling on a directed verdict motion only when there is no evidence to support the ruling or when the ruling is controlled by an error of law." Repko v. County of Georgetown, 424 S.C. 494, 500, 818 S.E.2d 743, 746 (2018). In addition, "[a]n appellate court may not reverse a lower court order based on a legal or factual premise not advanced by party who lost at the trial court level." Id. at 503, 818 S.E.2d at 748.

The denial of a motion for a continuance or dismissal without prejudice is reviewed under the deferential abuse of discretion standard. Crout v. South Carolina Nat'l Bank, 278 S.C. 120, 123, 293 S.E.2d 422, 423 (1982).

ARGUMENTS

I. The Circuit Court properly granted ALDI a directed verdict.

In South Carolina, a shopkeeper owes its invitees "a duty of ordinary care to keep his premises in a reasonably safe condition." Richardson, 404 S.C. at 234, 743 S.E.2d at 859. However, a "merchant is not an insurer of the safety of his customer but owes only the duty of exercising ordinary care to keep the premises in reasonably safe condition." Garvin v. Bi-Lo, Inc., 343 S.C. 625, 628, 541 S.E.2d 831, 832 (2001). "It is elementary that in order for a plaintiff to recover damages there must be proof not only of injury, but also that it was caused by the actionable negligence of the defendant. It should also be kept in mind that the doctrine of *res ipsa loquitur* does not apply in this State." Hunter v. Dixie Home Stores, 232 S.C. 139, 144, 101 S.E.2d 262, 265 (1957).

In order to recover, a plaintiff must show that a dangerous condition exists, and either that the defendant created the dangerous condition or that the defendant had actual or constructive knowledge of the condition. *E.g.*, Pennington v. Zayre Corp., 252 S.C. 176, 178, 165 S.E.2d 695, 696 (1969); Pringle v. SLR, Inc., 382 S.C. 397, 404, 675 S.E.2d 783, 787 (Ct. App. 2009) ("[t]o recover damages for injuries caused by a dangerous or defective condition on a defendant's premises, a plaintiff 'must show either (1) that the injury was caused by a specific act of the respondent which created the dangerous condition; or (2) that the respondent had actual or constructive knowledge of the dangerous condition and failed to remedy it'"). If a dangerous condition is open and obvious, however, a shopkeeper "is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." Richardson, 404 S.C. at 234, 743 S.E.2d at 860.

A. Plaintiff presented no evidence that a dangerous condition existed.

An underlying premise of landowner liability is that the plaintiff must show a dangerous condition existed on the merchant's property. Directed verdict was proper in this case because Plaintiff failed to present any evidence that the chair, floor or shopping cart constituted a dangerous condition.

In Shain v. Leiserv, Inc., 328 S.C. 574, 493 S.E.2d 111 (Ct. App. 1997), the plaintiff was injured when his foot crossed over the foul line at a bowling alley, which had been treated with conditioning oil to reduce friction on the bowling balls. This Court upheld the lower court's grant of summary judgment because the plaintiff failed to present evidence that the condition of the bowling lanes was, in fact, hazardous. 328 S.C. at 576, 493 S.E.2d at 112. Similarly, in Howard v. K-Mart Discount Stores, 293 S.C. 134, 359 S.E.2d 81 (Ct. App. 1987), this Court reversed a jury verdict because, "[t]estimony that a floor was slick, without evidence that the slickness constituted an unsafe condition, is insufficient to present a jury question on a merchant's conduct in the care of his floors and its causal relationship to the plaintiff's fall." 293 S.C. at 137-138, 359 S.E.2d at 83. Where the evidence is insufficient as a matter of law to demonstrate a merchant created a dangerous condition, directed verdict is appropriate. *See* Garvin, S.C. at 628, 541 S.E.2d at 833.

As the Circuit Court properly found in the instant case, after reviewing numerous cases from other jurisdictions involving chairs with wheels,[5] providing Plaintiff with a chair that had wheels, on Plaintiff's request for a chair, simply does not constitute a dangerous or hazardous condition. In Ford v. Bank of Am. Corp., 277 Ga. App. 708, 627 S.E.2d 376 (Ga. Ct. App.

[5] Where South Carolina courts have not addressed a specific fact pattern, as is the case here, it is appropriate to look to other jurisdictions for guidance. *E.g.*, Anderson v. Winn-Dixie Greenville, Inc., 257 S.C. 75, 79, 184 S.E.2d 77, 78 (1971) (looking to persuasive precedent from other jurisdictions when addressing an issue of first impression).

2006), the Georgia Court of Appeals addressed facts substantively similar to those in this case. There, the plaintiff was injured when she started to sit down on a bank chair that had wheels and it slipped out from under her, causing her to fall. She had visited the bank numerous times and, although she could not recall whether she had noticed that the chair had wheels before she attempted to sit in it, nothing obstructed her view of the chair and she had sat in chairs with wheels before. She could not identify what caused the chair to slip out from under her and did not know whether the chair was defective. 277 Ga. App. at 709, 627 S.E.2d at 378. As is the case in South Carolina, in Georgia, "[p]roof of an injury, without more, is not enough to establish a proprietor's liability."[6] In fact, before a plaintiff gets to the necessity of proving either that the defendant created the condition or knew or should have known of its existence, she must prove that a dangerous condition existed. "Without first establishing that a dangerous condition existed, the plaintiff cannot establish that the defendant knew about the danger and therefore cannot recover." 277 Ga. App. at 709, 627 S.E.2d at 378. As is the case here, the plaintiff failed to present any expert testimony that the chair was hazardous, or any rule or regulation violated by the chair, and "[m]erely stating that a condition is dangerous does not constitute evidence that it is so." 277 Ga. App. at 709-710, 627 S.E.2d at 378; *see also* Weldon v. Del Taco Corp., 194 Ga. App. 174, 390 S.E.2d 87 (Ga. Ct. App. 1990) (summary judgment proper where plaintiff failed to present any evidence that the chair or the floor in the restaurant constituted a dangerous condition).

Similarly, summary judgment was granted in Jones v. United States, 194 F. Supp. 3d 849 (E.D. Wisc. 2016), a case involving a chair on wheels in a Department of Veterans Affairs clinic. The plaintiff had been sitting on the chair, stood up and then missed the chair when she went to

[6] *E.g.*, Hunter, 232 S.C. at 144, 101 S.E.2d at 265 ("the doctrine of *res ipsa loquitur* does not apply in South Carolina").

sit back down. The district court explained that "wheeled chairs are in homes and offices everywhere and yet nowhere are they considered hazardous ..." 194 F. Supp. 3d at 853. The same result was reached by a New York appellate court in Granison v. Builders Square, Inc., 266 A.D.2d 922, 923, 697 N.Y.S.2d 800, 801 (N.Y. App. 1999) (holding that a chair on roller wheels did not amount "to a dangerous or defective condition").

Plaintiff argued at some point below that, because the chair was on a hard floor as opposed to on carpet, it presented a dangerous condition. However, the Louisiana Court of Appeals rejected just such a suggestion in Smith v. Marks Isaacs Co., 147 So. 118, 1933 La. App. LEXIS 1608 (La. Ct. App. 1933). There, the chair, which was equipped with "rollers," was on a marble floor in a beauty shop. "We cannot believe that such a chair if safe on a linoleum floor could be said to be unsafe just because of its use on a marble floor." 147 So. at 119, 1933 La. App. LEXIS 1608 at **4; *cf.* Streets v. Chesrown Enters., 2004 Ohio App. LEXIS 405 **12 (Ohio Ct. App. 2004) (concluding there was no evidence that a chair with wheels on a linoleum floor was inherently dangerous).

Finally, Williams v. Commonwealth, 53 Va. Cir. 399, 2000 Va. Cir. LEXIS 478 (Va. Cir. Ct. 2000), discussed in Jones, is instructive. There the plaintiff, a large woman, was "directed" by a dental student working for the medical college's dentist, to sit on a chair. The plaintiff took that to mean a "dentist's chair," which was round with a low back and on wheels. When the plaintiff went to sit on the chair, it "went out from under" her and she fell. She could not explain why or what caused her to fall. 53 Va. Cir. at 400, 2000 Va. Cir. LEXIS 478 **2. Assuming for purposes of the appeal that the plaintiff was directed to sit in the chair by a person in a position of authority, the court nonetheless set aside the jury verdict in plaintiff's favor, explaining that the plaintiff failed to "prove how and why the accident happened. All she said was that the chair

went out from under her when her buttocks contacted it. She did not say whether her buttocks made contact with the entire seat of the chair or whether, like the overwhelming majority of people have done at least once in their lives, she simply 'missed' the seat .... She presented no evidence that the chair, if sat upon properly, would not have supported her weight or would otherwise have caused her to fall." 53 Va. Cir. at 401, 2000 Va. Cir. LEXIS 478 **5-6. Similarly, here, the bare fact that Plaintiff fell does not indicate that the chair, the floor or the cart were in a defective or dangerous condition. Having failed to present any evidence of a dangerous condition, Plaintiff's claim failed and the directed verdict was proper. *See* Pringle, 382 S.C. at 404-405, 675 S.E.2d at 787 (summary judgment proper where the plaintiff failed to show that a residential chair used in a restaurant "in and of itself is a dangerous condition").

B. To the extent a chair on wheels on a concrete floor is a dangerous condition, it was open and obvious.

Even assuming, solely for the sake of argument, that a chair on wheels constitutes a dangerous condition, Plaintiff's testimony establishes that she knew the chair had wheels, she knew that chairs with wheels move and, moreover, that it is common sense that, when you try to sit on a chair with wheels, it will move as you sit down. (R. p. 310, lines 7-20). She saw the cashier bring her not one, but two different chairs, both of which had wheels. (R. p. 311, line 15 – p. 312, line 2). Plaintiff can be seen watching the cashier walk away from her with the first chair before attempting to sit on the second chair. (Defendant's Trial Exh. No. 3, Video at 1:25-28). Patently, the "open and obvious nature of the hazard serves as the warning and the owner may reasonably expect that persons entering the premises will discover those dangers and take measures to protect themselves." Streets, 2004 Ohio App. LEXIS 405 **8; *see also* Richardson, 404 S.C. at 234, 743 S.E.2d at 860 (a landowner "is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to

them, unless the possessor should anticipate the harm despite such knowledge or obviousness").

As the federal district court found in Jones, chairs with wheels are not inherently dangerous and, "any 'danger' arising out of the fact that the chair had wheels was an obvious one." 194 F. Supp. 3d at 853. The same result was reached in Granison, 266 A.D.2d at 923, 697 N.Y.S.2d at 801, where the New York appellate court held a chair with rollers was not inherently dangerous and that "there is no duty to warn against a condition that can be readily observed by the use of one's senses." Likewise, the claim in Streets failed because "[i]t is clear that even an invitee has a duty to exercise care for his or her own safety," and the plaintiff there "simply failed to look at the legs of the chair, misjudged the location of the chair, and did not grab onto the chair as she went to sit down." 2004 Ohio App. LEXIS 405 **10-11.

South Carolina law is in accord with respect to dangers that are open and obvious. For example, in Richardson, the plaintiff visited the Piggly Wiggly on a rainy day. It was raining when she entered the store and raining when she exited the store. Upon exiting, she fell on the wet concrete outside the store. This Court held that, because the plaintiff knew it was raining when she entered the store, "[t]he fact that the sidewalk was wet and slippery when she left the store should have been apparent." 404 S.C. at 234, 743 S.E.2d at 860. Similarly, in Meadows v. Heritage Vill. Church & Mission. Fellowship, 305 S.C. 375, 409 S.E.2d 349 (1991), the Supreme Court reversed a jury verdict in favor of plaintiff, holding that the landowner had no duty to warn the plaintiff "about the wet grass because it was a natural condition, the peril of which was obvious."[7] Because the fact that the chair was on wheels and would move was not only open and

[7] There is no evidence whatsoever that would support an argument, which Plaintiff has not even raised, that the exception to this rule might apply in this case, *i.e.*, where the landowner "should anticipate that the invitee will nevertheless encounter the condition, or that the invitee is likely to be distracted." *See*, Callander v. Charleston Doughnut Corp., 305 S.C. 123, 126, 406 S.E.2d 361, 363 (1991) (store owner testified that he knew some of his elderly customers "customarily

obvious, but admittedly known to Plaintiff, (R. p. 310, lines 7-20; p. 311, line 15 – p. 312, line 2), no duty to warn or take other steps to protect Plaintiff arose and, as a matter of law, the grant of a directed verdict was proper.

C. Plaintiff's argument that ALDI "voluntarily undertook to assist" her in sitting down is not preserved for appellate review and, in any event, lacks merit.

On appeal, Plaintiff appears to switch streams and argue that the directed verdict should be reversed because ALDI's cashier voluntarily undertook to assist her and, "once the cashier began to provide and assist Wiggins with the chair and in sitting down the cashier had a duty to provide assistance in a careful manner." (App. Br. pp. 11-12). However, this argument is not preserved for appellate review and, furthermore, lacks merit. There is no evidence that the cashier volunteered to assist Plaintiff in *sitting down* but, instead, simply responded to her request for a chair in which to sit. Plaintiff's Complaint merely alleged that "an employee of defendant provided a chair to Plaintiff," and that "Plaintiff attempted to take a seat on the chair provided, but the chair came from beneath Plaintiff, causing Plaintiff to fall to the ground ..." (Complaint, R. p. 27, ¶¶ 3-5). At her deposition, Plaintiff asserted that the cashier actually pulled the chair out from under her, but she later changed her story testifying at the hearing that, "[w]ell, I didn't find out till – how it actually happened till I saw the video." (R. p. 318, line 15 – p. 319, line 3). At the hearing, Plaintiff testified that she, personally "with common sense, would stand there and hold a chair for a person until they sat down." (R. p. 313, lines 1-4). However, the word "volunteer" was not uttered at the December 20, 2018 hearing. (R. pp. 132-342).

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backed up to the stools in order to sit down"); *cf.*, Lowrimore v. Fast Fare Stores, Inc., 299 S.C. 418, 385 S.E.2d 218 (Ct. App. 1989) (the fact that the shopkeeper's employee knew that the plaintiff was an amputee meant plaintiff "was entitled to greater care than those more physically fit than he"). Here, Plaintiff testified that she did not need help sitting and did not tell the cashier she needed any assistance in sitting in the chair but, instead, was physically able to sit on the chair on her own. (R. p. 312, line 17 – p. 313, line 18).

Because she did not raise it in her Complaint or at the hearing, this argument is not preserved for appellate review. An argument is not preserved for appeal where it is raised for the first time on appeal. Hotel & Motel Holdings, LLC v. BJC Enters., LLC, 414 S.C. 635, 657, 780 S.E.2d 263, 275 (Ct. App. 2015), *citing* State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005).

Furthermore, to the extent Plaintiff articulated at the Circuit Court level an argument that ALDI's cashier voluntarily undertook to assist her in sitting in the chair, which Respondent denies, the Court did not rule on that issue. As a result, and because Plaintiff did not file a motion to alter or amend in order to have this argument addressed, it is not preserved for appellate review. Shain, 328 S.C. at 578, 493 S.E.2d at 113 (an issue not ruled on by the trial court is not preserved for appellate review); *see also* Creighton v. Coligny Plaza Ltd. P'ship, 334 S.C. 96, 108, 512 S.E.2d 510, 516 (Ct. App. 1998) (issue not preserved "because the trial judge never ruled on the grounds the [plaintiffs] raise on appeal").

Even if this issue is preserved for appellate review, which Respondent denies, it lacks merit. In response to Plaintiff's argument below that it was "common sense" or a "reasonable expectation" that the cashier would remain behind her and hold the chair for her, as a mature adult with no discernable disability, it is presumed that she is able to take care of herself. In Smith, after determining that a chair on rollers on a marble floor was not inherently dangerous, the Louisiana Court of Appeals considered the plaintiff's argument that the defendants' employee should have assisted her in getting up from the chair. The Court concluded that the defendant was not liable "because there was no reason for [the employee] to believe that such assistance was necessary," because the plaintiff gave no indication that she needed assistance. Instead, because the plaintiff "was 'above the full age of majority,'" the presumption arose "that

she was able to take care of herself." 147 So. at 119, 1933 La. App. LEXIS 1608 at **6. There simply is no duty cognizable at law imposed on a shopkeeper to hold a chair for a patron.

The two cases cited by Plaintiff in support of her argument, Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991) and Johnson v. Jackson, 401 S.C. 152, 735 S.E.2d 664 (Ct. App. 2012), are factually distinguishable and, therefore, are inapposite. In Russell, the plaintiff was highly intoxicated, had been expelled from a restaurant and then engaged in a physical altercation in which he sustained a severe head laceration that was bleeding. Although some people were attempting to assist the plaintiff, when the police arrived, they took charge of the situation, eventually telling the plaintiff to leave the premises but offering no assistance with his injuries. The plaintiff later was found dead in a creek beneath a railway trestle. The claim was dismissed on the pleadings. However, citing Section 323 of the Restatement of Torts 2d, and under a liberal construction of the pleadings, the Supreme Court held that the complaint sufficiently stated a cause of action because the police had taken control of the situation, preempting the other individuals' attempts to provide aid to the plaintiff. 305 S.C. at 89-90, 406 S.E.2d at 339-340. Here, in contrast, there is no evidence that Plaintiff was unable to care for herself, had been injured or that other patrons were assisting her, which assistance was pre-empted by ALDI. Instead, she simply asked for a chair which the cashier provided.

Of note, as referenced in Russell, Section 323 of the Restatement 2d provides that "[o]ne who undertakes, gratuitously or for consideration, to render services to another which he should recognize as *necessary for the protection of the other's person or things*, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking," under two specific conditions. 305 S.C. at 89, 406 S.E.2d at 340 (emphasis added). Here, there is no evidence whatsoever that ALDI undertook any action "necessary for

the protection" of Plaintiff's person. She asked for a chair. The cashier provided a chair.

As was the case in Hendricks v. Clemson Univ., 353 S.C. 449, 578 S.E.2d 711 (2003), here, it is highly questionable whether the rule applying to voluntary undertakings, which has "thus far been limited to situations in which a party has voluntarily undertaken *to prevent physical harm*," 353 S.C. at 458, 578 S.E.2d at 715 (emphasis added), even applies. In Johnson v. Robert E. Lee Acad., Inc., this Court observed that "recognition of a voluntarily assumed duty in South Carolina jurisprudence is rooted in section 323 of the Restatement 2d of Torts." 401 S.C. 500, 504 n.3, 737 S.E.2d 512, 514 n.3 (Ct. App. 2012). Section 323, in turn, "contemplates a party relying on the rendering of services to another for the other's protection." 401 S.C. at 505, 737 S.E.2d at 514. There simply is no evidence that services or assistance was rendered to Plaintiff for her protection or to prevent physical harm.

In Johnson, the plaintiff was injured while he was assisting in loading computers into a truck that the defendant had directed his co-worker to park in a particular location. The defendant "maintained primary control of the loading area, knowingly and frequently managed the pick-up process, and directed [the co-worker] where to park the day of the accident." Based on those facts, this Court held it was a jury question whether the defendant voluntarily undertook a duty to the plaintiff. 401 S.C. at 159-160, 735 S.E.2 at 667-668. In contrast, here there are no conflicting facts as to whether ALDI voluntarily undertook to assist Plaintiff with sitting down in the chair. The evidence shows that Plaintiff asked the cashier for a chair. (R. p. 252, lines 2-17). The cashier brought her not one, but two chairs, both of which had wheels on the bottom. Plaintiff knew both chairs had wheels on the bottom and that the chair would roll. (R. p. 310, lines 7-20; p. 311, line 15 – p. 312, line 2). Plaintiff did not ask the cashier for help sitting down and, furthermore, testified that she did not need assistance in sitting in a chair. (R. p. 312, line 17

– p. 313, line 18). The fact that Plaintiff testified that she thought the cashier was standing behind her, holding the chair, or that that is what she "personally" would have done, does not create any legally cognizable duty on the part of ALDI for the cashier to have done so. Furthermore, as noted above, Plaintiff's assertion that "it was absolutely reasonable for Appellant to believe the cashier was continuing to assist by holding the chair," (App. Br. p. 11), is belied by the plain evidence of the video, which shows Plaintiff watched the cashier walking away, just prior to backing into the chair in an attempt to sit. (Defendant's Trial Exh. No. 3, Video at 1:25-1:28).

Plaintiff has not raised any reasonably arguable question of fact regarding whether ALDI volunteered to help her sit down or voluntarily undertook any other duty that it breached. As a result, the directed verdict was proper and should be affirmed.

II. The Circuit Court properly denied Plaintiff's last-minute motion for dismissal without prejudice.

The Circuit Court properly denied Plaintiff's last-minute request for a dismissal without prejudice. Here, as was the case in Newman v. Old West, Inc., 286 S.C. 394, 334 S.E.2d 275 (1985), the plaintiff "had sufficient notice that the above cause would be called for trial." In Newman, the Supreme Court found that the fact the defendant had expended large sums of money in preparing witnesses for trial constituted prejudice. 286 S.C. at 396, 334 S.E.2d at 276. As noted above, this matter has been pending for 18 months, Respondent has expended both time and money preparing for trial, Plaintiff had submitted subpoenas for ALDI employee, Carol Rice, and another witness to appear at trial, and Plaintiff sought the dismissal at the last minute. (R. p. 117, line 22 – p. 118, line 1). Consistent with the result reached in Newman, denial of Plaintiff's request was appropriate.

The facts in Crout are closely analogous to those in the case at hand. There, as is the case

here, the parties attended a pretrial conference at which both plaintiff and defendant stated they were ready for trial. Just prior to the trial, however, the plaintiff sought a voluntary dismissal without prejudice. Observing that what is currently Rule 41(a)(2), SCRCP, "'vests discretionary power in the presiding judge,'" the Supreme Court instructed that the proper standard of review of a denial of a motion for a continuance or voluntary dismissal without prejudice is abuse of discretion. 278 S.C. at 123, 293 S.E.2d at 423. The facts that the Supreme Court found significant in Crout are the facts that that case shares with the instant case: the parties had attended a pretrial conference at which both sides agreed they were ready for trial and the plaintiff waited until just days before trial was scheduled to begin to move for a continuance or voluntary dismissal without prejudice. "When a case has advanced to the trial state, courts are reluctant to grant the plaintiff a voluntary dismissal without prejudice absent a compelling reason." 278 S.C. at 123, 293 S.E.2d at 423.

Similarly, the Fourth Circuit found sufficient legal prejudice to the defendant in Paturzo v. Home Life Ins. Co., 503 F.2d 333 (4th Cir. 1974),[8] where the "parties had extensively prepared for trial when plaintiff made his motion to dismiss," which was made on the morning of the trial. 503 F.2d at 335. There, as is the case here, the plaintiff previously had sought a brief postponement of the trial date due to a scheduling issue with the plaintiff, which request was granted. There, as is the case here, "[d]uring the course of all of the above-described proceedings, plaintiff's counsel never mentioned or suggested that he intended" to dismiss the case without prejudice. Id. at 335. There, the Fourth Circuit held, as this Court also should hold, "[a] court will not reverse the trial court's denial of plaintiff's voluntary motion to dismiss without prejudice except where it appears that the trial court failed to exercise its discretion, or

[8] Notes to Rule 41, SCRCP, indicate that it "is the same as the Federal Rule," except for service requirements.

abused its discretion." Id.

Here, the trial court properly exercised its discretion. This case initially was set for hearing for the week of December 10, 2018 pursuant to a Consent Scheduling Order. (Consent Scheduling Order, filed Nov. 20, 2018, R. pp. 22-23). At the December 10, 2018 roster meeting, Plaintiff's counsel requested and was granted a one week continuance because Plaintiff was not feeling well. (*See* Email from Brett Bayne to Catherine Ortmann, Hon. Robert Hood's law clerk, re: Vanessa Wiggins v. ALDI, Dec. 10, 2018 11:10AM, R. p. 343). On Wednesday, December 12, 2018, Plaintiff's counsel sent out two trial subpoenas, one of which was to an ALDI employee, Carol Rice. (R. p. 117, line 22 – p. 118, line 1).

On the Friday before the week in which the trial was scheduled to start, Plaintiff served a motion for a continuance or to dismiss the suit without prejudice. (Notice of Motion and Motion to Continue, filed Dec. 14, 2018, R. pp. 33-35). On Monday, December 17, 2018, Judge Hood indicated that he had received an email from Plaintiff's counsel just that morning seeking a voluntary dismissal without prejudice. (R. p. 108, lines 6-9). Plaintiff's counsel explained that the dismissal was necessary for three reasons: 1) Plaintiff had advised that she was scheduled for another surgery in the spring, 2) they needed to depose additional expert witnesses, and 3) Plaintiff had just "retained co-counsel, Mr. Jake Moore in this matter." (R. p. 108, line 20 – p. 109, line 11). As noted above, Mr. Moore had not filed a notice of appearance and was not even present at the December 17 hearing. (R. p. 110, lines 16-21). Defense counsel argued that the parties had agreed to a trial date, they had flown people (clients) in from out of state and, importantly, were prepared for trial. (R. p. 122, lines 17-20). Defense counsel also noted that some expert witnesses were out of state. (R. p. 129, lines 8-15). Defense counsel explained "we're ready to go. We are here, cleared the scales for the second week in a row. The evidence

is ready, and that's where we stand." (R. p. 130, lines 13-15).

In denying Plaintiff's motion to continue the case or for a voluntary dismissal without prejudice, Judge Hood advised Plaintiff's counsel that he could either proceed to trial, or he could dismiss the case with prejudice and allow Plaintiff to appeal it immediately. Plaintiff's counsel indicated she would need to discuss the options with Plaintiff. (R. p. 130, line 23 – p. 131, line13). Plaintiff made the decision at that time to proceed with trial. (*See* Email from Kelly Burnside to Catherine Ortmann, Hon. Robert Hood's law clerk, re: Vanessa Wiggins v. ALDI, Dec. 17, 2018 12:52PM, R. p. 344 (advising the court "[m]y client has decided she does want to move forward with trial on Wednesday, December 19, 2018 because her motion for voluntary dismissal has been denied")).

The Circuit Court clearly and properly exercised its discretion to deny Plaintiff's last-minute attempt to dismiss her case without prejudice. The case had been pending for some 18 months during which discovery was conducted. The parties had chosen the week they believed trial should start, Plaintiff had been granted a short continuance and, until the Friday before trial, indicated she was ready to move forward. Defendants had gone to the expense to prepare for and were ready for trial. The Circuit Court properly denied her motion.

Finally, even if there was any error in the Court's ruling on this issue, which Respondent denies, the directed verdict was granted on the basis that Plaintiff failed to prove a dangerous condition existed and/or that even assuming one existed, it was open and obvious. Given that Plaintiff's case did not even reach the issue of causation, her inability to depose additional medical witnesses or experts is irrelevant.[9] Expert medical testimony would not change the

[9] *See* (R. p. 108, line 25 – p. 109, line 7 (Plaintiff's counsel explaining she could not confirm that Plaintiff's treating physician would be able to testify during the week of December 17); p. 115, lines 19-24 (explaining that Plaintiff's counsel had advised she was seeking a continuance

outcome of this case. "Whatever doesn't make any difference, doesn't matter." Jennings v. Jennings, 401 S.C. 1, 6, 736 S.E.2d 242, 244 (2012).

CONCLUSION

For all the reasons stated herein, this Court should affirm the grant of a directed verdict in Respondent's favor and hold that the Circuit Court did not abuse its discretion in denying Plaintiff's motion for a dismissal without prejudice.

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February 14, 2020

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because she "just realized that they had not deposed any of the doctors in the case and that they needed to do that before they could proceed to trial"); p. 130, lines 10-22 (Plaintiff's counsel explaining that Plaintiff was scheduled for another surgery and "one of our biggest concerns [is] that we don't have a full scope of the damages")).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
The Honorable Robert E. Hood, Circuit Court Judge

Case No.: 2017-CP-40-05549

Vanessa Wiggins,.....Appellant,

v.

ALDI, Inc.....Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Respondent ALDI complies with Rule 211(b), SCACR. The undersigned also certifies that this Brief of Respondent complies with the South Carolina Supreme Court's April 16, 2014 Order re: Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.

February 14, 2020

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