THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge

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.

RESPONDENTS' FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. Did the Trial Court Err in Granting Summary Judgment on the Doctrine of Res Ipsa Loquitir when Appellants Relied on Actual Facts and Inferences Therefrom in the Record?

II. Did the Trial Court Err in Granting Summary Judgment in Favor of Respondents When the Evidence and Inferences Therefrom Created a Genuine Issue of Material Fact as to Respondent's Negligence?

III. Did the Trial Court Err in Granting Summary Judgment in Favor of Respondents on Appellant Gary A. Berry's Loss of Consortium Claim When There was Evidence of a Genuine Issue of Material Fact as to Respondent's Negligence?

COUNTER-STATEMENT OF ISSUES ON APPEAL

I. Whether the Trial Court Properly Granted Summary Judgment Where Appellants Relied Upon the Doctrine of *Res Ipsa Loquitur*, Which is Not Recognized in South Carolina, to Support the Negligence Claim?

II. Whether the Trial Court Properly Granted Summary Judgment on Appellants' Negligence Claim Where There was No Evidence that Respondent Had Actual or Construction Notice of Any Slippery Surface on the Floor?

III. Whether the Trial Court Properly Granted Summary Judgment on Appellant's Loss of Consortium in Light of Its Grant of Summary Judgment on the Underlying Claim of Negligence?

STATEMENT OF THE CASE

Appellants commenced the underlying premises liability action with the filing of a Complaint in the Sumter County Court of Common Pleas on December 30, 2014, alleging causes of action for negligence and loss of consortium. (R. pp. 1-5). Appellants filed an Amended Complaint on February 23, 2015. (R. pp. 6-9). Appellants allege that on February 4, 2014, Wanda Berry slipped and fell at the Chick-fil-A branded restaurant ("Chick-fil-A") located within the Sumter Mall. (R. p. 7). Respondent filed a timely Answer, denying any liability to Appellants. (R. pp. 10-15).

Following the exchange of written discovery and depositions, Respondent filed a Motion for Summary Judgment and accompanying Memorandum of Law in Support thereof on November 20, 2018. (R. pp. 16-17); (R. pp. 29-50[1]). Appellants filed an Amended Memorandum of Law in Opposition on January 22, 2019, to which Respondent filed a Reply on February 1, 2019. (R. pp. 72-77).

On February 5, 2019, a hearing was held on Respondent's Motion for Summary Judgment before The Honorable Kristi F. Curtis. (R. pp. 87-112). Judge Curtis heard argument from the parties, reviewed the surveillance camera footage maintained from the date of the incident, and took the matter under advisement. (R. pp. 87-112).

On May 7, 2019, Judge Curtis entered an Order granting Respondent's Motion for Summary Judgment.[2] (R. pp. 78-86). Judge Curtis granted relief in favor of Respondent on the negligence claim, finding that Appellant was relying upon the unrecognized doctrine of *res ipsa loquitur* and finding that even if Appellant did fall because of a slippery substance, there was no

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[1] R. pp. 18-28 of the Record on Appeal are duplicates of exhibits to Respondents' Memorandum in Support of their Motion for Summary Judgment, R. pp. 40-50.

[2] It is noteworthy that this Order was not prepared by the parties, but rather drafted by the trial court.

evidence that Defendant had actual or constructive knowledge of the condition. (R. p. 84). Consequently, Judge Curtis also granted relief in favor of Respondent on the loss of consortium claim, which was necessarily derivative of the negligence claim. (R. pp. 84-85).

Appellants filed a notice of appeal, which was perfected with the filing of their Brief. This Brief of Respondent follows.

STANDARD OF REVIEW

An appellate court reviews a grant of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP; Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991). Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Id. Under Rule 56(c), the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. Baughman, 306 S.C. at 115, 410 S.E.2d at 545. With respect to an issue upon which the nonmoving party has the burden of proof, this initial responsibility may be discharged by pointing out to the trial court that there is an absence of evidence to support the nonmoving party's case. Id. The nonmoving 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.

In determining whether any triable issues of fact exist, the evidence and all inferences which can be **reasonably** drawn therefrom must be viewed in the light most favorable to the nonmoving party. Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997) (emphasis added). Nonetheless, a court, "cannot ignore facts unfavorable to [the non-moving] party and [it] must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts." Bloom v. Ravoira, 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). "[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).

The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. Bankers Trust of South Carolina v. Benson, 267 S.C. 152, 155, 226 S.E.2d 703, 704 (1976). In that way, "[a] motion for summary judgment is akin to a motion for a directed verdict" because "[i]n each instance, one party must lose *as a matter of law.*" Main v. Corley, 281 S.C. 525, 526, 316 S.E.2d 406, 407 (1984) (emphasis added); see also Baughman, 306 S.C. at 115, 410 S.E.2d at 545 (standard for summary judgment "mirrors" standard for directed verdict).

STATEMENT OF FACTS

Surveillance footage captured the incident, as well as over twenty minutes prior and three minutes following it.[3] (R. p. 113-Feb. 4, 2013 Video Footage, 13:30:17 to 13:32:37). Thus, it is undisputed that approximately 1:30 p.m., Appellant Wanda Berry placed her order at the counter of the subject Chick-fil-A, rounded the corner into the dining area with her drink in hand, and walked to the nearby condiment station where she retrieved several items. When her food was ready, she proceeded from the condiment station toward the kitchen door, where an employee was bringing out her tray of food. (R. p. 42, line 3 – p. 43, line 15); (R. p. 89, lines 8-13). Mrs. Berry stepped forward toward the employee, slipped and fell, injuring her left shoulder. (R. p. 43, lines 2-15; p. 47, lines 6-13); (R. p. 90, lines 6-13). When Mrs. Berry got up and went to a nearby table, she no longer had a drink cup in her hand, as the employee took it from her after the fall. As

[3] The video footage was submitted to the trial court, designated for the Record on Appeal, and is on file with this Court.

Respondent's counsel pointed out at the hearing, there is a dark spot on the floor after Mrs. Berry's fall that was not there prior. The employee put out a wet floor sign over that area and brought Mrs. Berry a replacement drink shortly thereafter. (R. p. 91, line 19 – p. 92, line 1 – p. 93, line 5; p. 93, lines 14-21).

Mrs. Berry testified that the flooring "in the dining room side when you walk around the corner and where all the chairs and tables are" had a "greasy, slippery floor." (R. p. 43, lines 2-16; p. 44, lines 5-13). Mrs. Berry further testified:

> 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. **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?**...
> 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. 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.**

(R. p. 43, line 24 – p. 44, line 9; p. 45, lines 8-25; p. 46, lines 3-17). When asked directly as to what evidence she had to support that Defendant was aware of any slippery condition on the subject floor, Mrs. Berry asserted: "**I just know that it was slippery under my feet.**" (R. p. 48 line 21 – p. 49, line 12). Thus, according to Mrs. Berry's testimony, she had notice that the floor was "squishy," "gooshy," "greasy," "slippery," or "sticky" before her fall but has no evidence the condition was known to Respondent. Moreover, her testimony that the floor was "squishy," "gooshy," "greasy," "slippery," or "sticky" is contradicted by the video, as no other patron or employee had any difficulty walking in the area. (R. p. 90, line 14 – p. 92, line 9; p. 93, line 7 – p. 95, line 2; p. 108, line 16 – p. 109, line 19).

In addition to Ms. Berry's testimony, the trial court also considered the affidavit of Howard Cannon. Cannon purports to be a "restaurant expert," with training and expertise in the areas of restaurant management and food service standards. Mr. Cannon averred that he reviewed the pleadings, 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." (R. pp. 82). 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." (R. pp. 82-83).

Respondent argued that the submission of Cannon's affidavit was an attempt to get around Mrs. Berry's inadequate testimony, but that it lacked probative value because it was not based upon facts or expertise. (R. p. 94, line 23 – p. 95, line 22; p. 109, line 20 – p. 110, line 6). Rather, what Mrs. Berry and Cannon both argued was essentially "that because she fell, there had to be a foreign substance on the floor." (R. p. 96, lines 5-7). "*Res ipsa loquitor* is not the law of South Carolina," such that Appellants' theory cannot "be based on merely looking at the floor, seeing the fall and speculating that there must have been something there." (R. p. 96, lines 7-13).

Appellants responded by citing Mrs. Berry's testimony that the floor was "slippery," the fact that other witnesses who came to assist "look[ed] down at the floor," that the employee "step[ped] over something" and placed a wet floor sign in the area after the fall. (R. p. 98, line 8 – p. 99, line 17). Thus, Appellants aver: "there's no question there is something wet, there's no question she slipped." (R. p. 99, lines 13-15). Appellant further contended that Respondent should have known but failed to discover that the floor was wet because an employee cleaned the area thirteen minutes prior to the fall and nothing new was spilled in the intervening period. (R. p. 98, lines 8-23; p. 99, lines 20-25; p. 100, line 24 – p. 101, line 16). Thus, they argue that a "jury could conclude that the wet substance was there at the time she was cleaning." (R. p. 100, lines 15-23). Appellants conceded that the fact that Mrs. Berry slipped does not mean there was anything on the floor and that other people traversed the same area without incident. However, they contended that those facts did not "rule out the fact that there was something on the floor." (R. p. 101, lines 7-22). Appellants went back to the placement of the wet floor sign, stating "a lot of inferences

can be drawn from that, and one is... that there was something wet on the floor." (R. p. 101, line 18 – p. 102, line 5; p. 102, line 16 – p. 103, line 23). Regarding the stain on the floor shown only after Mrs. Berry's fall, Appellants argued that was Respondent's "interpretation." (R. p. 104, lines 3-4). "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 definitely that one was there." (R. p. 104, lines 5-8).

When Appellants attempted to bolster their arguments with what they characterized as "uncontradicted" expert testimony, Judge Curtis questioned: "Mr. Clark, isn't your expert 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." (R. p. 104, lines 17-25). She further asked: "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?" (R. p. 105, lines 7-9). Appellants argued that Cannon was relying upon his experience to opine that the second employee would not have put down a wet floor sign unless the floor was wet "before," which demonstrates the first employee did not do an adequate job cleaning, connoting a lack of proper training and supervision. (R. p. 105, lines 1-6; p. 105, line 10 – p. 106, line 9; p. 107, line 12 – p. 108, line 3). Appellants were dismissive of the idea that Mrs. Berry's drink spilt during her fall and that was the reason for the wet floor sign, arguing that was a question for the jury since it was "not absolutely clear one way or the other." (R. p. 106, line 10 – p. 107, line 11; p. 108, lines 4-12).

The trial court conducted an independent review of the surveillance footage. (R. p. 83). Judge Curtis made the following findings regarding what was shown on the footage:

> 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.

(R. p. 83).

In granting Respondent's motion for summary judgment, the trial court found that "Plaintiff's testimony and Cannon's expert opinion fall squarely within the definition of the doctrine of *res ipsa loquitur*." (R. p. 83). The court explained:

> 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.

(R. pp. 83-84). Accordingly, the court ruled that because *res ipsa loquitur* is not legally cognizable under South Carolina law, Plaintiffs' claims fail as a matter of law. (R. p. 84) (citing Hunter v. Dixie Home Stores, 232 S.C. 139, 101 S.E.2d 262, 265 (1957); King v. J.C. Penney Co., 238 S.C. 336, 120 S.E.2d 229 (1961)). Further, the court ruled: "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." (R. p. 84). Consequently, the court found that Mr. Berry's loss of consortium also failed as a matter of law because Respondent owed no independent duty to him. (R. pp. 84-85) (citing Lee v. Bunch, 373 S.C. 654, 647 S.E.2d 197 (2007); Williams v. APAC Atl., Inc., 2010 WL 569735 (D.S.C. 2010)).

ARGUMENT

I. The Trial Court Properly Granted Summary Judgment Where Appellants Relied Upon the Doctrine of *Res Ipsa Loquitur*, Which is Not Recognized in South Carolina, to Support the Negligence Claim.

To establish a prima facie case for negligence under South Carolina law, a plaintiff 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). "The plaintiff has the burden of proving each element of negligence, including the defendant's lack of due care." Snow v. City of Columbia, 305 S.C. 544, 555, 409 S.E.2d 797, 803 (Ct. App. 1991). "This burden of proof cannot be met by relying on the theory that the thing speaks for itself or that the very fact of injury indicates a failure to exercise reasonable care." Id. (citing King v. J.C. Penney Co., 238 S.C. 336, 120 S.E.2d 229 (1961); Gilland v. Peter's Dry Cleaning Co., 195 S.C. 417, 11 S.E.2d 857 (1940)). The Snow Court explained:

> South Carolina does not recognize the rule of *res ipsa loquitur*. Crider v. Infinger Transportation Co., 248 S.C. 10, 148 S.E.2d 732 (1966). In an action for negligence, the plaintiff must prove by direct or circumstantial evidence that the defendant did not exercise reasonable care. South Carolina's rejection of *res ipsa loquitur* is consistent with its general adherence to fault based liability in tort. It also comports with the normal rules of proof, which require the plaintiff to prove affirmatively each element of his cause of action.

Id. at 555 n.7, 409 S.E.2d at 803 n.7.

Appellants cite to Eickhoff v. Beard-Laney, Inc., 199 S.C. 500, 20 S.E.2d 153 (1942), a trucking accident case, for its reliance upon the American Jurisprudence's differentiation between the *res ipsa loquitur* doctrine and the principle that negligence may be established by circumstantial evidence. (Br. of Appellant, pp. 3-4). "Res ipsa loquitur and circumstantial evidence have been distinguished upon the question whether the circumstances proved point

merely to the physical cause of the occurrence, without having any tendency to indicate the responsible human agency, or, upon the other hand, have some tendency to indicate some fault of omission or commission upon the part of the defendant." 199 S.C. at 500, 20 S.E.2d at 155 (citing 16 Am. Jur., sec. 328, pp. 989-993). With respect to circumstantial evidence, the Eickhoff Court noted that "in the absence of direct evidence, to show the existence of such circumstances as would justify the inference that the injury... was due to the wrongful act of the defendant, and not leave the question to mere speculation or conjecture. The facts and circumstances shown should be reckoned with in the light of ordinary experience and such conclusions deduced therefrom as common sense dictates." Id. at 500, 20 S.E.2d at 156 (quoting Leek v. New South Exp. Lines, 192 S.C. 527, 7 S.E.2d 459, 462 (1940)).

In Leek v. New South Exp. Lines, another trucking accident case, the Court reversed and ordered entry of judgment in favor of defendant, explaining that "[t]he plaintiff was bound to show something more than that the defendant was possibly responsible for the decedent's death, in order to entitle him to a verdict." 192 S.C. 527, 7 S.E.2d 459, 462 (1940). The Leek Court found that the plaintiff failed to meet his burden, which "in the absence of positive evidence of that fact, [was] to show not only the existence of such possible responsibility, but proof of circumstances which would furnish a reasonable basis for the inference by the jury of the ultimate fact that the death was caused by the wrongful act of the defendant in driving its truck upon the wrong side of the road." Id.

In King v. J.C. Penney Co., the Plaintiff was injured on a department store's internal escalator. 238 S.C. 336, 338-39, 120 S.E.2d 229, 230 (1961). Plaintiff had used the escalator previously, including on the day of the incident when she ascended to the second floor. Id. at 338, 120 S.E.2d at 230. At the time of the incident, she was accompanied by her four-year-old daughter and by her friend, Mrs. Smith. Id. The plaintiff averred that when her daughter stepped on the

escalator it "jerked and she fell." Id. Then, when the plaintiff reached to get her daughter and stepped on the escalator "it gave a jerk and I went down." Id. On cross-examination, she similarly described "it jerked the child out of my hand.... When I stepped on I was jerked down too." Id. at 339, 120 S.E.2d at 230. The plaintiff's friend, Ms. Smith, originally provided a written statement that the plaintiff lost her balance and fell but testified at trial that "the jerk caused Mrs. King to lose her balance." Id. The King Court noted South Carolina's consistent refusal to adopt the doctrine of *res ipsa loquitur*, such that plaintiff was required to "prove by the greater weight or preponderance of the evidence not only the injury but also that it was caused by the actionable negligence of the defendant." Id. at 339-40, 120 S.E.2d at 230. Taking the evidence in the light most favorable to Plaintiff, the Court found that she stated it jerked twice and her witness stated it jerked once but that "there is no evidence that defendant had any knowledge of similar malfunctions prior thereto or that the escalator was in anywise defective in such a manner as to charge it with actionable negligence." Id. at 340-41, 120 S.E.2d at 231. Accordingly, the Court reversed the verdict and judgment and entered judgment in favor of the defendant store. Id. at 341, 120 S.E.2d at 231.

Here, Appellants argues that they have "alleged numerous acts upon which a jury could infer Respondent's negligence," but stating that Mrs. Berry's testimony that "the floor was greasy when she fell" "takes this case out of the realm of res ipsa loquitur." (Br. of Appellant, p. 5). Appellants also cite the video evidence showing Mrs. Berry's fall followed by "Respondent's employee's feet sliding and altering her gait to step over the spot where [Mrs.] Berry fell before placing a wet floor sign in the exact location of the fall." (Br. of Appellant, p. 5). Appellants cite to these "facts" as circumstantial evidence to support a finding of negligence. (Br. of Appellant, p. 5). Interestingly, Appellants do not rely upon their purported expert in this portion of their argument. (See Br. of Appellant, pp. 3-5).

Notably, Mrs. Berry used the inconsistent terms "squishy," "gooshy," "greasy," "slippery," and "sticky" to describe the entire tile floor of the restaurant, at least from the condiment area into the dining area. (R. p. 43, line 24 – p. 45, line 25; p. 46, lines 3-17). Though she claimed to "feel it under [her] shoes," Mrs. Berry did not see any substance on the floor. (R. p. 43, line 24 – p. 44, line 2). There is nothing in the record to indicate that Plaintiff had any wetness or grease on her clothing or skin as a result of the fall.

Most importantly, prior to Mrs. Berry's fall, the video surveillance footage shows over thirty instances of people walking in the area of the condiment station and dining room that Mrs. Berry claimed was covered with settled grease. (See Video Footage, 13:06:25 to 13:29:39). Additionally, the two patrons who aided Respondent's employee with assisting Mrs. Berry did not slip or appear to lose their balance. (See Video Footage, 13:30:54 to 13:31:36). The exact area where Plaintiff fell was traversed over a dozen times without incident prior to Mrs. Berry's fall. (See Video Footage, 13:10:00 to 13:21:53). Contrary to Appellants' assertion, a review of the video does not show that Respondent's employee slid or altered her gait.[4] (See Video Footage, 13:31:52 to 13:32:05; 13:32:28 to 13:33:02; 13:33:17 to 13:33:23).

Moreover, Appellants continue to ignore the video evidence that Mrs. Berry's drink was in her hand and spilled during her fall, which is what necessitated the placement of the wet floor sign, which was closer to the kitchen door than where Mrs. Berry slipped. (Compare 13:30:36 to 13:30:50, with 13:31:32 to 13:32:02). Appellants' contention that placement of the wet floor sign is an admission that there was some substance on the floor prior to fall is pure speculation.

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[4] Appellants failed to provide any specific citation to the time mark in the video where this alleged "feet sliding" and "altered gait" supposedly occurred. (See Br. of Appellant, p. 5). Like Respondents, the trial court's review of the video found that "a worker walks across the exact spot where Plaintiff's foot slipped with no slipping and no problems." (R. p. 83).

Thus, while the facts and all inferences that can *reasonably* be drawn therefrom must be taken in the light most favorable to the non-moving party, Mrs. Berry's statements are belied by the whole of the video. "[A]ny evidence, even a scintilla, that is useful to withstand a summary judgment motion must meet the prerequisite of being probative." Bass v. Gopal, Inc., 384 S.C. 238, 247 n.6, 680 S.E.2d 917, 921 n.6 (Ct. App. 2009), aff'd, 395 S.C. 129, 716 S.E.2d 910 (2011) (citing McDowell v. Stilley Plywood Co., 210 S.C. 173, 179, 41 S.E.2d 872, 874–75 (1947) (holding 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)). Here, considering the whole of the evidence, there does not exist "a reasonable basis for the inference by the jury of the ultimate fact" that a substance on floor caused Mrs. Berry's fall. See Leek, 192 S.C. at 527, 7 S.E.2d at 462.

The trial court properly considered this evidence and found the indisputable facts that no one else had any difficulty traversing the area before or after the fall and that it seemed clear that "Plaintiff spilled her drink during the fall, causing a spill several feet from where Plaintiff's foot slipped." (R. p. 83). Thus, while Appellants attempt to contort the evidence to create dispute of material fact, they are left with the *res ipsa loquitor* argument that because Mrs. Berry slipped there must have been a slippery substance on the floor. Accordingly, the trial court properly granted summary judgment on Appellants' negligence claim.

II. The Trial Court Properly Granted Summary Judgment on Appellants' Negligence Claim Where There was No Evidence that Respondent Had Actual or Construction Notice of Any Slippery Surface on the Floor.

Assuming *arguendo* that there was sufficient evidence that Mrs. Berry feel because of a slippery substance, the trial court properly granted summary judgment on the negligence claims based upon the absence of any evidence that Defendant had actual or constructive knowledge of

the existence of any dangerous condition and failed to remedy it. (R. p. 84). 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). 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. Thus, "[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)).

In addition to reliance upon Mrs. Berry's statement that the floor felt "greasy" under her shoes, Appellants cite the sweeping of the area of the fall approximately thirteen minutes prior to

the fall and the absence of any foreign substance being placed in the area during the intervening time. Appellants also maintain their contention that an employee's feet slid in the spot where Mrs. Berry fell, she altered her gait to step over where Mrs. Berry fell, and that a wet floor sign was placed "on the exact spot" of the fall. (Br. of Appellant, pp. 6-7). This assertion is clearly inconsistent with the video evidence. (See Video Footage, 13:31:52 to 13:32:05; 13:32:28 to 13:33:02; 13:33:17 to 13:33:23). Appellants then propose a line of inferences that something was on the floor and that it existed when the first employee was sweeping. (Br. of Appellant, p. 7). They further reference their submission of "uncontested expert testimony that Respondent was negligent," in the form of an affidavit from Howard Cannon. (Br. of Appellant, p. 7).

In Hunter v. Dixie Home Stores, which involved a slip and fall at a grocery store, the Court explained that "[t]he burden in this case was upon the respondent [customer] to show that the beans were on the floor by an act of the appellant [proprietor] or that they had been there for such a time as to charge the appellant with notice thereof." 232 S.C. 139, 144, 101 S.E.2d 262, 265 (1957). The Hunter Court found that the evidence did not show any actual knowledge of the store owner that the beans were in the aisle, the time of day her injury occurred, or whether other customers had previously been in the store and used the aisle where she was walking. Id. at 144, 101 S.E.2d at 265. The Court cited numerous cases for their holdings that "in order for a customer to recover damages for injuries sustained by falling on some vegetable matter in an aisle, there must be proof that the storekeeper had actual knowledge of the presence of debris upon the floor, or that it had been on the floor long enough to charge the storekeeper with constructive notice of its presence." Id. at 145-47, 101 S.E.2d at 265-66. In one such case, the Fourth Circuit ruled:

> There is not a shred of evidence in the record that Green, or any of its employees, servants or agents, had any actual knowledge of the presence of the popcorn on the floor. In this case, Bowen can recover only upon a showing that the popcorn had been on the floor long enough to charge Green with constructive notice of its presence.

Id. at 147, 101 S.E.2d at 266 (quoting H. L. Green Co., Inc., v. Bowen, 223 F.2d 523, 524 (4th Cir. 1955)). Similarly, the Hunter Court concluded, "after giving the respondent the benefit of every reasonable inference to be drawn from the testimony, that she failed to prove that the appellant was guilty of any acts of negligence which would warrant the submission of this case to the jury." Id. at 147-48, 101 S.E.2d at 266.

In the present case, the limits of Mrs. Berry testimony and unreasonableness of Appellants' interpretation of the video footage are discussed more fully *supra*. Even after the sweeping of the area, no one else who traversed it slipped, fell, or otherwise appeared to be unstable on their feet. (See Video Footage, 13:15:31 to 13:33:53). Thus, contrary to Appellants' assertion the video evidence supports only one reasonable inference—that the area was swept approximately fifteen minutes prior to Mrs. Berry's fall and traversed many times by other patrons and employees, none of whom experienced or reported any slippery substance. The wet floor sign was not placed in the exact spot where Mrs. Berry lost her footing, but rather closer to the kitchen door and broom pan, where Mrs. Berry's drink obviously spilled. Despite the distance and quality of the footage, the appearance of a new discoloration after the fall is perceivable.

Further, far from uncontested, Respondent argued that Cannon's purported expert testimony could not satisfy the basic requirements for admissibility. (R. p. 94, line 23 – p. 96, line 13; p. 109, line 20 – p. 110, line 6). "All expert testimony must satisfy the Rule 702 criteria, and that includes the trial court's gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration." State v. White, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009); see Rule 702, SCRE ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify

thereto in the form of an opinion or otherwise.)" "In the discharge of its gatekeeping role, a trial court must assess the threshold foundational requirements of qualifications and reliability and further find that the proposed evidence will assist the trier of fact." Id. at 274, 676 S.E.2d at 689. "The familiar evidentiary mantra that a challenge to evidence goes to 'weight, not admissibility' may be invoked only after the trial court has vetted the matters of qualifications and reliability and admitted the evidence." Id. Here, the trial court accurately determined that Cannon's opinion was that "[b]ecause Plaintiff slipped... the floor must have been slippery and Chick-fil-A must have been negligent." (R. p. 83). The trial court noted that Cannon "reviewed the same documents and videos that the court has reviewed before making his conclusory statements." (R. p. 83). What Cannon failed to do was "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." (R. p. 83). With respect to industry standards, the Court again found that Cannon's testimony was merely a "conclusory" opinion "that because Plaintiff fell, Defendant must have failed to meet industry standards." (R. pp. 83-84).

In sum, to survive summary judgment, assuming *arguendo* the floor was slippery, on the issue of notice Appellants were required to demonstrate an issue of fact exists as to whether Respondent had actual or constructive knowledge of the alleged dangerous condition and failed to remedy it. See Wintersteen, 344 S.C. at 35, 542 S.E.2d at 729; King v. J.C. Penney Co., 238 S.C. 336, 340-41, 120 S.E.2d 229, 231 (1961) (finding even in face of plaintiff's testimony that escalator jerked, there was "no evidence that defendant had any knowledge of similar malfunctions prior thereto or that the escalator was in anywise defective in such a manner as to charge it with actionable negligence"). What the video evidence showed is a complete absence of evidence that Respondent created, knew, or should have known of any foreign substance of the floor prior to

Mrs. Berry's fall. Accordingly, the trial court properly granted summary judgment on Appellants' negligence claim.

III. The Trial Court Properly Granted Summary Judgment on Appellant's Loss of Consortium in Light of Its Grant of Summary Judgment on the Underlying Claim of Negligence.

"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." Lee v. Bunch, 373 S.C. 654, 663, 647 S.E.2d 197, 202 (2007) (quoting 41 Am.Jur.2d *Husband and Wife* § 227 (2007)). "[A]s it necessarily depends on plaintiff proving defendants' liability for his injuries," dismissal of the spouses claim for loss of consortium is required where the court grants summary judgment against the injured spouse. Williams v. APAC Atl. Inc., 2010 WL 569735, at *7 (D.S.C. Feb. 11, 2010), aff'd, 384 F. App'x 264 (4th Cir. 2010) (citing Creighton v. Coligny Plaza Ltd. P'ship, 334 S.C. 96, 512 S.E.2d 510, 523 (Ct. App. 1998)).

Appellants contend that "[b]ased on the fact that there was a genuine issue of material fact as to Respondent's negligence, Summary Judgment on Appellant Gary A. Berry's loss of consortium claim should have been denied." (Br. of Appellant, p. 7). Thus, Appellants' argument for reversal of the grant of summary judgment on the loss of consortium claim is reliant upon their success on both of their prior issues and survival of Mrs. Berry's negligence claim. On the contrary, the trial court's grant of summary judgment on the negligence claim was proper, and accordingly so was the grant of summary judgment on Mr. Berry's loss of consortium claim.

CONCLUSION

Based upon the foregoing, Respondent respectfully requests that this Court affirm the trial court's grant of summary judgment.

Respectfully submitted,

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Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge

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 certifies that Respondents' Final Brief complies with Rule 211(b), SCACR.

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