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

Wanda V. Berry and Gary A. Berry, Appellants

v.

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

RECORD ON APPEAL

John D. Clark, Esquire, Bar No.: 64296
Clark Law Firm, LLC
22 East Liberty Street
P.O. Drawer 880
Sumter, South Carolina 29151-0880
(803) 775-1234
Attorney for Appellant

Joseph S. McCue, Esquire, Bar No. 11194
Collins & Lacy, P.C.
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Post Office Box 12487
Columbia, South Carolina 29211
(803) 256-2660
Attorney for Respondent

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STATE OF SOUTH C

COUNTY OF SUMTE

Summons and Complaint
Filed on December 30, 2014

OMMON PLEAS

Wanda Berry and Gary .

OVERSHEET

Plaintiff(s)

2014 DEC 30 PM 4:19

2014-CP - 43-_____

vs.

JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

Scott Richardson d/b/a Chick-Fil-A

Defendant(s)

Submitted By: John D. Clark, Esquire
Address: 22 East Liberty Street, Post Office Drawer 880
Sumter, South Carolina 29151

SC Bar #: 64296
Telephone #: (803) 775-1234
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Other:
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NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (*Check all that apply)*

**If Action is Judgment/Settlement do not complete*

- ☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
- ☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- ☒ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- ☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (*Check One Box Below*)

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- ☐ Debt Collection (110)
- ☐ Employment (120)
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- ☐ Breach of Contract (140)
- ☐ Other (199)

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- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)

Previous Notice of Intent Case # 20____-NI-_____-_____

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Submitting Party Signature: _____ Date: December 28, 2014

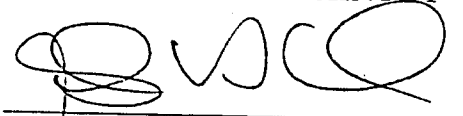
Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER) THIRD JUDICIAL CIRCUIT
) 2014-CP-43- _____
)
Wanda V. Berry and Gary A. Berry,)
)
Plaintiff,)
)
-vs.-) SUMMONS
)
Scott Richardson d/b/a Chick-Fil-A,)
)
Defendant.)
_____)

TO: SCOTT RICHARDSON D/B/A CHICK-FIL-A, THE ABOVE-NAMED DEFENDANT:

YOU ARE HEREBY SUMMONED and required to Answer the Complaint in this action, a copy of which is herewith served upon you and to serve a copy of your Answer to said Complaint on the subscriber at this office at 22 East Liberty Street, Post Office Drawer 880, Sumter, South Carolina 29151-0880, within thirty (30) days after the service hereof, exclusive of the day of such service; and on your failure to do so, judgment by default will be rendered against you for the relief demanded in the Complaint.

CLARK LAW FIRM, LLC
ATTORNEYS FOR PLAINTIFF



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Sumter, South Carolina
December 28, 2014

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THIRD JUDICIAL CIRCUIT
COUNTY OF SUMTER	)	2014-CP-43 _____
	)	
Wanda V. Berry and Gary A. Berry,	)	
	)	
Plaintiff,	)	
	)	
-vs.-	)	COMPLAINT
	)	(Premises Liability)
Scott Richardson d/b/a Chick-Fil-A,	)	(Jury Trial Demanded)
	)	
Defendant.	)	
	)	

The Plaintiff complaining of the Defendant above named, would respectfully show unto this Honorable Court that:

JURISDICTION AND VENUE

1. Plaintiffs are citizens and residents of the County of Sumter, State of South Carolina.

2. Upon information and belief, Defendant Scott Richardson does business as Chick-Fil-A and maintains agents and servants in the County of Sumter, State of South Carolina for the purpose of carrying on its business as a restaurant herein after referred to as "Chick-Fil-A".

FOR A FIRST CAUSE OF ACTION
(Negligence)

3. On or about February 4, 2013, at approximately 2:00 p.m., the Plaintiff was a customer at Chick-Fil-A, and after receiving her order, she was walking to a table and slipped on a foreign substance on the floor and violently fell to the floor.

4. Defendant owed the duty to the Plaintiff to maintain the premises in a reasonably safe condition, to give warning of latent or concealed perils, to discover risks and take safety precautions and to warn of or eliminate foreseeable risks.

5. The Defendant knew or should have known that the slippery conditions were present and created an unsafe condition.

6. As a result of the accident, the Plaintiff has suffered great physical harm and injury, all of which has caused her to incur a great sum of medical expenses.

7. The Defendant was willful, wanton, careless, and grossly negligent in the following particulars:

a) in failing to maintain a safe environment;

b) in failing to correct a known hazard on the premises;

c) in failing to warn Plaintiff of such dangers by signs, personnel, or barricades.

All of which were the direct and proximate causes of the injuries and damages suffered by the Plaintiff herein.

FOR A SECOND CAUSE OF ACTION
(Loss of Consortium)

8. Plaintiff reallges the allegation of the above paragraphs, and incorporates same; herein by references as if fully repeated verbatim.

9. The Plaintiffs have been married for approximately 40 years and are the parents of five children.

10. That throughout the marriage, the Plaintiff Gary A. Berry has relied on companionship, household services and marital relations that Plaintiff Wanda V. Berry has provided.

11. As a result of Wanda V. Berry's physical and mental injuries caused by Defendant's negligence, Gary A. Berry has suffered a permanent loss of consortium of his wife, in the form of companionship, household services and marital relations.

12. The Plaintiffs are informed and believe that they are entitled to judgment against the Defendant, for actual damages and punitive damages in an appropriate amount.

WHEREFORE, Plaintiffs request judgment against the Defendant, for actual and punitive damages in an appropriate amount, for the cost of this action, and for such other and further relief as the Court may deem just and proper.

CLARK LAW FIRM, L.L.C.
ATTORNEYS FOR PLAINTIFF

John D. Clark, Esquire
22 East Liberty Street
Post Office Drawer 880
Sumter, South Carolina 29150
(803) 775-1234 • (803) 775-8590 *fax*
jclark@theclarklawfirm.com

Sumter, South Carolina
December 28, 2014

Summons and Amended Complaint Filed on February 23, 2015

STATE OF SOU[illegible] ION PLEAS
COUNTY OF SU[illegible] CUIT
3-2776

2015 FEB 23 PM 12:55
JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

Wanda V. Berry and Gary A. Berry,

Plaintiff,

-vs-

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

Defendant.

SUMMONS

TO: SCOTT RICHARDSON D/B/A CHICK-FIL-A OF SUMTER MALL, THE ABOVE-NAMED DEFENDANT:

YOU ARE HEREBY SUMMONED and required to Answer the Complaint in this action, a copy of which is herewith served upon you and to serve a copy of your Answer to said Complaint on the subscriber at this office at 22 East Liberty Street, Post Office Drawer 880, Sumter, South Carolina 29151-0880, within thirty (30) days after the service hereof, exclusive of the day of such service; and on your failure to do so, judgment by default will be rendered against you for the relief demanded in the Complaint.

CLARK LAW FIRM, LLC
ATTORNEYS FOR PLAINTIFF

JOHN D. CLARK, ESQUIRE
22 East Liberty Street
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jclark@theclarklawfirm.com

Sumter, South Carolina
February 18, 2015

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF SUMTER) THIRD JUDICIAL CIRCUIT
) Docket No.: 2014-CP-43-2776

Wanda V. Berry and Gary A. Berry,)
)
Plaintiff,)
)
-vs.-) AMENDED -COMPLAINT
) (Premises Liability)
Scott Richardson d/b/a Chick-Fil-A of) (Jury Trial Demanded)
Sumter Mall,)
)
Defendant.)
)

The Plaintiff complaining of the Defendant above named, would respectfully show unto this Honorable Court that:

JURISDICTION AND VENUE

1. Plaintiffs are citizens and residents of the County of Sumter, State of South Carolina.

2. Upon information and belief, Defendant Scott Richardson does business as Chick-Fil-A of Sumter Mall and maintains agents and servants in the County of Sumter, State of South Carolina for the purpose of carrying on its business as a restaurant herein after referred to as "Chick-Fil-A".

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4. Defendant owed the duty to the Plaintiff to maintain the premises in a reasonably safe condition, to give warning of latent or concealed perils, to discover risks and take safety precautions and to warn of or eliminate foreseeable risks.

5. The Defendant knew or should have known that the slippery conditions were present and created an unsafe condition.

6. As a result of the accident, the Plaintiff has suffered great physical harm and injury, all of which has caused her to incur a great sum of medical expenses.

7. The Defendant was willful, wanton, careless, and grossly negligent in the following particulars:

a) in failing to maintain a safe environment;

b) in failing to correct a known hazard on the premises;

c) in failing to warn Plaintiff of such dangers by signs, personnel, or barricades.

All of which were the direct and proximate causes of the injuries and damages suffered by the Plaintiff herein.

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(Loss of Consortium)

8. Plaintiff reallges the allegation of the above paragraphs, and incorporates same; herein by references as if fully repeated verbatim.

9. The Plaintiffs have been married for approximately 40 years and are the parents of five children.

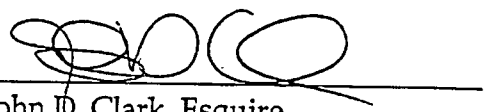
10. That throughout the marriage, the Plaintiff Gary A. Berry has relied on companionship, household services and marital relations that Plaintiff Wanda V. Berry has provided.

11. As a result of Wanda V. Berry's physical and mental injuries caused by Defendant's negligence, Gary A. Berry has suffered a permanent loss of consortium of his wife, in the form of companionship, household services and marital relations.

12. The Plaintiffs are informed and believe that they are entitled to judgment against the Defendant, for actual damages and punitive damages in an appropriate amount.

WHEREFORE, Plaintiffs request judgment against the Defendant, for actual and punitive damages in an appropriate amount, for the cost of this action, and for such other and further relief as the Court may deem just and proper.

CLARK LAW FIRM, L.L.C.
ATTORNEYS FOR PLAINTIFF



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jclark@theclarklawfirm.com

Sumter, South Carolina
February 18, 2015

Answer of Defendant
Dated March 10, 2015

STATE OF SOUTH	)	ON PLEAS
COUNTY OF SUMTER	)	THIRD JUDICIAL CIRCUIT
Wanda V. Berry and Gary A. Berry,	)	Civil Action No.: 2014-CP-43-2776
Plaintiffs,	)	DEFENDANT'S ANSWER TO PLAINTIFFS' COMPLAINT (JURY TRIAL DEMANDED)
vs.	)	
Scott Richardson d/b/a Chick-fil-A,	)	
Defendant.	)	

The Defendant, Scott Richardson d/b/a Chick-fil-A of Sumter Mall ("Richardson") responds to Plaintiffs' Complaint by denying each and every allegation not hereinafter specifically admitted, and demanding strict proof thereof.

FOR A FIRST DEFENSE AND BY WAY OF ANSWER

1. Lacks sufficient information upon which to form a belief as to the truth or falsity of the allegation of Paragraph 1 and, therefore, denies the same.

2. Admits the allegation of Paragraph 2.

3. Admits only so much of Paragraph 3 as alleges or could be construed to allege that on or about February 4, 2013, at approximately 2:00 p.m. Plaintiff was a customer at Chick-fil-A of Sumter Mall and fell. The remaining allegations of Paragraph 3 are denied.

4. Paragraph 4 purports to set forth legal conclusions which require no response from this Defendant. To the extent a response is required, these allegations are denied.

5. Denies the allegations of Paragraphs 5, 6, and 7.

6. In response to Paragraph 8, Richardson incorporates each of its responses to the Complaint as if set forth verbatim herein.

7. Lacks sufficient information upon which to form a belief as to the truth or falsity of the allegations of Paragraph 9.

8. Lacks sufficient information upon which to form a belief as to the truth or falsity of the allegations of Paragraph 10.

9. Denies the allegations of Paragraphs 11 and 12 and specifically denies Plaintiffs are entitled to any of the relief sought in the "Wherefore" clause of the Complaint.

FOR A SECOND DEFENSE

10. Such injuries or losses as Plaintiffs sustained, if any, where caused by Plaintiffs' assumption of a known risk, and this Defendant pleads Plaintiffs' assumption of a known risk as a complete defense to this action

FOR A THIRD DEFENSE

11. Even if this Defendant was negligent in any respect, which is expressly denied, and such conduct operated as a proximate cause of Plaintiffs' injuries, if any, which is expressly denied, this Defendant alleges Plaintiffs' negligent, grossly negligent, reckless, willful, and wanton conduct contributed more than fifty percent (50%) to the cause of the accident, and therefore, Plaintiffs' claims are barred.

FOR A FOURTH DEFENSE

12. Even if this Defendant was negligent in any respect, which is expressly denied, and even if such conduct on the part of this Defendant operated as a greater than fifty percent (50%) cause of Plaintiffs' injuries, if any, which is also denied, this Defendant is entitled to a determination as to the percentage which Plaintiffs' negligent, grossly negligent, reckless, willful, and wanton conduct contributed to Plaintiffs' accident and resulting injuries, if any, and

to a reduction of any amount awarded to the Plaintiffs by an amount equal to the percentage of Plaintiffs' own negligence.

FOR A FIFTH DEFENSE

13. Plaintiffs either knew or should have known of any alleged deficiencies in the subject property and accepted the same with such knowledge. As a result, Plaintiffs' recovery should be barred.

FOR A SIXTH DEFENSE

14. Any injuries or damages sustained by the Plaintiffs were due to and caused and occasioned by Plaintiffs' own negligence, gross negligence, recklessness, willfulness, and wantonness which was the direct and proximate cause of Plaintiffs' alleged injuries or damages, if any, and without which the same would not have occurred, and therefore, due to Plaintiffs' sole negligence, gross negligence, recklessness, willfulness, and wantonness, Plaintiffs' claims are barred.

FOR A SEVENTH DEFENSE

15. Plaintiffs' claims may be barred by the doctrine of unavoidable accident.

FOR AN EIGHTH DEFENSE

16. This Defendant specifically reserves any additional and/or affirmative defenses as may be available to it or revealed to it during the course of the investigation and/or discovery in this case and further incorporates any and all applicable defenses by Chick-fil-A, Inc.

Wherefore, having fully responded to Plaintiffs' Complaint, Richardson prays for its dismissal and for such other relief as this Court deems just and proper.

Respectfully Submitted,
COLLINS & LACY, P.C.

By: _____

Joseph S. McCue, Esquire
Post Office Box 12487
Columbia, SC 29211
803.256.2660

ATTORNEYS FOR DEFENDANT SCOTT RICHARDSON D/B/A CHICK-FIL-A

Columbia, South Carolina
March 10, 2015

CERTIFICATE OF SERVICE

The undersigned employee of Collins & Lacy, P.C., Attorneys at Law, Post Office Box 12487, 1330 Lady Street, Sixth Floor, Columbia, South Carolina 29211, does hereby certify that (s)he has served the following named individual(s) with a copy of the pleading(s) indicated below via electronic mail and/or by mailing a copy of same to them in the United States mail, with sufficient postage affixed thereto and return address clearly marked on the date indicated below:

COUNSEL SERVED:
John D. Clark, Esquire
Clark Law Firm, LLC
PO Box 880
Sumter, SC 29151
Counsel for Plaintiffs

PLEADING:

DEFENDANT'S ANSWER TO PLAINTIFFS' COMPLAINT

Richelle Campbell
Richelle Campbell

Columbia, South Carolina
March 11, 2015

Collins & Lacy
ATTORNEYS AT LAW

Joseph S. McCue | D: 803.255.0412 | E: jmccue@collinsandlacy.com

March 11, 2015

The Honorable James C. Campbell
Sumter County Clerk of Court
141 N. Main Street, Rm. 308
Sumter, SC 29150-4965

Re: Wanda V. Berry and Gary A. Berry v. Scott Richardson d/b/a Chick-fil-A of Sumter Mall
Civil Action No. 2014-CP-43-2776
Claim No. 30130226985-0001
C&L File No. 001033-00108

Dear Mr. Campbell:

Enclosed for filing please find the original and one copy of Defendant's Answer to Plaintiffs' Complaint in the above-referenced matter. Please file the original and return a clocked-in copy to me.

With warmest regards,

Sincerely,

Joseph S. McCue

Enclosures
cc/enc: John D. Clark, Esquire

Defendant's Motion for Summary Judgment
Filed on November 20, 2018

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF SUMTER)	THIRD JUDICIAL CIRCUIT
)	
Wanda V. Berry and Gary A. Berry,)	Civil Action No.: 2014CP4302776
)	
Plaintiffs,)	
)	
vs.)	**DEFENDANT SCOTT RICHARDSON D/B/A CHICK-FIL-A OF SUMTER MALL'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT**
)	
Scott Richardson d/b/a Chick-fil-A of Sumter Mall,)	
)	
Defendant.)	
)	

TO: JOHN D. CLARK, ESQUIRE, COUNSEL FOR PLAINTIFF:

Pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, Defendant Scott Richardson d/b/a Chick-fil-A of Sumter Mall ("Defendant") moves this Honorable Court for an order granting Defendant summary judgment in the instant case.

Defendant maintains that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Hunt v. Happy Valley Ltd. P'ship, 315 S.C. 428, 430, 434 S.E.2d 285, 286 (Ct. App. 1993).

Plaintiff's premises liability claims against Defendant sound in negligence. Plaintiff alleges that on February 4, 2013, Plaintiff slipped and fell on the floor of the Chick-fil-A restaurant located within the Sumter Mall, injuring her left shoulder. Plaintiff alleges she slipped on a foreign substance on the floor (Amd Complaint at ¶3).

Substantial discovery has been complete, including the deposition of Plaintiffs Wanda and Gary Berry, Defendant Scott Richardson, witness Paul Thrower, and Dr. Danny Ford. The parties

have also exchanged extensive written discovery. Accordingly, the facts giving rise to this suit are now well-known to the parties.

Defendant's motion for summary judgment is based on the following grounds:

(1) Plaintiffs cannot prove Defendant had actual or constructive knowledge of an allegedly dangerous condition and failed to remedy it; and

(2) According to Plaintiff's testimony, Plaintiff was on notice of the alleged dangerous condition prior to her fall.

This Motion is based upon the pleadings in the action, the Affidavits attached hereto or which will be served prior to the hearing, upon the memoranda in support of this motion and attachments thereto, upon Rule 56 of the South Carolina Rules of Civil Procedure, and upon such additional law and argument as shall be appropriate.

Defendant respectfully requests argument on this motion. Further, Defendant reserves the right to amend this motion prior to argument and disposition of the motion.

Respectfully submitted,

COLLINS & LACY, P.C.

By: s/Joseph S. McCue

Joseph S. McCue, Esquire
State Bar No. 11194
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Post Office Box 12487
Columbia, SC 29211
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ATTORNEYS FOR DEFENDANT SCOTT RICHARDSON D/B/A CHICK-FIL-A OF SUMTER MALL, FSU

Columbia, South Carolina
November 20, 2018

EXHIBIT A

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER)	CASE NO.: 2014-CP-43-2776
Wanda V. Berry and Gary A. Berry,)	
Plaintiffs,)	
vs.)	Deposition of:
Scott Richardson d/b/a Chick-fil-A of Sumter Mall,)	Wanda V. Berry
)	July 7, 2016
)	10:28 a.m. - 12:09 p.m.
Defendant.)	
)	

Deposition on oral examination of Wanda V. Berry, reported by Jennifer Nottle, Court Reporter and Notary Public in and for the State of South Carolina; pursuant to Rule 30 of the South Carolina Rules of Civil Procedure; said deposition was taken at the law offices of Clark Law Firm, L.L.C., 22 E. Liberty Street, Sumter, South Carolina, on Thursday, the 7th day of July, 2016.

hurry up and go home?

A: Yes, sir.

Q: Okay. And then you told him that the floor -- did you tell him the floor was gooshy (ph), greasy feeling or was that something that you just --

A: I can't remember if I told him that -- yes, I'm sure I did because that's why I fell. I turned to her as she was coming out the kitchen door when I ordered. She said, you can go around and get your napkins and stuff, I'll bring it to you. And she came, I turned around that quick it was ready. And there she was, so I stepped to her to take the tray and then I slipped up on the floor and fell.

Q: Okay. So the person that came out to give you your food, did she also take your order?

A: Yes, sir.

Q: Okay. And she said, you can go get your napkins and I'll bring the food to you?

A: Yes, sir.

Q: Okay. All right. And then as she brought the food out you went to reach for it and slipped; is that right?

MS. CLARK: Objection to form.

A: Yeah.

Q: Okay. If I misstate anything, you let me know, okay?

A: Okay.

Q: My understanding of your testimony was that you went to get your condiments, you said the food was ready real quickly, she came out and tell me what happened after that?

A: She was at the door frame, standing in the door frame. I took one step to her and I slipped. and the tray went up in the air, pulled my left shoulder back around. I fell on my hip on the floor, about the size of a basket ball. And it burned like fire for a couple of days. And I reached for it and it just went up in the air and then she ran back. She said, oh, I'll go get you new food. And she came back with a mop also and the yellow wet floor thing to mop it up. But there was no rug there, it was greasy, slippery floor.

Q: Okay. So when you fell you say that this person, the female employee said she'd get you more food, and then she brought a mop out. Take me through that sequence if you would.

A: I think -- I think she got the mop and mopped up the floor first and then brought me another tray. And by then the manager was coming out to speak with me.

Q: Okay. Did you -- as you're walking across the floor to get your food, did you see any substance on the

floor?

A: No, sir. You could just feel it under your shoes.

Q: Could you feel it across the entire floor?

A: Yes, sir.

Q: Okay. All right. And would that have been from the counter area all the way around to where you fell, you felt the greasy floor?

A: It's in the dining room side when you walk around the corner and where all the chairs and tables are.

Q: Okay. So when you got to the area where the condiments are as I understand it there's the counter is kind of a straight line where people walk up?

A: Right.

Q: And then there's a little walkway or little area between the mall walking area and the dining area that you kind of go through; is that right?

A: It's like a 90 degree angle. Here's your serving counter, you walk around the corner, and there's your napkins, mayonnaise, straws.

Q: Okay.

A: And the trash doors are right under that, it's all one unit. And three, three and a half feet away is the kitchen door.

Q: Okay.

A: Where they walk in and out from the kitchen.

Q: But the greasy floor feeling that you said you felt squishy or gooshy (ph), I think was --

A: When you walk -- when you come around the corner.

Q: As soon as you come around the corner from there into the area you fell?

MS. CLARK: Object to form.

A: Right.

Q: Okay. Is that an accurate description of your testimony that you felt the squishy area from the time you came around the condiment area until the time you fell? The reason I'm asking you that question is she objected to the form which means she thinks I asked a poorly-worded question, or she objects for another reason, so I want to get it clarified so that I eliminate the objection.

A: Well it's all -- it's all tile. And it's where the grease just floats in the air and settles on the floor. So it would have been from where -- it's carpet in the mall. And then when you walk up to them it's tile.

Q: Okay.

A: So it's all greasy all the way around but it was -- I would say when you walk you can feel your feet pivot.

Q: Okay.

A: Because it's that greasy. Sticky.

Q: Okay.

A: I couldn't eat.

Q: Did you look at the bottom of your shoes while you were in the store?

A: No, sir.

Q: Did you feel the bottom of your boots?

A: No.

Q: Is it accurate to say that before your fall you knew that the floor was greasy?

A: I was careful walking.

Q: And were you careful because you felt like the floor was greasy?

A: Yeah, because your feet were like pivoting. When you can walk you can feel your shoe pivot.

Q: And you thought it was pivoting because the floor was greasy?

A: Yes, sir.

Q: Okay. Ms. Berry, I forgot to ask you some questions that I typically ask at the beginning of every deposition. Are you under the influence of any medications today that would affect your ability to testify?

A: No, sir. No, sir.

Q: Okay. And you feel perfectly fine being here today giving your deposition?

next little while I went back and I got a shot. I don't think I got the shot -- I don't remember which visit was the shot that they gave me for pain.

Q: Okay.

A: And it still hurt so then I had the MRI.

Q: When you say they gave you a shot for pain, is that -- where was that pain?

A: In my left shoulder.

Q: Okay. And what body parts were injured when you fell at the Chick-fil-A?

A: Well just the hit on my hip when I fell. But then this is (indicating) what was yanked back and torn off, all the ligaments were torn off from the bone.

Q: Okay. Now you said all the ligaments were torn off from the bone, would you defer to the medical providers as to what actually occurred?

A: You mean what they said, what they told me?

Q: Yes, ma'am. Would you --

A: He called it -- when he went in he called it a bald eagle. He said everything was torn loose and he didn't know if he could fix it. But he put what he called toggle bolts down in it, screws into it to hold it on. And he hoped that that would fix it. And thank the Lord it did.

Q: Okay. And when you say he, was that Dr. Ford?

Q: Okay. Do you pay for any health insurance?

A: Yes, sir.

Q: And is your health insurance -- tell me about your health insurance versus social security?

A: I don't know it's just like insurance, it picks up. I don't -- United Health Care.

Q: Okay. But is that -- is United Health Care provided to you by the government as a result of your social security status?

A: No, we pay for that. Monthly premium.

Q: You pay for that, okay. To your knowledge did social security -- did your status as being disabled by the social security administration did that result in any payments by the social security administration on your behalf?

A: I don't know, it's all the bills. I don't know how that works.

Q: Okay. Let's take a quick break and we may be done. I just need to look through my notes.

(A short break was taken.)

Q: Ms. Berry, we're back on the record after a brief break. I have just a few more questions. The -- in your Complaint, which is the formal lawsuit brought against my client, Scott Richardson, you indicate that the Defendant knew or should have known that the

slippery conditions were present. What evidence do you have to support that they were aware of any slippery condition on the floor?

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

Q: Okay. And you say you were aware of that by walking across it?

A: Yes, sir.

Q: Across the entire dining room?

A: Yes, sir.

Q: Okay. So you were aware of that condition before you fell?

A: Yeah, I could feel it.

Q: Okay. Those are all the questions I have, thank you.

MS. BERRY - EXAMINATION BY MS. CLARK:

Q: Ms. Berry, as it relates to your left shoulder, you were asked whether you can -- I don't really remember the question but the question pertained to your osteoarthritis and your fibromyalgia as it relates to your left shoulder. Are you able to tell the difference between the left shoulder pain, and your arthritis and your fibromyalgia?

A: Yes, ma'am.

Q: Okay.

A: If I have attacks, yeah. Flare-ups.

Q: Okay. And so if you have pain in your shoulder --

EXHIBIT B

FEBRUARY 4, 2013 Incident Reporting-6 Video Clips - will be mailed to Sumter County Clerk's Office to be hand filed.

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER	THIRD JUDICIAL CIRCUIT
Wanda V. Berry and Gary A. Berry, Plaintiffs, vs. Scott Richardson d/b/a Chick-fil-A of Sumter Mall, Defendant.	Civil Action No.: 2014CP4302776 **DEFENDANT SCOTT RICHARDSON D/B/A CHICK-FIL-A OF SUMTER MALL'S MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT**

Pursuant to Rule 56, of the South Carolina Rules of Civil Procedure, Defendant Scott Richardson d/b/a Chick-fil-A of Sumter Mall ("Defendant") moves this Court for an order granting summary judgment in its favor on Plaintiffs' claims. Defendant now files this memorandum of law in support of its Motion for Summary Judgment. First, Defendant respectfully requests this Court grant summary judgment in its favor because there is no evidence that Defendant had actual or constructive notice of an alleged dangerous condition necessary to support a premises liability claim. According to Plaintiff's testimony, Plaintiff was on notice of the alleged defective condition prior to her fall.

FACTS/PROCEDURAL BACKGROUND

This premises liability matter arises out of Plaintiff Wanda Berry's February 4, 2014 fall at the Chick-fil-A branded restaurant ("Chick-fil-A") located within the Sumter Mall in Sumter, South Carolina. (Complaint at ¶2, 3).

Plaintiff Wanda Berry alleges that around 2:00 p.m., she placed her order at the counter of the subject Chick-fil-A, rounded the corner into the dining area, and walked to the nearby condiment station within the restaurant to pick up her condiments. Her food was ready quickly,

and she then proceeded further into the dining area to receive her tray of food. (**Ex. A**, Deposition of Wanda Berry, p. 33, line 3 – p. 34, line 15). Upon receiving her tray of food, Plaintiff avers that she stepped forward and slipped on the floor, falling and injuring her left shoulder. (**Ex. A**, p. 34, lines 2-15; p. 46, lines 6-13). Surveillance footage of Plaintiff's accident was retained following the incident. (**Ex. B**, February 4, 2013 Incident Recording).

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

Plaintiff Wanda Berry and her husband Gary Berry filed their Complaint against Defendant Scott Richardson d/b/a Chick-fil-A of Sumter Mall, alleging a premises liability claim sounding in negligence. Plaintiff Gary Berry asserts a loss of consortium claim. The parties have conducted discovery and held Plaintiffs' deposition, Defendant's deposition, and the depositions of Dr. Ford, one of Plaintiff's medical providers. Defendant Scott Richardson d/b/a Chick-fil-A of Sumter Mall now moves for summary judgment it its favor on all of Plaintiff's claims.

STANDARD OF REVIEW

A court will grant a moving party's motion for summary judgment when there exists no genuine issue of material fact, and that party is entitled to judgment as a matter of law. Rule 56(c), SCRCP.

In determining whether any triable issues of fact exist, the court must view both the evidence and all reasonable inferences able to be drawn from the evidence in the light most favorable to the non-moving party. Simmons v. Tuomey Regional Medical Center, 341 S.C. 32, 533 S.E.2d 312 (2000). Nonetheless, the trial court, "cannot ignore facts unfavorable to [the 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, 339 S.C. 417, 423, 529 S.E.2d 710, 713 (2000). Accordingly, the court must search the proof to ascertain whether it discloses a real issue, rather than a formal, perfunctory or shadowy one. Saluda Motor Lines v. Crouch, 300 S.C. 43, 46, 386 S.E. 2d 290, 292 (Ct. App. 1989).

The plain language of Rule 56(c), SCRCP, mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial. Bray v. Marathon Corp., 347 S.C. 189, 553 S.E.2d 477 (Ct. App. 2001).[1] With respect to an issue on

[1] In Bass v. Gopal, Inc., 384 S.C. 238, 247 n.6, 680 S.E.2d 917, 921 n.6 (Ct. App. 2009), the Court of Appeals addressed the recent change in summary judgment standard. In granting the summary judgment motion, the South Carolina Court of Appeals noted:

> [I]n Hancock v. Mid-South Mgmt., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009), our Supreme Court stated that in 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. However, in footnote 3 of the opinion, the Court was careful to point out that its pronouncement concerning a mere scintilla of evidence was not necessary for its determination of the outcome in the Hancock case. In any event, we must assume

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

LAW/ANALYSIS

(1) Plaintiffs cannot prove Defendant had actual or constructive knowledge of an allegedly dangerous condition and failed to remedy it.

It is well-settled in South Carolina that a merchant is not the insurer of the safety of its customers. Rather, a merchant who invites the public to his premises owes them a duty to exercise due care to keep the premises in a reasonably safe condition. Garvin v. Bi-Lo, Inc., 343 S.C. 625, 541 S.E.2d 831 (2001). A merchant is responsible for the consequences of conditions arising from his own negligence, "provided he has actual or constructive notice of an unsafe condition and a reasonable opportunity to correct it." Mullen v. Winn-Dixie Stores, Inc., 252 F.2d 232, 233 (4th Cir. 1958) (applying South Carolina law).

---

any evidence, even a scintilla, that is useful to withstand a summary judgment motion must meet the prerequisite of being probative.

The Hancock Court also cited McDowell v. Stilley Plywood Co., 210 S.C. 173, 179, 41 S.E.2d 872, 874-75 (1947), for the proposition "that although there was a scintilla of testimony that could be used to support the claimants' position, when the entire testimony of the witnesses was viewed as a whole, it was obvious the testimony in support of claimants' position rested on speculation and thus had no probative value." Id.

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

In Wintersteen, the South Carolina Supreme Court again reiterated the elements that must be proven to recover in a negligence action based on a defective condition of the premises:

> In South Carolina, to recover damages for injuries caused by a dangerous condition or defective condition on a landowner's premises, the plaintiff must show either: (1) the injury was caused by a specific act of the landowner that created the dangerous condition; or (2) the landowner had actual or constructive knowledge of the dangerous condition and failed to remedy it. Anderson v. Racetrac Petroleum, Inc., 296 S.C. 204, 371 S.E.2d 530 (1988); Pennington v. Zayre Corp., 252 S.C. 176, 165 S.E.2d 695 (1969); Hunter v. Dixie Home Stores, 232 S.C. 139, 101 S.E.2d 262 (1957).

Id. at 35, 542 S.E.2d at 729.

"A plaintiff seeking to recover for injuries sustained in a fall caused by a foreign substance on a storekeeper's floor must prove that the storekeeper had actual or constructive notice that the foreign substance was on the floor." Gosnell v. U.S. Postal Service, 2007 WL 10344997 (D.S.C. 2007) (citing Calvert v. House Beautiful Paint & Decorating Center, 313 S.C. 494, 496, 443, S.E.2d 398, 399 (1994)).

To prevail in her premises liability case, Mrs. Berry must demonstrate an issue of fact exists as to whether Defendant had actual or constrictive knowledge of the alleged dangerous condition and failed to remedy it. Wintersteen, at 35, 542 S.E.2d at 729. On these grounds, this Court should grant summary judgment because Plaintiff cannot show actual or constructive notice.

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

> Q: Ms. Berry, we're back on the record after a brief break. I have just a few more questions. The – in your Complaint, which is the formal lawsuit brought against my client, Scott Richardson, you indicate that the Defendant knew or should have known that the slippery conditions were present. What evidence do you have to support that they were aware of any slippery condition on the floor?
>
> A: I just know that it was slippery under my feet.
>
> (**Ex. A**, p. 56, line 21-- p. 57, line 4).

Plaintiff's testimony falls squarely within the definition of the doctrine of *res ipsa loquitur*. Accordingly, because *res ipsa loquitur* is not legally cognizable under South Carolina law, Plaintiffs' claims fail as a matter of law.

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

Assuming, arguendo, that Plaintiff fell because of a slippery surface, as she claims, she has not established any evidence whatsoever that Defendant had actual or constructive knowledge of

the existence of any dangerous condition and failed to remedy it. Accordingly, Defendant respectfully requests this Court grant summary judgment in its favor.

(2) The alleged dangerous condition, if any, was a known and expected condition to Plaintiff.

In South Carolina, a merchant owes a customer a duty of ordinary care to keep his premises in a reasonably safe condition. Wimberley v. Winn–Dixie Greenville, Inc., 252 S.C. 117, 120–21,165 S.E.2d 627, 628 (1969) ("[O]ne who operates a store is not an insurer of the safety of its customers, the duty owed 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."). A landowner's general duty to use reasonable care to remedy or warn of latent hazardous conditions on his premises arises from the owner's superior knowledge of the conditions on the land within his control. Byerly v. Connor, 307 S.C. 441, 415 S.E.2d 796 (1992). It is this superior knowledge of the allegedly defective condition that is the crux of an invitor's liability for injuries that occur on his premises. Id.; Sides v. Greenville Hosp. Sys., 362 S.C. 250, 607 S.E.2d 362 (Ct. App. 2004).

No such duty exists where the invitee has at least equal knowledge of the allegedly defective condition prior to injury, or of which he or she may reasonably be assumed to be aware. 62A Am. Jur. 2d Premises Liability § 495. Rather, when a person goes into danger with knowledge of the alleged defective condition, it is well settled that she assumes the consequences of her actions. House v. European Health Spa, 269 S.C. 644, 648, 239 S.E.2d 653, 655 (1977) (holding trial court should have directed verdict for premises owner where plaintiff was aware shower tiles on which she fell were often slippery and she carelessly exposed herself to this risk); see also (The Santa Barbara) Canton Co. of Baltimore v. Brown, 299 F. 147, 151 (4th Cir. 1924) ("Generally one who uses or enters on the property of another with full knowledge of [a] dangerous condition cannot recover for injuries to his person or property arising from the known danger.").

"Reasonable care on the part of [a] possessor [of land] ... does not ordinarily require precautions, or even warning, **against dangers which are known to [a] visitor**, or so obvious to him that he may be expected to discover them." Restatement (Second) of Torts § 343A cmt. e (1965) (emphasis added) (quoted in Creech v. S.C. Wildlife and Marine Res. Dep't, 328 S.C. 24, 31, 491 S.E.2d 571, 574 (1997)).

In the case at bar, even if the floor was in fact slippery, Plaintiff has unambiguously testified that she knew that the floor was slippery before she fell.

> Q: Ms. Berry, we're back on the record after a brief break. I have just a few more questions. The – in your Complaint, which is the formal lawsuit brought against my client, Scott Richardson, you indicate that the Defendant knew or should have known that the slippery conditions were present. What evidence do you have to support that they were aware of any slippery condition on the floor?
>
> A: I just know that it was slippery under my feet.
>
> Q: Okay. And you say you were aware of that by walking across it?
>
> A: Yes, sir.
>
> Q: Across the entire dining room?
>
> A: Yes, sir.
>
> Q: Okay. So you were aware of that condition before you fell?
>
> A: Yeah, I could feel it.

(**Ex. A**, p. 56, line 21-- p. 57, line 12).

Plaintiff further testified she could feel her feet "pivot" below her as she traversed the dining and condiment areas, and that she was walking carefully because she knew the floor was slippery.

> Q: Is it accurate to say that before your fall you knew that the floor was greasy?
>
> A: I was careful walking.

Q: And you were careful because you felt like the floor was greasy?

A: Yeah, because your feet were like pivoting. When you can walk and you can feel your shoe pivot.

Q: And you thought you were pivoting because the floor was greasy?

A: Yes, sir.

(**Ex. A**, p. 42, lines 8-17).

Plaintiff's testimony is unequivocal that she knew the floor was slippery before she fell. The slippery nature of the floor, if it existed, was a known condition to Plaintiff at the time of her accident. Thus, Plaintiff's testimony, even viewed in the light most favorable to her, is not enough to create a material issue of fact for a jury to decide. Compare Legette v. Piggly Wiggly, Inc., 368 S.C. 576, 629 S.E.2d 375 (Ct. App. 2006) (plaintiff's uncertain, vacillating testimony about absence of mats and cones from entrance to store on rainy day not enough to create a genuine issue of material fact).

In Meadows v. Heritage Vill. Church & Missionary Fellowship, Inc., the Supreme Court of South Carolina held an owner did not have a duty to warn an invitee about the danger of wet grass "because it was a natural condition, the peril of which was obvious. In contrast, a latent defect is one which an owner has, or should have, knowledge of, and of which an invitee **is reasonably unaware**. It is one which a reasonably careful inspection will not reveal." Meadows v. Heritage Vill. Church & Missionary Fellowship, Inc., 305 S.C. 375, 378, 409 S.E.2d 349, 351 (1991) (emphasis added).

Here, Plaintiff's own testimony establishes she was aware of the alleged dangerous condition. She testified she had actual knowledge of the condition before her fall. Therefore, Chick-fil-A did not breach its duty to provide reasonably safe premises. Furthermore, Plaintiff's testimony conclusively shows Plaintiff knew that the floor was slippery and was walking carefully

with the knowledge that the floor was slippery prior to her fall. When viewed in a light most favorable to Plaintiff, Plaintiff has presented no evidence that Chick-fil-A was negligent.

(3) Mr. Berry's loss of consortium claim is likewise barred.

As discussed previously, Defendant owes no duty to remedy or warn Mrs. Berry with respect to a condition of which she had prior knowledge. Likewise, Defendant owes no duty to Mr. Berry that would give rise to a claim for loss of consortium. See Lee v. Bunch, 373 S.C. 654, 647 S.E.2d 197 (2007) ("Generally, a plaintiff spouse's claim for loss of consortium fails if the impaired spouse's claim fails, whether the claim is considered separate and independent from the impaired spouse's claim or derivative in nature.") (quoting 41 Am.Jur.2d Husband and Wife § 227 (2007)); cf. Williams v. APAC Atl., Inc., 2010 WL 569735 (D.S.C. 2010) (dismissing loss of consortium claim where summary judgment was granted for defendant on injured spouse's claim because loss of consortium claim "necessarily depends on plaintiff proving defendants' liability for his injuries"). Accordingly, Scott Richardson d/b/a Chick-fil-A of Sumter Mall is entitled to judgment in its favor as a matter of law on Mr. Berry's loss of consortium claim.

CONCLUSION

It is undisputed that prior to her fall, Plaintiff had actual knowledge of the condition which she contends caused her to fall. Further, Plaintiff cannot prove Defendant has actual or constructive notice of the alleged dangerous condition; as such, her failure to warn claims must similarly fail. For the foregoing reasons, Defendant Scott Richardson d/b/a Chick-fil-A of Sumter Mall, FSU respectfully requests summary judgment be entered in its favor on Plaintiffs' claims.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

COLLINS & LACY, P.C.

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ATTORNEYS FOR DEFENDANT SCOTT RICHARDSON D/B/A CHICK-FIL-A OF SUMTER MALL, FSU

Columbia, South Carolina
November 20, 2018

EXHIBIT A

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER	)	CASE NO.: 2014-CP-43-2776
Wanda V. Berry and Gary A. Berry,	)	
Plaintiffs,	)	
vs.	)	Deposition of:
Scott Richardson d/b/a Chick-fil-A of Sumter Mall,	)	Wanda V. Berry
	)	July 7, 2016
	)	10:28 a.m. - 12:09 p.m.
Defendant.	)	
_____	)	

Deposition on oral examination of Wanda V. Berry, reported by Jennifer Nottle, Court Reporter and Notary Public in and for the State of South Carolina; pursuant to Rule 30 of the South Carolina Rules of Civil Procedure; said deposition was taken at the law offices of Clark Law Firm, L.L.C., 22 E. Liberty Street, Sumter, South Carolina, on Thursday, the 7th day of July, 2016.

hurry up and go home?

A: Yes, sir.

Q: Okay. And then you told him that the floor -- did you tell him the floor was gooshy (ph), greasy feeling or was that something that you just --

A: I can't remember if I told him that -- yes, I'm sure I did because that's why I fell. I turned to her as she was coming out the kitchen door when I ordered. She said, you can go around and get your napkins and stuff, I'll bring it to you. And she came, I turned around that quick it was ready. And there she was, so I stepped to her to take the tray and then I slipped up on the floor and fell.

Q: Okay. So the person that came out to give you your food, did she also take your order?

A: Yes, sir.

Q: Okay. And she said, you can go get your napkins and I'll bring the food to you?

A: Yes, sir.

Q: Okay. All right. And then as she brought the food out you went to reach for it and slipped; is that right?

MS. CLARK: Objection to form.

A: Yeah.

Q: Okay. If I misstate anything, you let me know, okay?

A: Okay.

Q: My understanding of your testimony was that you went to get your condiments, you said the food was ready real quickly, she came out and tell me what happened after that?

A: She was at the door frame, standing in the door frame. I took one step to her and I slipped. and the tray went up in the air, pulled my left shoulder back around. I fell on my hip on the floor, about the size of a basket ball. And it burned like fire for a couple of days. And I reached for it and it just went up in the air and then she ran back. She said, oh, I'll go get you new food. And she came back with a mop also and the yellow wet floor thing to mop it up. But there was no rug there, it was greasy, slippery floor.

Q: Okay. So when you fell you say that this person, the female employee said she'd get you more food, and then she brought a mop out. Take me through that sequence if you would.

A: I think -- I think she got the mop and mopped up the floor first and then brought me another tray. And by then the manager was coming out to speak with me.

Q: Okay. Did you -- as you're walking across the floor to get your food, did you see any substance on the

floor?

A: No, sir. You could just feel it under your shoes.

Q: Could you feel it across the entire floor?

A: Yes, sir.

Q: Okay. All right. And would that have been from the counter area all the way around to where you fell, you felt the greasy floor?

A: It's in the dining room side when you walk around the corner and where all the chairs and tables are.

Q: Okay. So when you got to the area where the condiments are as I understand it there's the counter is kind of a straight line where people walk up?

A: Right.

Q: And then there's a little walkway or little area between the mall walking area and the dining area that you kind of go through; is that right?

A: It's like a 90 degree angle. Here's your serving counter, you walk around the corner, and there's your napkins, mayonnaise, straws.

Q: Okay.

A: And the trash doors are right under that, it's all one unit. And three, three and a half feet away is the kitchen door.

Q: Okay.

A: Where they walk in and out from the kitchen.

Q: But the greasy floor feeling that you said you felt squishy or gooshy (ph), I think was --

A: When you walk -- when you come around the corner.

Q: As soon as you come around the corner from there into the area you fell?

MS. CLARK: Object to form.

A: Right.

Q: Okay. Is that an accurate description of your testimony that you felt the squishy area from the time you came around the condiment area until the time you fell? The reason I'm asking you that question is she objected to the form which means she thinks I asked a poorly-worded question, or she objects for another reason, so I want to get it clarified so that I eliminate the objection.

A: Well it's all -- it's all tile. And it's where the grease just floats in the air and settles on the floor. So it would have been from where -- it's carpet in the mall. And then when you walk up to them it's tile.

Q: Okay.

A: So it's all greasy all the way around but it was -- I would say when you walk you can feel your feet pivot.

Q: Okay.

A: Because it's that greasy. Sticky.

Q: Okay.

A: I couldn't eat.

Q: Did you look at the bottom of your shoes while you were in the store?

A: No, sir.

Q: Did you feel the bottom of your boots?

A: No.

Q: Is it accurate to say that before your fall you knew that the floor was greasy?

A: I was careful walking.

Q: And were you careful because you felt like the floor was greasy?

A: Yeah, because your feet were like pivoting. When you can walk you can feel your shoe pivot.

Q: And you thought it was pivoting because the floor was greasy?

A: Yes, sir.

Q: Okay. Ms. Berry, I forgot to ask you some questions that I typically ask at the beginning of every deposition. Are you under the influence of any medications today that would affect your ability to testify?

A: No, sir. No, sir.

Q: Okay. And you feel perfectly fine being here today giving your deposition?

next little while I went back and I got a shot. I don't think I got the shot -- I don't remember which visit was the shot that they gave me for pain.

Q: Okay.

A: And it still hurt so then I had the MRI.

Q: When you say they gave you a shot for pain, is that -- where was that pain?

A: In my left shoulder.

Q: Okay. And what body parts were injured when you fell at the Chick-fil-A?

A: Well just the hit on my hip when I fell. But then this is (indicating) what was yanked back and torn off, all the ligaments were torn off from the bone.

Q: Okay. Now you said all the ligaments were torn off from the bone, would you defer to the medical providers as to what actually occurred?

A: You mean what they said, what they told me?

Q: Yes, ma'am. Would you --

A: He called it -- when he went in he called it a bald eagle. He said everything was torn loose and he didn't know if he could fix it. But he put what he called toggle bolts down in it, screws into it to hold it on. And he hoped that that would fix it. And thank the Lord it did.

Q: Okay. And when you say he, was that Dr. Ford?

Q: Okay. Do you pay for any health insurance?

A: Yes, sir.

Q: And is your health insurance -- tell me about your health insurance versus social security?

A: I don't know it's just like insurance, it picks up. I don't -- United Health Care.

Q: Okay. But is that -- is United Health Care provided to you by the government as a result of your social security status?

A: No, we pay for that. Monthly premium.

Q: You pay for that, okay. To your knowledge did social security -- did your status as being disabled by the social security administration did that result in any payments by the social security administration on your behalf?

A: I don't know, it's all the bills. I don't know how that works.

Q: Okay. Let's take a quick break and we may be done. I just need to look through my notes.

(A short break was taken.)

Q: Ms. Berry, we're back on the record after a brief break. I have just a few more questions. The -- in your Complaint, which is the formal lawsuit brought against my client, Scott Richardson, you indicate that the Defendant knew or should have known that the

slippery conditions were present. What evidence do you have to support that they were aware of any slippery condition on the floor?

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

Q: Okay. And you say you were aware of that by walking across it?

A: Yes, sir.

Q: Across the entire dining room?

A: Yes, sir.

Q: Okay. So you were aware of that condition before you fell?

A: Yeah, I could feel it.

Q: Okay. Those are all the questions I have, thank you.

MS. BERRY - EXAMINATION BY MS. CLARK:

Q: Ms. Berry, as it relates to your left shoulder, you were asked whether you can -- I don't really remember the question but the question pertained to your osteoarthritis and your fibromyalgia as it relates to your left shoulder. Are you able to tell the difference between the left shoulder pain, and your arthritis and your fibromyalgia?

A: Yes, ma'am.

Q: Okay.

A: If I have attacks, yeah. Flare-ups.

Q: Okay. And so if you have pain in your shoulder --

EXHIBIT B

FEBRUARY 4, 2013 Incident Reporting-6 Video Clips - will be mailed to Sumter County Clerk's Office to be hand filed.

STATE OF SOUTH CAROLINA COUNTY OF SUMTER	IN THE COURT OF COMMON PLEAS THIRD JUDICIAL CIRCUIT Civil Action No.: 2018-CP-43-00851
Wanda V. Berry and Gary A. Berry, Plaintiffs, vs. Scott Richardson d/b/a Chick-Fil-A of Sumter Mall, Defendant.	PLAINTIFFS' AMENDED MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

SUMMARY OF FACTS

The pleadings, depositions, answers to interrogatories, responses to requests for production of documents and affidavits, and all reasonable inferences to be drawn therefrom, would support the following findings:

1. At the time of the incident which is the subject of the Complaint, Wanda Berry was an invitee of Chick-Fil-A at the Sumter Mall.
2. That on or about February 4, 2013, Plaintiff slipped and fell on a slippery foreign substance on the floor in Defendant's dining room.
3. That after Plaintiff's fall, Defendant's employee saw Plaintiff on the floor, assisted Plaintiff in getting off the floor and acknowledged that a foreign substance was on the floor.

4. That approximately fifteen minutes (15) prior to Plaintiff's fall, Defendant's employee was sweeping the floor in the exact area where Plaintiff fell but did not take any actions to remove a slippery, wet substance from the floor.

5. That during the fifteen minutes (15) prior to Plaintiff's fall but after Defendant's employee was sweeping in the area where Plaintiff ultimately fell, no foreign substances were placed on the floor.

6. The events described above are shown on Defendant's security video attached hereto as Exhibit "A".

7. The opinion given by Plaintiff's expert in the Affidavit of Howard Cannon attached as Exhibit "B" is that:

   - Chick-fil-A's employee(s) reasonably had, or should have had, actual and/or constructive knowledge of a hazardous condition on the floor of the dining room where Plaintiff fell in the form of a slippery, wet substance before Plaintiff's fall and the employee(s) did not meet the industry standard of care in remedying or eliminating the hazardous condition, and that the hazardous condition was the proximate cause of Plaintiff's fall.
   - Based on my review of the video of the fall and the dining room before and after the fall, it is my opinion that a slippery, wet substance was on the floor where Plaintiff fell causing her to fall, that a Chick-fil-A employee was cleaning in the area of the fall minutes prior to the fall and was aware, or reasonably should have been aware, of the

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

- Chick-fil-A failed to properly train, supervise, and/or monitor its employee to industry standard on recognizing hazards and maintaining the floor of the dining room in a safe condition, and that said failures were a proximate cause of Plaintiff's fall.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where 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 judgment as a matter of law. Belton v. Cincinnati Ins. Co., 360 S.C. 575, 602 S.E.2d 389 (2004); McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 597 S.E.2d 181 (Ct.App.2004); Rule 56(c), SCRCP; *see also* Higgins v. Medical Univ. of South Carolina, 326 S.C. 592, 486 S.E.2d 269 (Ct.App.1997) (noting that when ruling on motion for summary judgment, trial judge must consider all of the documents and evidence within the record, including pleadings, depositions, answers to interrogatories, admissions on file, and affidavits). All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (Ct.App.2003); Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 542 S.E.2d 736 (Ct.App.2001); *see also*

Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 563, 564 S.E.2d 94, 96 (2002) ("On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below."). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000); *Hawkins v. City of Greenville*, 358 S.C. 280, 594 S.E.2d 557 (Ct.App.2004). Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts. *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 534 S.E.2d 672 (2000); *Ellis v. Davidson*, 358 S.C. 509, 595 S.E.2d 817 (Ct.App.2004).

The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003); *Rumpf v. Massachusetts Mut. Life Ins. Co.*, 357 S.C. 386, 593 S.E.2d 183 (Ct.App.2004). Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 594 S.E.2d 455 (2004); *Hawkins*, 358 S.C. at 289, 594 S.E.2d at 561-62; *Murray v. Holnam, Inc.*, 344 S.C. 129, 542 S.E.2d 743 (Ct.App.2001). *BPS, Inc. v. Worthy*, 362 S.C. 319, 325–26, 608 S.E.2d 155, 159 (Ct. App. 2005)

LAW

To recover damages for injuries caused by a dangerous or defective condition on a storekeeper's premises, the plaintiff must show either (1) that the injury was caused by a

specific act of the defendant which created the dangerous condition; or (2) that the defendant had actual or constructive knowledge of the dangerous condition and failed to remedy it. *Anderson v. Racetrac Petroleum Inc.*, 296 S.C. 204, 371 S.E.2d 530 (1988); *Pennington v. Zayre Corp.*, 252 S.C. 176, 165 S.E.2d 695 (1969); *Hunter v. Dixie Home Stores*, 232 S.C. 139, 101 S.E.2d 262 (1957). In the case of a foreign substance, the plaintiff must demonstrate either that the substance was placed there by the defendant or its agents, or that the defendant had actual or constructive notice the substance was on the floor at the time of the slip and fall. *Calvert v. House Beautiful Paint & Decorating Ctr., Inc.*, 313 S.C. 494, 443 S.E.2d 398 (1994); *Wimberly v. Winn-Dixie Greenville, Inc.*, 252 S.C. 117, 165 S.E.2d 627 (1969); *Pennington v. Zayre Corp.*, 252 S.C. 176, 165 S.E.2d 695 (1969); *Orr v. Saylor*, 253 S.C. 155, 169 S.E.2d 396 (1969); *Hunter v. Dixie Home Stores*, 232 S.C. 139, 101 S.E.2d 262 (1957); *Gilliland v. Pierce*, 235 S.C. 268, 111 S.E.2d 521 (1959); *Gillespie v. Wal-Mart Stores, Inc.*, 302 S.C. 90, 394 S.E.2d 24 (Ct.App.1990).

Storekeeper liability is founded upon the duty of care a possessor of land owes to an invitee. Generally, a person owes an invitee the duty of exercising **reasonable** or **ordinary** care for his safety and is liable for any injury resulting from the breach of this duty. *Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984). Although a merchant is not an insurer of the safety of his customers. *Felder v. K-Mart*, 297 S.C. 446, 377 S.E.2d 332 (1989), he owes a duty to keep aisles and passageways in a reasonably safe condition. *Moore v. Levitre*, 294 S.C. 453, 365 S.E.2d 730 (1988).

DISCUSSION

I. ACTUAL AND CONSTRUCTIVE NOTICE

There is video evidence in this case which shows that Defendant had actual and/ or constructive knowledge of a dangerous condition on its floor prior to Plaintiff's fall in the area where Plaintiff fell and failed to take reasonable steps to remedy the dangerous condition, and as a result, Plaintiff was injured and sustained damages. The video evidence is undisputed that Plaintiff slipped and fell, that there was a foreign substance on the floor at the time of the fall, that Defendant's employee inspected the area where Plaintiff fell prior to the fall but did not take reasonable actions to remove the foreign substance, and that between the time of Defendant's employee's inspection and Plaintiff's fall there was no foreign substance placed on the floor. Plaintiff submits that this is evidence that Defendant knew or should have known that the substance was on the floor prior to the fall and did not take reasonable steps to remedy the dangerous condition.

There is expert opinion in the record that Defendant's employee knew or should have known that the foreign substance was on the floor prior to Plaintiff's fall and did not take reasonable steps to remedy the dangerous condition. Furthermore, there is expert opinion in the record that Defendant failed to properly train, supervise and/or monitor its employee to industry standards on recognizing hazards and maintaining the floor of the dining room in a safe condition, and that said failures were a proximate cause of Plaintiff's fall.

II. COMPARATIVE NEGLIGENCE

Defendant also asserts that Plaintiff was on notice of the dangerous condition prior to her fall and, therefore, Defendant is not liable for Plaintiff's injury. However, under South Carolina law a possessor of the premises is liable to an invitee for physical harm caused by a condition of the premises known to the invitee if the possessor of the premises should anticipate the harm despite such knowledge or obviousness. The possessor may also have a duty to protect the invitee if he has reason to expect the invitee's attention maybe distracted so that he would not discover what is obvious. *Callander v. Charleston Doughnut Corp*. 305 S.C. 123, 406 S.E .2nd 361 (1991) Restatement Second of Torts Section 343(A) (1965).

Plaintiffs submit that even if Plaintiff was aware the floor was slippery prior to her fall, Defendant is still liable because Defendant should have anticipated the harm to Plaintiff despite her knowledge of the dangerous condition. Under the facts of this case, Plaintiff was having a meal in Defendant's dining room. Defendant should have known that even if Plaintiff knew that the floor was slippery, she still could slip and fall while walking about the dining room.

Plaintiffs also point out that the cases relied upon by Defendant were decided under prior South Carolina law when South Carolina recognized the defense of Contributory Negligence. Therefore, said cases are inapplicable to the case at bar.

III. LOSS OF CONSORTIUM

Based on the fact that there is a genuine issue of material fact as to Defendant's negligence causing injuries to Plaintiff Wanda Berry, the loss of consortium claim made by Plaintiff Garry Berry survives summary judgment.

CONCLUSION

Based on the above, summary judgment must be denied.

CLARK LAW FIRM, LLC
ATTORNEYS FOR PLAINTIFF

s/John D. Clark
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January 22, 2019

Exhibit "A" to Plaintiff's Memorandum in Opposition

February 4, 2013, Video Clips will be mailed to Sumter County Clerk's Office to be hand filed.

Exhibit "B" to Plaintiff's Memorandum in Opposition

"Affidavit of Howard Cannon"

STATE OF SOUTH CAROLINA	**IN THE COURT OF COMMON PLEAS**
COUNTY OF SUMTER	**THIRD JUDICIAL CIRCUIT**
	Civil Action No.: 2014-CP-40-2776
Wanda Berry and Gary A. Berry,	
Plaintiff,	**AFFIDAVIT OF HOWARD CANNON**
vs.	
Scott Richardson d/b/a/Chick-fil-A, Defendant.	

The undersigned, after first being duly sworn, deposes and states as follows, that:

1. I am a restaurant expert and my office is located at Restaurant Operations Institute (ROI), Inc. in Birmingham, AL with mail arriving at Chelsea, AL. I have been an expert witness in 200+ litigation matters in states across the United States for both plaintiffs and defendants. Attached hereto as Exhibit "A" is my curriculum vitae.

2. I have reviewed the documents and videos provided of the slip and fall accident involving Wanda Berry in the Chick-fil-A of Sumter Mall on February 4, 2014.

3. I have reviewed the Summons and Complaint, Answer, discovery responses of Plaintiff and Defendant, video footage of the actual fall, and video footage of the dining room before and after the fall, as well as the depositions of Paul Thrower, Scott Richardson, Wanda Berry, and Gary Berry.

4. It is my opinion that Chick-fil-A's employee(s) reasonably had, or should have had, actual and/or constructive knowledge of a hazardous condition on the floor of

the dining room where Plaintiff fell in the form of a slippery, wet substance before Plaintiff's fall and the employee(s) did not meet the industry standard of care in remedying or eliminating the hazardous condition, and that the hazardous condition was the proximate cause of Plaintiff's fall.

5. Based on my review of the video of the fall and the dining room before and after the fall, it is my opinion that a slippery, wet substance was on the floor where Plaintiff fell causing her to fall, that a Chick-fil-A employee was cleaning in the area of the fall minutes prior to the fall and was aware, or reasonably should have been aware, of the substance, and the hazard, but did not remedy the hazardous condition, and that after the fall the employee acknowledged the slippery, wet substance on the floor by looking at the substance, placing a wet floor sign over the substance, and altering her walking gait to step over the substance.

6. It is also my opinion that Chick-fil-A failed to properly train, supervise, and/or monitor its employee to industry standard on recognizing hazards and maintaining the floor of the dining room in a safe condition, and that said failures were a proximate cause of Plaintiff's fall.

7. My opinions are based on my training, background, education, and knowledge of restaurant industry safety, safety rules, best practices, policies, procedures, training and management oversight and the standard of care in the restaurant industry.

8. My opinions are offered to a reasonable degree of professional certainty using the industry standard methodology, and scientific formula for risk.

9. This Affidavit may not contain all of the opinions that I have or may express in this matter, nor all of the basis for my opinions in this matter. I reserve the right to formulate and articulate additional opinions and as additional materials are provided to me. All opinions provided herein will be provided during testimony. In relation to all documents considered and utilized by me, I have assumed that they are all correct and accurate. I have made no attempt to independently audit or verify the documents, or the evidence and information contained within them. I have requested all reasonably arguable relevant documents pertaining to my scope of assignment in this matter and retaining counsel has stated that I am in receipt of such. In accordance with my standard business practices and recognized professional ethics, the costs for conducting my work and providing my opinions is in no way impacted by, or contingent upon, my conclusions and opinions. Neither myself, my company, or my employees have any present or contemplated interest or bias with respect to any parties in this matter.

10. I have read all the statements contained in this Affidavit and swear that the same are true and correct to the best of my knowledge, information and belief.

HOWARD CANNON

SWORN TO AND SUBSCRIBED before me a Notary Public, on this the 16th day of January, 2019.

NOTARY PUBLIC

My Commission Expires:

BEVIN BARBER
My Commission Expires
September 7, 2022

Exhibit "A" to the Affidavit of Howard Cannon

"Curriculum Vitae of Howard Cannon"

RESTAURANT EXPERT WITNESS

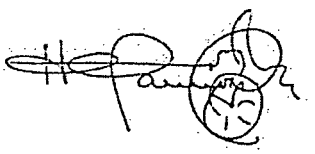
HOWARD CANNON

Restaurant Expert Witness

60 Chelsea Corners, #201
Chelsea, AL 35043
800.300.5764

Curriculum Vitae

With List of Publications



Updated December 5, 2016

HOWARD CANNON

Restaurant Expert Witness

Restaurant Operations Institute (ROI), Inc.
60 Chelsea Corners, #201, Chelsea, AL 35043
800-300-5764

Summary of Qualifications

I have been involved in more than 150 expert witness cases in states across the country and have worked with both plaintiffs and defendants.

I am the author of *Restaurant OSHA Safety and Security: The Book of Restaurant Industry Standards & Best Practices*© - 2016. I am also the author of *The Complete Idiot's Guide to Starting a Restaurant*© – *first and second editions* – which, since their writing by me in 1999 and 2000 and their initial publishing in 2001 and subsequent revisions, have been published and distributed in dozens of countries around the globe and read and referenced by tens of thousands of people worldwide.

My hands-on knowledge, skill, training, education, and experience in restaurant, bar, food and beverage industry establishments at the employee level dates back to 1978; at the management level dates back to 1983; at the multi-unit management level dates back to 1985; and, at the corporate level dates back to 1987. Furthermore, these positions, responsibilities, and experiences continue to be an integral and active part of my every-day consulting, advisory, training, writing, expert witness, and coaching practice.

I have been an expert guest on national television and radio; including The Doctor OZ Show, Anderson Cooper Live, The Travel Channel, Hotel Impossible, Canadian Public Radio, Fox News, CBS and many others. I have been published in national publications; including, Reader's Digest, The Wall Street Journal, Bar and Nightclub Magazine, My Foodservice News, Independent Restaurateur Magazine, QSR, and many others. I have provided industry analysis for Blue-Shift Reports, and been a guest speaker at Washington State University, The Community College of Philadelphia, the National Restaurant Association, the International Franchise Association, and many others.

My areas of experience and field of expertise relate directly to day-to-day operations, human resources, risk management, safety, security, food and beverage safety and contaminations, furniture, fixtures and equipment, alcohol sales, serving and distribution, management oversight, the industry standard of care, the reasonable and customary operating systems used, and general industry compliance, among other things related strictly to restaurant, bar, food and beverage industry establishments; and, the policies, procedures, practices, systems, standards of care, and management oversight that coincides with them.

I have authored articles; given speeches; conducted training classes, seminars, and workshops on a wide-variety of restaurant, bar, food and beverage industry-related subject matters and have several years of experience as a restaurant trade magazine owner, publisher, and writer.

Restaurant Operations Institute (ROI), Inc., and its associated brands offer restaurant, bar, food, and beverage industry consulting, coaching, expert witness, training, mediation, and advisory services to clients of various types and sizes in markets across the country and around the globe.

I have served dozens of the world's largest restaurant brands, as well as, countless mom-and-pop independent operators since my business inception on July 14, 1987. I have studied, served, and surveyed virtually every type, style, and size of restaurant, bar, food and beverage industry establishment, as well as, those who rely on them – customers, employees, and vendors.

ROI was founded by and is solely-owned by me, and is, or has been, in direct association with Restaurant Expert Witness, Restaurant Consultants of America, Restaurant Profitability Magazine, Restaurant Rhino, and more than one-hundred restaurant-industry websites.

I have Federal Certification with 29 CFR 1910 from the Occupational Safety and Health Administration. I am a Certified Forensic Consultant (CFC) from the American College of Forensic Examiners. I have Hazard Analysis & Critical Control Points Manager Certification (HACCP) and National Environmental Health Association Certification. I have been trained in Food Safety and On-premise Alcohol by ServSafe and TIPS 2.0, respectively. I attended the University of Wisconsin system and have a Master's in Business Administration from Hamilton University and am a Master's Level Advisory Member for Culinary Management at Stratford University.

I believe it is my broad industry knowledge, skill, education, training, experience, and perspective that I have developed from more than thirty-seven years that makes me uniquely qualified in a wide variety of subject matters pertaining specifically to restaurants and bars.

AUTHORED BOOKS

- *The Complete Idiot's Guide to Starting Your Own Restaurant*© (2001; Alpha Books) ISBN 0-02-864168-X; Library of Congress Catalog Card Number: 2001095862
- *Stretch Yourself – Getting Promoted*© (2003; Pearson Books) – ISBN 0-536-72823-2
- *The Complete Idiot's Guide to Starting a Restaurant©- Second Edition* (2005; Alpha Books) ISBN 978-1-59257-416-2; Library of Congress Catalog Card Number: 2005930931
- *Restaurant OSHA Safety and Security: The Book of Restaurant Industry Standards & Best Practices*© (2016; ROSSI) ISBN 978-1-945614-00-2 and 978-1-945614-07-1

Books authored by Howard Cannon have been available in many countries around the globe and have been published and distributed by the following reputable publishing firms:

- Penguin Group (USA) Inc., 375 Hudson Street, New York, New York 10014, USA
- Penguin Group (Canada), 90 Eglinton Avenue East, Suite 700, Toronto, Ontario M4P 2Y3, Canada - a division of Pearson Penguin Canada Inc.
- Penguin Books Ltd., 80 Strand, London WC2R ORL, England
- Penguin Ireland, 25 St. Stephen's Green, Dublin 2, Ireland - a division of Penguin Books Ltd
- Penguin Group (Australia), 250 Camberwell Road, Camberwell, Victoria 3124, Australia - a division of Pearson Australia Group Pty. Ltd
- Penguin Books India Pvt. Ltd., 11 Community Ctr, Panchsheel Pk, New Delhi, 110 017, India
- Penguin Group (NZ), 67 Apollo Drive, Rosedale, North Shore, Auckland 1311, New Zealand - a division of Pearson New Zealand Ltd
- Penguin Books (SA) (Pty.) Ltd., 24 Sturdee Ave, Rosebank, Johannesburg 2196, South Africa
- Penguin Books Ltd., Registered Offices: 80 Strand, London WC2R ORL, England
- Alpha Books, 375 Hudson Street, New York, New York 10014, USA
- Pearson Education, Inc., 75 Arlington Street, Suite 300, Boston, MA 02116

INDUSTRY EXPERIENCE AND POSITIONS

Howard Cannon started his restaurant industry career washing dishes and bussing tables in Boaz, Wisconsin in 1978, and has since held the following restaurant and bar industry positions:

- Positions Held – dishwasher, busboy, host, waiter, line-cook, fry cook, prep cook, bar-back, bartender, bouncer, security, shift supervisor, shift manager, Assistant Manager, Manager, General Manager, Delivery Manager, Catering Manager, Multi-Unit Manager, District Manager, Marketing Manager, Human Resources Manager, Purchasing Manager, Special Projects Manager, Director of Operations, Regional Vice President, Vice President, Chief Operating Officer, President, and Operations Executive Committee Member.
- Industry Experience – Operations; Human Resources; Surveillance; Marketing; Industry Trends; Private Investigations; Start-ups; Turnarounds; Branding; Concept Design; Franchising; Systems Development; Purchasing; Construction; Site Selection; Training; Safety; Security; Risk Management; Point of Sale; Furnishings; Fixtures; Equipment; Facilities; Management; Leadership; Business Planning; Funding; Intellectual Property; Forensic Analysis; Food Safety; OSHA; FACTA; ADA Compliance; Contract Management; Alcohol Management; Finance; Accounting; Premises Liability; Valuation; Food and Beverage Contamination; Entertainment, Travel, and Unique Venue Food and Beverage Concept Creation, Development, Assessment, and Performance Improvement.

CLIENTS, PROJECTS AND RECOGNIZABLE BRANDS – [partial listing]

- Types of Clients – Entrepreneurs, Corporate Chains, Franchisees, Franchisors, Investors, Bankers, Lawyers, Insurance Companies, Developers, City and County Government Agencies, and Creditors
- Types of Establishments – Fast Food, Quick Casual,; Casual Dining, Fine Dining, Kiosks, Food Courts, Food Trucks, Corporate Dining, Sports Venues, Arenas, Casinos, Buffets, Delivery, Catering, Cafeteria Dining, Contract Foodservice, Convenience Foods, Bars, Lounges, Clubs, Prisons, Schools, and Hotels
- Size of Companies – Independent Operators, Regional Chains, National Chains, and International Chains – from one to several thousand locations
- Geographic Areas – Every State of the United States, Canada, Mexico, England, France, India, Asia, Jamaica, the Philippines, and Haiti
- Scope of Work – Operations, Private Investigations, Video Surveillance, Safety Training, Bench Marking, Region and Unit Turnarounds, Logo Design, Marketing, Branding Design, Site Selection, Strategy, Concept Development, Point of Sale, Equipment, Facilities, Building Design, Funding Strategy, Human Resources, Business Planning, International Brand Penetration, US Brand Penetration, Merger and Acquisition, Valuations, Capital Acquisition, Contract Negotiation, Menu Design, Exit Strategy, Food & Beverage Purchasing, Vendor Selection, Cost Controls, Investor Evaluation, Recruiting, Training, Franchise Development, Franchise Sales, Industry Trend Analysis, Employee Productivity Improvement, Buying and Selling Processes, Industry Assessment, Leadership Assessment, Concept Compliance, Premises Liability, Food and Beverage Liability, Mediation, and Expert Witness
- Recognizable Brands – Pizza Hut, Taco Bell, Arby's, PepsiCo, Compass Group, Aramark, Wall Street Deli, TCBY, IBM, Otis Elevator, Swarovski Helicopter, The Hartford, Carrier, The Houston Astrodome, ENRON Field, Harrah's Horseshoe Casino, RTM Restaurant Group, Sodexho, Seattle's Best Coffee, Starbuck's, Mrs. Fields, Papa John's, Hot-n-Now, Lone Star Steakhouse, Subway, Wendy's, Burger King, Domino's, Little Caesars, Chow King, Greenwich Pizza, AmSouth Bank, Jollibee Corporation, Lamppost Pizza, Wachovia Bank, Sbarro Pizza, Shari's Restaurants, The Mill Restaurant, Quiznos, American Food Distributors, Apple Lane

Farms, On Tap Sports Bar & Grill, Caney Fork Restaurants, Fat Burger, Swift Pork, Harrah's Casinos, Healthy Taco Corp., Kenosha Beef International, Ltd., Brinker Chili's Texas, Inc., Chicken King Corporation, Frontier Bank, Applebee's, Atlanta Bread Company, Harvey's Casino, ConAgra Foods, Cochran & Edwards, Cici's Pizza, Outback Steakhouse, Gator's Dockside Restaurants, Paradise Restaurant & Bar, Plush Bar, Golden Corral Restaurants, Phillip's Seafood Restaurants, Waffle House Restaurants, Hard Rock Café, Wing It, Denny's Restaurants, O' Charley's Restaurants, Niagara Bottling, Buckhorn Grill, Selective Insurance Company, Oregon Mutual Insurance, Caruso Exc., Wilson Mutual Insurance, Amco Insurance, Nationwide Mutual Insurance, Liberty Mutual Insurance, The Wynn Hotel & Casino, The Plaza Hotel & Casino, Old Town Buffet, PlayLV Gaming Operations, Weingarten Realty, Buffalo Wild Wings, World of Beer, Fireman's Fund Insurance, Panera Bread, Dignity Health, Cracker Barrel, TGI Friday's, PF Chang's, Quick trip Corporation, Culinary Academy of New York, Kentucky Fried Chicken, Fuddruckers, Texas Roadhouse, Church's Fried Chicken, Wyndham Hotels, Chick-Fil-A, Sheraton Hotels, H. J. Heinz, Golden Corral, Chili's, Kenosha Beef International, O' Charley's, Birchwood Foods, Outback Steakhouse, K & W Cafeterias, and many more.

CORPORATE INDUSTRY EXPERIENCE

Howard Cannon has held several corporate industry positions over the length of his career, including, but not limited to, the following:

07/1987 to Present
Restaurant Operations Institute (ROI), Inc. – *Restaurant, Bar, Food, and Beverage Industry Author, Speaker, Consultant, Expert Witness, Mediator, CEO* – founder and sole owner of ROI –the company was founded and began operation on July 14, 1987 as a part-time venture and, after several business relocations and plan revisions, the company progressed to what it is today

Pizza Hut – District Manager; Multi-Unit Manager; Delivery Manager; General Manager; 1987 to 1991 – responsible for 7 restaurants doing approximately $6.3 million in annual sales and managing approximately 250 employees for multiple franchisees of Pizza Hut, Inc.

Taco Bell Inc. – Multi-Unit TMU Manager, Marketing Manager, Human Resources Manager, Special Projects Manager; 1991 to 1993 – responsible for 7 restaurants directly and 17 restaurants indirectly, doing approximately $9 million and $19 million, respectively, in annual sales and managing 300 and 750 employees, respectively, for Taco Bell Corporate and the franchisor of the Taco Bell brand

Arby's – Regional Vice President, Director of Operations, Co-op Marketing Manager, District Manager, Area Supervisor; 1995 to 1999 – responsible for 73 restaurants doing approximately $59 million in annual sales and managing approximately 2,400 employees for a franchisee of Arby's Inc.

Compass Group PLC– Regional Vice President; 1999 – responsible for 70 corporate dining and subsidized dining locations, and several hundred contract employees for the world's largest food-service company - doing business in sports venues, corporate dining, prisons, manufacturing plants and educational facilities

Wall Street Deli, Inc. – Chief Operating Officer; 2000 – responsible for 121 corporate restaurants and several franchisees, offering several different brands across 21 different states - doing

approximately $65 million in annual sales and managing approximately 1,800 employees for this publically-held restaurant company

Restaurant Profitability Magazine – Publisher/CEO; 2004 to 2008 – the founder and publisher of this restaurant-industry trade magazine with content targeted at independent restaurant owners and operators, with print publications being licensed and distributed in 20 different states and several different countries around the world, and supported by restaurant industry product and service providers of varying types

List of Publications [Articles, Speeches, Interviews, Media, and Seminars]

Howard Cannon has had dozens of restaurant-industry articles published and, during the length of his career, has produced more than one hundred restaurant-industry interviews, speeches, articles, workshops, and seminars distributed in trade magazines, newspapers, non-industry publications, television, radio, high-schools, universities, trade shows, corporate events, classes, internet distribution and company functions in markets across the United States and in countries around the world. The following is a partial listing of content authored, presented or contributed to over the last ten years:

- *Eat Lunch and Die! – The Dr. Oz Show*
- *Hotel Impossible Appearance on the Travel Channel – Anchorage, Alaska*
- *Dirty Little Restaurant Secrets –Anderson Cooper Live*
- *Hotel Impossible Appearance on The Travel Channel –Juneau, Alaska – Alaskan Hotel*
- *Hospitality and the Law –Will You Be Served? : Community College of Philadelphia –CLE*
- *Boston Herald interview regarding restaurant performance*
- *We are a For-Profit Franchisor! –Any Questions?*
- *Using Experts to Drive Real Results seminar– International Franchise Association*
- *13+ Things You Shouldn't Eat at a Restaurants –Readers' Digest*
- *With Food Service Equipment Cheap Can Be Costly –Convenience Store Decisions*
- *Profit and Loss Closed King George Inn –The Morning Call*
- *Dirty Restaurant Secrets the Kitchen Crew Won't Tell You –Reader's Digest*
- *Does Becoming a Franchisor Make $$? –National Restaurant Association Show*
- *You Have to Make Green to Be Green – The Independent Restaurateur Magazine*
- *The Marketing Hot Stove Theory I and II – Bar and Nightclub Magazine*
- *The State of the Restaurant Industry – Canadian Public Radio*
- *Executive/Entrepreneur Interview – Fox TV News*
- *Building Green Restaurants – Fox TV News, 303 the Magazine, QSR Magazine*
- *5 Secrets to Pocketing More Profits – My Food Service News*
- *Restaurant Purchasing – The Birmingham News*
- *Restaurant Industry Analysis – Blue Shift Research Reports*
- *6 Prescriptions for Restaurant Failure – My Food Service News*
- *Spring Cleaning Starting with Your Bad Habits – Independent Restaurateur Magazine*
- *Restaurant Start-up, Turnaround & Profit Improvement Boot Camps*
- *We Are a FOR-PROFIT Restaurant! – Any Questions seminars*
- *The Mouse Training Theory seminars*
- *Hoosiers Training seminars*
- *Stretch Yourself – How to get Promoted in the Restaurant Business*
- *Shake the Money Tree*
- *An Apple Made You Fat – Not a Big Mac*

- *10 Obvious Ways to Control Food Cost*
- *Restaurant Best Practices*
- *Angel Investors Have Money for Restaurants*
- *Why is Hands-On Floor Management Important to Profit Ability?*
- *6 Management Basics for Restaurants*
- *Servers Leave Money On The Table*
- *Fast Start Tips for New Hires*
- *Stolen Profit Preventing Theft*
- *Are You Promoting Failure?*
- *The Workplace Generation Gap*
- *Recruiting & Keeping Key Employees*
- *Impact –speeches, seminars, and videos*
- *Start-Up –speeches, seminars, and videos*
- *Shake the Money Tree – speeches, seminars, and videos*
- *Site Selection – speeches, seminars, and videos*
- *Don't Go Sit On a Mountain – speeches, seminars, and videos*

EDUCATION, TRAINING & ACADEMIC ACHIEVEMENTS

University of Wisconsin – Center Richland
B.S., Business Administration – Hamilton University
Master's in Business Administration – Hamilton University
Professional Commercial Mediation and Conflict Resolution Certification (PCM)
Occupational Safety and Health Administration Act – Federal Certification # 2301944 (OSHA)
American College of Forensic Examiners – Certified Forensic Consultant (CFC)
Hazard Analysis & Critical Control Points Manager Certification (HACCP)
The National Environmental Health Association Certification
Occupational Safety and Health Administration Act – Federal Certification with 29 CFR 1910
OSHA – Inspections, Citations, and Penalties
OSHA – Walking and Working Surfaces
OSHA – Means of Egress and Fire Protection
OSHA – Flammable and Combustible Liquids and Fire Prevention and Protection
OSHA – Machine Guarding and Material Handling
OSHA – Hazard Communication and Industrial Hygiene and Blood-borne Pathogens
OSHA –Health and Safety Programs
Washington State University Hotel Restaurant Division seminars
University of Kentucky and Blue Shift Reports; industry surveys and analyses
ServSafe and Food Safety Training
TIPS On-Premise Alcohol Training 2.0
National Restaurant Association
American College of Forensic Examiners
Master's Level Advisory Board Member – Culinary Management – Stratford University

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER	THIRD JUDICIAL CIRCUIT
Wanda V. Berry and Gary A. Berry, Plaintiffs, vs. Scott Richardson d/b/a Chick-fil-A of Sumter Mall, Defendant.	Civil Action No.: 2018-CP-43-00851 **DEFENDANT SCOTT RICHARDSON D/B/A CHICK-FIL-A OF SUMTER MALL'S REPLY TO PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Defendant Scott Richardson d/b/a Chick-fil-A of Sumter Mall ("Defendant") hereby submits his reply in response to Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment. Defendant moved for summary judgment on November 20, 2018. Plaintiffs filed their response and amended response in opposition of summary judgment on January 22, 2019. For the reasons set forth in Defendant's motion and this reply, as well as any oral argument as the Court may hear, the Court must grant Defendant's Motion for Summary Judgment as there is no genuine dispute of material fact such that Defendant is entitled to judgment as a matter of law.

LAW/ANALYSIS

Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment relies on conjecture and speculation rather than facts to support their arguments. It is unsupported by any cite to the record other than the video of Plaintiff's fall submitted by both Plaintiff and Defendant.

On the issue of notice of a wet, slipper condition on the floor of Defendant's dining room, the record is clear. According to Plaintiff's testimony, she was on notice of the slippery or "squishy" condition of the Defendant's dining room floor prior to her fall. There is no evidence in the record that the Defendant was aware of any foreign substance on his dining room floor prior to Plaintiff's fall.

The video clearly establishes that the Defendant's employees were diligent in cleaning the dining room area and floor prior to Plaintiff's fall. The video shows numerous customers and employees of defendant walking across the dining room and none of them slip or lose their footing. The video does not show any evidence of a foreign substance on Defendant's floor prior to Plaintiff's fall. The video does establish that during Plaintiff's fall, some of her drink was spilled on the floor and Defendant's employee placed a "wet floor" sign over the area of that spill. See Exhibits 1, 2 and 3, which are enlarged screenshots of the video of Defendant's dining room at 13:30:46; 13:31:31; and 13:32:43. This is the only evidence in the record that shows defendant was on notice of any wet or slippery condition on its dining room floor – a condition which occurred when Plaintiff spilled some of her drink when she fell.

CONCLUSION

Based on Defendant's Motion for Summary Judgment, Memorandum in Support of Summary Judgment, and the arguments articulated in this Reply to Plaintiffs' Response in Opposition of Summary Judgment, Defendant respectfully requests the Court grant summary judgment in its favor.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,

COLLINS & LACY, P.C.

By: s/Joseph S. McCue

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ATTORNEYS FOR DEFENDANT SCOTT RICHARDSON D/B/A CHICK-FIL-A OF SUMTER MALL, FSU

DEFENDANT SCOTT RICHARDSON D/B/A CHICK-FIL-A OF SUMTER MALL'S REPLY TO PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Columbia, South Carolina
February 1, 2019


EXHIBIT
1
Jan 13 13:30:46

ELECTRONICALLY FILED - 2019 Feb 01 10:11 AM - TURNER - COMMON PLEAS - 20
BCP4300851
EXHIBIT
2
76
4/2013 13:31:31
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EXHIBIT 3

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

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

FACTS/PROCEDURAL BACKGROUND

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

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

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

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

STANDARD OF REVIEW

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

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

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

LAW/ANALYSIS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IT IS SO ORDERED.

Kristi Curtis, Circuit Court Judge

May _____, 2019

Sumter Common Pleas

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

Case Number: 2018CP4300851

Type: Order/Summary Judgment

So Ordered

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

STATE OF SOUTH CAROLINA COUNTY OF SUMTER WANDA V. BERRY AND GARY A. BERRY, PLAINTIFFS, vs. SCOTT RICHARDSON, D/B/A CHICK-FIL-A OF SUMTER MALL, DEFENDANT.	COURT OF COMMON PLEAS 2018-CP-43-00851 TRANSCRIPT OF RECORD

February 5, 2019
Sumter, South Carolina

B E F O R E:

THE HONORABLE KRISTI F. CURTIS, JUDGE

A P P E A R A N C E S:

JOHN DERRICK CLARK, ESQ.
Attorney for the Plaintiff

JOSEPH SCOTT McCUE, ESQ.
Attorney for the Defendant

Transcribed by:
CHERYL A. SMITH
Circuit Court Reporter
from DCRP, Digital
Courtroom Recorder
Project

INDEX

(SW) - Denotes State's Witness
(DW) - Denotes Defense Witness
(IC) - Denotes In Camera

PAGE

(There were no witnesses called.)

EXHIBITS

NO	DESCRIPTION	ID	EVD

(There were no exhibits introduced.)

PROCEEDINGS

(WHEREUPON, proceedings commenced at 11:24 a.m.)

THE COURT: Okay. This is defendant's motion for summary judgment.

MR. McCUE: Yes, Your Honor. Your Honor, Joey McCue on behalf of Scott Richardson, DBA Chick-fil-A.

Your Honor, Mr. Richardson, at the time of this accident in February of 2013, operated a Chick-fil-A branded restaurant in Sumter Mall. Plaintiff came in at approximately 1:30 that day, ordered food, proceeded to the condiment counter and was in that area of the dining room condiment counter that's actually shown on a video. I don't know if Your Honor -- have you got a screen showing this same video?

THE COURT: I do.

MR. McCUE: The gentleman here in the white is in the dining room area. If you look back over to the top corner, that's the plaintiff, Ms. Berry, who is seated here with Mr. Clark along with her husband who also is the plaintiff in the case.

THE COURT: So I'm sorry. She's seated in the -- at the bottom of the screen?

MR. McCUE: No, ma'am. She's at the top or at the counter. If you look ---

THE COURT: Okay. Yeah. I can see now.

MR. McCUE: You can barely see. The problem with these videos, the more you blow them up, the grainier they get at times.

THE COURT: Sure.

MR. McCUE: She orders the food, walks around to the condiment counter, and then you see each end of the condiment counter there's a trash can receptacle, and they're identifiable with those little light areas at the top where they kind of swing the doors, say "thank you" on them. The plaintiff stepped around there, was in that area about 30 seconds before she fell. She fell right in that area in front of the left-hand trash can.

During the 20 minutes before her fall, we had a Chick-fil-A employee -- and this is all on video, Your Honor. We can play the 20 minutes of video for you and walk through that and point it out or y'all can take -- whatever you prefer. But in the 20 minutes before, the Chick-fil-A employee was cleaning the dining room which included cleaning the tables, cleaning the condiment counter, cleaning the front counter, and also sweeping on a couple of occasions, on five occasions. There were also employees of the store as well as customers who -- I'm sorry. She was cleaning the dining room four times. On five occasions there were employees or customers in the

specific area in front of that trash can where the plaintiff fell in the 20 minutes prior to her fall.

None of the customers anywhere in the store, none of the employees anywhere in the store slipped, fell, looked like they lost their balance in any way, shape or form until the plaintiff came along.

There's -- there are -- as you can see, there's no wet floor signs out at the time, and that's because there's no evidence of any foreign substance on the floor that would require a wet floor sign.

In the video, Your Honor, if you look at the corner right here, this is a door leading back in the back of the restaurant, and the Chick-fil-A employee, when a customer comes out of the dining room, they will come out this door and deliver their food. Earlier in the video you'll see that this is a dustpan with a short broom that's used in the dining room. That's actually a highchair that sits next to it.

After the plaintiff's fall -- well, when the plaintiff falls, she's falling as our employee is coming out to hand her her food. The plaintiff slips in this area and proceeds to fall in this direction. Our employee has the tray in her hand, plaintiff has a drink cup in one hand and our employee helps the plaintiff as she's falling and winds up with a drink in her hand, takes it from the

plaintiff.

And you'll notice after the fall there's a stain in this area that's not here now, and after the plaintiff is seated in this chair right here, our employee comes out and places the wet floor sign over the spill. Later in the video she moves it a little bit so that she can reach across the counter and get the plaintiff's replacement food. So that's kind of what this part of the video will show.

I'm going to borrow Mr. Clark's computer here.

Your Honor, there's one other thing I'd like to point out. When she's coming across the condiment counter, if you'll watch her feet, the plaintiff is not picking her feet up like somebody who would walk normal. She's sliding her feet this way barely above the floor.

I'm not quick enough with Mr. Clark's computer here. Let me pause it a minute.

(Video plays.)

MR. McCUE: Okay. See plaintiff's -- I missed it again. In any event, plaintiff's got her drink in the hand. She's helped up by our employee and two customers.

Okay. All right. Now, Your Honor, I stopped the video to point out this discoloration right here, it's not present before plaintiff's fall. It's kind of an L-shaped spill. And you'll notice when our employee comes out,

that's the location where she puts the wet floor sign out because that's the only spot on the floor where there is a wet substance. She'll later move it a little bit so that she can reach across that barrier and get the plaintiff's replacement food.

(Video plays.)

MR. McCUE: Again, Your Honor, the area where plaintiff's feet slipped is this area in here.

As you know, Your Honor, in South Carolina in a foreign substance case, the plaintiff needs to show -- or any premises liability case -- that the condition was created by the defendant or the condition existed for long enough that they had actual or constructive knowledge that there was a dangerous condition on the floor. In this case there's no indication, there are no factual evidence in the record that would establish there was a dangerous condition on the floor at the time of the plaintiff's fall. There is a dangerous condition afterwards where we put the wet floor sign where plaintiff appears to have spilled her drink, but not prior to that point, Your Honor.

The plaintiff in her deposition said that she thought the floor was slippery, and we've cited numerous instances in her deposition testimony both on page 2 and on page 6 of the transcript where Ms. Berry testified that the floor

on the dining room side was slippery just when you walk around the corner where all the chairs and tables are. Okay. She denies she could see any substance on the floor, but, quote, you could just feel it under your shoes, end quote, an area she described as, quote, across the entire floor, end quote. And then when she went across that area, she testified, quote, it's all greasy all the way around, but it was -- I would say when you walk, you could feel your feet pivot, end quote. And she testified that before her fall she was walking carefully, quote, because your feet were like pivoting when you can walk and you can feel your shoes pivot, end quote. And she believed her shoes were pivoting because the grease -- there was grease or something on the floor.

We asked her if she had any evidence to support whether the defendant was aware of any slippery condition on the floor, and she just said, "I just know that it was slippery under my feet."

Again, I asked her specifically, and this is cited on page 6 of our memo, "What evidence do you have to support that they, Chick-fil-A employees, were aware of any slippery condition on the floor?"

And her answer, "I just know it was slippery under my feet."

Your Honor, that's not evidence to establish that

Chick-fil-A knew that there was a dangerous condition on that floor and failed to remedy it. And plaintiff has tried to get around -- plaintiff's counsel has tried to get around the plaintiff's testimony by the submission of a purported expert, Howard Cannon, who testifies by way of affidavit as to opinions absent any facts.

In his affidavit, he makes several assertions as to the condition of the floor at the time of the plaintiff's fall and alleges that the Chick-fil-A employees -- based on the video evidence alone, Chick-fil-A employees knew or should have known of the dangerous condition of the floor.

So our position, Your Honor, that that evidence or that -- those opinions lack probative value because they're not based on facts. And we actually cited on page 4 in a footnote -- 3 and 4 of our memo a case on point. It was initially cited for a different point but it applies here. And it's addressing the point that Mr. Clark will raise. He raised it in his prior summary judgment motion. He said all the plaintiff has to do is show some evidence on the issue of fact. That's not the standard. You have to show more than a scintilla of evidence.

And the Hancock court stated citing a case called McDowell vs. Stilley Plywood for the proposition that although there is a scintilla of testimony that could be

construed to support the claimant's position, when the entire testimony of the witness was viewed as a whole, it was obvious the testimony was supported by claimant's position, rested on speculation and thus had no probative value. But what both the plaintiff's theory and Mr. Cannon's theory appear to be is that because she fell, there had to be a foreign substance on the floor. And res ipsa loquitur is not the law of South Carolina. Whether you're a plaintiff, lay witness, or a fact witness, expert witness, you have to come forward with some facts on which you base an expert's opinion. It can't be based on merely looking at the floor, seeing the fall and speculating that there must have been something there.

People fall all the time. They fall because they're inattentive. I trip over my dog probably four times a week because I'm just not paying attention and she likes to be underfoot. That doesn't mean that the dog's at fault. That is my fault for not paying attention. And because I fell -- fall tripping over my dog doesn't mean my wife or my daughter are at fault. I just need to pay better attention.

It's our position, Your Honor, that they have no factual basis to defeat our motion for summary judgment, and we're entitled to summary judgment in South Carolina.

Thank you.

THE COURT: Thank you, sir.

Mr. Clark?

MR. CLARK: Please the court, Your Honor. I want to get my video cued up.

(Pause in proceedings.)

MR. CLARK: May it please the Court, Your Honor.

THE COURT: Yes, sir.

MR. CLARK: Here today with Mr. and Mrs. Wanda -- Ms. Wanda and Gary Berry. Ms. Berry was the person that you saw in the video. She slipped and fell and suffered serious injury to her shoulder.

Your Honor, the defendant is not entitled to summary judgment on his claim -- on this claim because there is evidence in the record that they knew or should have known that the floor was dangerous.

Your Honor, I would just point out that the plaintiff is never required to prove exactly what's on the floor. He can hardly ever do that unless he does a sample test. All he's required to do is that there was a dangerous condition that defendants knew or should have known.

You have seen Ms. Berry fall. And, Your Honor, before I go into that, all the evidence in this case -- well, first of all, summary judgment is not favored. It's a drastic remedy. This state favors a jury determining the liability of the parties. All the evidence and the

inferences from the evidence have to be viewed in the light most favorable to Ms. Berry, and if there is a scintilla of evidence where a jury could say in our opinion they knew or should have known it was on the floor and didn't take proper action, then the Court cannot grant summary judgment. It has to allow this case to proceed to a jury trial, which we are prepared to do.

Your Honor, Ms. Berry, she fell, according to the video, at 13:28:52. And I believe that is almost 1:29 p.m. Our position is that 13 minutes prior to this, the employee who you see in the video is doing some work on the floor there in the exact same spot that Ms. Berry fell in. And our position and the position and the opinion of the expert is that in that 13-minute period from 13:15:37, that that's -- that's the time that you're looking at now, 13:15:37, in essence 15 minutes after 1:00. And 28 minutes after 1:00, there is no -- nothing falls on the floor. There's nothing on -- nothing -- in that 13-minute video, if you look at it from during that period, nobody from the video wastes anything on the floor. But when you look at the fall and the events after the fall, you see that Ms. Berry slips and falls. She slips. I mean, that's on the video.

You also see that the employee puts a wet floor sign out. And what does that establish? That establishes that

the employee acknowledged at that point that there was a wet substance on the floor.

Mr. McCue didn't point this out, but I'm going to point it out. If you look at 13:31:53, after the fall, you see the employee change her gait. You'll see her step over a substance. She already put the sign down. I think an inference can be drawn or has to be drawn that if there was nothing on the floor, why would she ever put a wet floor sign down? She steps over something. She changes her gait at 13:31:53. At 13:31:55, you can see her staring down at the floor. You can also see witnesses who come up to help Ms. Berry look down at the floor.

So our position is that there's no question that -- and my view of the evidence, there's no question there is something wet, there's no question she slipped. She said -- she said the floor was slippery. They acknowledge it was wet by putting the wet floor sign down. The question is, should they have known it was down there because the video proves it was there? It shows she fell.

Our position is is that this employee just 13 minutes before the fall is cleaning in this area. And if you look at 13:15:37, and I'm going to play, what it will show is it's going to show this employee sweep something up into this -- this dustpan and then flip it back on the floor. So I ask Robin to . . .

(Video plays.)

MR. McCUE: I have a better ---

MR. CLARK: You have a better ---

MR. McCUE: My screen's not jumping if you want to use it, Your Honor.

MR. CLARK: Yeah.

THE COURT: Thank you.

MR. McCUE: Entered into dangerous territory trying to do this without my IT people standing over my -- I was accused one time of doctoring a Facebook photograph by a witness in trial, and I had to bring my IT people down there to essentially testify that I'm not smart enough to doctor a Facebook photograph.

(Pause in proceedings.)

MR. CLARK: So, Your Honor, you've seen the fall, and it shows that she slipped on something. But what the evidence shows is that the employee is sweeping in that area 13 minutes before the fall. 13 minutes later, Ms. Berry slips on something, they acknowledge that it's something wet by putting a wet floor sign, they acknowledge that something's wet on the floor by stepping over it. So by inference, the jury could conclude that the wet substance was there at the time she was cleaning.

And I think Mr. McCue said, and I wrote down exactly what he said, he said that they'd been cleaning in that --

he said it was a 20-minute period, but he said that the employee had -- sweeping on four occasions during this period. Our position is that that employee failed to discover and failed to remedy the wet condition that was on the floor that we know was on the floor at the time she fell. And we also know ---

THE COURT: Mr. Clark, I mean, the fact that she slipped doesn't necessarily mean there was anything on the floor. It could be you have slick shoes on ---

MR. CLARK: I understand.

THE COURT: --- the bottom of your shoes are slick or that you stepped in something slick and now tracked it in. And it appears that the other people who go to help her are stepping all in that general area and don't seem to be looking at or acknowledging anything on the floor.

MR. CLARK: If I could, Your Honor.

THE COURT: Sure.

MR. CLARK: First of all, the fact that the other persons didn't fall doesn't rule out the fact that there was something on the floor. That -- that can be argued by Mr. McCue, but it doesn't definitively prove that there was nothing on the floor.

If we could go back to the fall itself, they put a wet floor sign down. Now, a lot of inferences can be drawn from that, and one is is that there was something

wet on the floor. There would be no reason for them to put down a wet floor sign if there was nothing on the floor. And so at this point, all we have to show is that there's a reasonable inference that there was something on the floor. And I want to show you where this happened at.

MR. McCUE: All right. For you young almost lawyers there, his client and my client have a big dispute over what happened. That doesn't mean we have a dispute.

MR. CLARK: I agree with that.

MR. McCUE: I like him, he likes me, we help each other out and then the jury figures out what happened if it has to.

MR. CLARK: So, Your Honor, this is the fall, and this is what I'm talking about.

(Pause in proceedings.)

MR. CLARK: All right. So Ms. Berry is coming around, she's walking, she slips right here. And what we rely on to prove that there was something on the floor or that there is some evidence there was something on the floor, because what happens after this fall, Ms. Berry said it was slick, she testified it was slick, and then watch the employee. She's being helped over, she comes out, she steps over something, she gets the wet floor sign and she puts it right where she fell at.

And so our position is that an inference can be drawn

that because she put the wet floor sign down, there was something wet down there, and that's all we have to show at this point is that there is some evidence that something was on the floor that they should have known about.

Your Honor, she's picking something off the floor at that point. She's inspecting the floor. She's stepping around it. She's looking down. She's looking at her shoes now, and she moves the sign over. Now, that might have been to get the tray, but Ms. Berry said it was slick there and the employee put the wet floor sign down.

And if you can go back to when she puts the wet floor sign down, please.

Your Honor -- back it up a little bit. Now, when she puts the wet floor sign, her own feet slide.

(Pause in proceedings.)

MR. CLARK: She bends down, picks something up off the floor. She's looking at that spot again. She gets the tray, and she leaves the wet floor sign there. She doesn't -- she doesn't clean it, but I think the inference can be drawn that because she put the wet floor sign there, even though -- she believes something was wet on the floor.

Your Honor, the fact that nobody else -- what Mr. McCue says in the 13 minutes or in the 20 minutes the

young lady swept on at least four occasions, nobody else fell, which I argued that that doesn't mean it wasn't slick. Mr. McCue says on one of these videos you can see a stain and on one you cannot. That's his interpretation. That would be up to the jury to decide whether that stain was there before she fell or not. Quite frankly, I can't see the stain in this video and say definitively that one was there.

In his brief he argued that Ms. Berry said it was slippery all over, and he cited a case from contributory negligence (unintelligible) which said if she knew it was slick, then she -- you know, she was contributorily negligence and the case was dismissed. Well, comparative negligence here, that would be the argument, and that would be up to the jury to decide if Ms. Berry's negligence outweighed the negligence of Chick-fil-A.

Your Honor, we submitted there's expert testimony in the record that's uncontradicted that would by itself prevent the Court from granting summary judgment and throwing this case out. Your Honor ---

THE COURT: Mr. Clark, isn't your expert witness really just watching this video and giving his opinion of what the video is showing? I mean, he doesn't have any knowledge outside of what we can see on the video about what happened that day.

MR. CLARK: Well, Your Honor -- well, Your Honor, an expert can rely on just about anything in forming his opinion. There's nothing else he can look at. But he formed the opinion that the employee put the wet floor sign down, that that means something was wet down there and that she had been working in the area.

THE COURT: But the fact that he's an expert really doesn't make his interpretation of the video any different than anybody else's, does it?

MR. CLARK: Well, I think it does, Your Honor. I mean, he's an expert, and he knows how a floor is supposed to be cleaned. The jury can find the facts, but he can give his opinion that I saw this and I saw her clean. And what he's basically saying is that she didn't do -- based on the fact that there was water on -- or a wet substance on the floor, she didn't do an adequate job cleaning when she was cleaning. And that's his opinion, in his expert opinion, and he has a higher degree of knowledge and is able to give his opinion.

And what Mr. McCue is arguing, I think some of what the Court is saying goes to the weight of his testimony, not necessarily the admissibility of it. He's giving it. He says in his opinion that that floor was wet before. He's a restaurant expert. And he says if she hadn't put the wet floor sign, there would be no reason to put it

down if it wasn't wet. There's evidence that she slipped. The question is, where did it come from? How long had it been down there? Because I think there is evidence that a jury could find it was wet. I mean, they put a wet floor sign down, she says it was slippery. They could find that. The question is, could they find that she didn't do an adequate job cleaning before? They could. And they could infer that unless there's a leak in the ceiling or a spring under the floor, where did the water come from?

Now, Mr. McCue argued that -- I think he argued that maybe she spilled her drink. Well, the evidence is that if you look at the video closely, that she started to slip before the tray was passed. So she couldn't have slipped on what was on the tray because she started to slip before the tray was passed, and she slipped and fell into the lady with the tray.

THE COURT: I mean, she could have slipped because her shoes were slippery and then dropped her drink and ---

MR. CLARK: Well, that could be.

THE COURT: But you're saying that's a jury question ---

MR. CLARK: Yes, ma'am.

THE COURT: --- and the fact that they put the wet sign up gives it -- leaves it in the jury's ---

MR. CLARK: Right.

THE COURT: --- hands.

MR. CLARK: And, Your Honor, you make a good point. If you look at the exchange, there's no evidence the drink fell. The drink didn't fall. The young lady -- and then Mr. McCue said she went back to get the food. If I could just back this up a little bit. Your Honor, you can see the tray coming out, and she falls before she even touches the tray. The lady -- the attendant seems to have the drink in her right hand. But, again, that would be a jury question of whether a drink fell on the floor or whether it was there before she started to slide.

So, Your Honor, and now going to Mr. Cannon's affidavit, he said that not only did he rely on the video footage, but he relied on the depositions of Paul Thrower, Scott Richland, Wanda Berry and Gary Berry. And what he said is that, based on his review of the video, that Number 6 in his affidavit, he says in his opinion Chick-fil-A failed to properly train, supervise or monitor the employees to industry standard, recognizing hazards and maintaining the floor of the dining room in a safe condition, and that said failures were a proximate cause of the fall.

So what he's saying is, based on the fact that the water was on -- something was on the floor that they deemed was necessary to put a wet floor sign down and the

person had been cleaning four times before with nothing intervening, that there is at least some evidence that a jury could find at this stage of the game, Your Honor.

And I believe -- so in our opinion, Your Honor, it's a jury question to determine whether she did an adequate job, whether this substance was there before because it's not absolutely clear one way or the other, and that allows us to survive summary judgment. As you know, when the evidence is a scintilla and whether a jury could draw an inference that that substance was on the floor, that there was a substance on the floor, and that's our position, Your Honor. Thank you.

THE COURT: Thank you.

Do you want to respond, Mr. McCue?

MR. McCUE: Just very briefly, Your Honor.

First, on the issue of superior knowledge, they have to come forward and establish that we, the defendant, had knowledge of the slippery and dangerous condition or that it had been there a sufficient amount of time. They've not done that. The plaintiff claims to have superior knowledge that the floor was slippery because she was on the floor surface for 30 seconds before she fell and claims from the time she came around the counter that she was -- her feet were slippery and pivoting.

Briefly with regard to the issue of the wet floor

sign and the drink, Your Honor, they keep pointing to the floor sign, both their expert and Mr. Clark that the fact they put a wet floor sign out after the fall as being some evidence there was a slippery substance on the floor after the fall. Even if the plaintiff fell and told our employee, which is not in the record, that there was a greasy substance, then we would have done the exact same thing, put a wet floor sign out, because that's what you should do if somebody tells you there's something wet or if you see, as in this instance, the plaintiff's cup come out of her hand.

My -- and to clarify, in case there's any misunderstanding, Mr. Clark misunderstood it but I think Your Honor caught it. My position is that she fell because of the drink that she spilled. My position is as she was falling, there was a drink, and that's what prompted the placement of the wet floor sign, again, after. There's no knowledge that we had -- or no evidence that we had any sort of knowledge.

With regard to the expert testimony, before you even get to whether it's an expert or lay witness, any testimony has to be probative, and you get to the point I was laying in wait to make, Your Honor. What Mr. Cannon says is -- all he does is look at the video and interpret it, the same way these three young men or four young men

over here to do. No better, no worse. It doesn't meet the requirements of Rule 702 that it be -- he have some specific scientific knowledge that would help the fact finder to make a decision. His opinions, quite frankly, don't meet that threshold. They don't even meet the probative threshold.

There's simply no evidence put before the Court today that we were on notice of the condition, even assuming that it exists. And for that reason, we're entitled to summary judgment.

Thank you, Your Honor.

MR. CLARK: May I just briefly respond?

THE COURT: Just very briefly.

MR. CLARK: Your Honor, I just want to point out Mr. McCue said we have to show that the defendant had knowledge. That's not the standard. We have to show that they should have known. That's the standard.

THE COURT: Or that something was there for a sufficient period of time that you should have known.

MR. CLARK: Well, I don't know that the rule is a sufficient time is not necessarily an element because if you inspect the floor and you don't do an adequate job and they come back two seconds later, then you're still liable. So it doesn't have to be on their floors. I don't think time is in the equation. The issue is whether

they should have known, whether she did an adequate job in inspecting the floor.

And also, what Mr. -- and the reason why I want to respond also was because what he said is not in evidence when he said if someone tells the attendant that something wet was on the floor. There's no evidence that anybody did that. But he's saying that and he's testifying, creating facts that aren't in the record. There's no testimony that someone told this young lady something was on the floor.

THE COURT: That's not what I understood. I think that was just a hypothetical.

MR. CLARK: Okay. Well, if that's the hypothetical, then what is the reason for the wet floor sign? She thought -- an inference can be drawn that she thought something wet was on the floor.

Thank you, Your Honor. That's all I have.

THE COURT: Thank you. I understand everybody's position. I'm going to look at it carefully and take it under advisement.

MR. CLARK: Thank you, Your Honor.

THE COURT: Thank you.

MR. McCUE: Thank you, Your Honor.

(WHEREUPON, proceedings concluded at 12:13 p.m.)

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF SUMTER)

I, CHERYL A. SMITH, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the digitally recorded proceedings had from the DCRP, Digital Courtroom Recorder Project, and evidence introduced in the trial of the captioned case, relative to appeal, in the Common Pleas court for Sumter County, South Carolina, on the 5th day of February, 2019.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

October 31, 2019

Cheryl A. Smith, CVR-M
Court Reporter

Video Clips of February 4, 2013 Fall of Plaintiff

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

Wanda V. Berry and Gary A. Berry, Appellants

v.

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

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

March 3, 2020

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