IN THE

Supreme Court of Virginia

RECORD NO. 080782

DORIS KNIGHT FULTZ,

Appellant,

v.

DELHAIZE AMERICA, INC.,
D/B/A FOOD LION, INC. and FOOD LION, LLC
and
NATIONWIDE MONEY SERVICES, INC.,

Appellees.

BRIEF OF APPELLEES

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SUBJECT INDEX

TABLE OF CITATIONS ii

STATEMENT OF CASE 1

QUESTIONS PRESENTED 3

STATEMENT OF FACTS 5

ARGUMENT 6

I. Standard of Review 6

II. The Trial Court was Correct in Granting Summary Judgment in Favor of Food Lion When it Held that Fultz was Contributorily Negligent as a Matter of Law 7

A. The Subject Bars, Including the Brackets, Were an Open and Obvious Condition 8

B. Fultz Failed to Show an Extrinsic, Substantial and Unexpected Distraction Which Would Excuse Her Contributory Negligence 12

III. The Contributory Negligence Defense Is Available to an Occupant Regardless of the Theory of Negligence Alleged by an Invitee 18

CONCLUSION 20

CERTIFICATE OF SERVICE

EXHIBIT 1

TABLE OF CITATIONS

RULES CITED

Rule 3:20 of the Rules of the Supreme Court of Virginia 6

Rule 4:11 of the Rules of the Supreme Court of Virginia 2

Rule 5:28 of the Rules of the Supreme Court of Virginia 1

CASES CITED

Board of Supervisors v. Lake Services, Inc.,
247 Va. 293, 440 S.E.2d 600 (1994) 11

Carson v. Leblanc,
245 Va. 135, 427 S.E.2d 189 (1993) 6

Dickerson v. Fatehi,
253 Va. 324, 484 S.E.2d 880 (1997) 7

Dudas v. Glenwood Gold Club, Inc.,
261 Va. 133, 540 S.E. 2d 129 (2001) 6

Gottlief v. Andrus,
200 Va. 114, 104 S.E.2d 743 (1958) 7, 8, 12

Little Creek Investment Corp. v. Hubbard,
249 Va. 258, 455 S.E.2d 244 (1995) 10, 11

Scott v. City of Lynchburg,
241 Va. 64, 399 S.E.2d 809 (1991) 7

Shifflet v. Timberlake,
205 Va. 406, 137 S.E.2d 908 (1964) 16

Southern Floors and Acoustics, Inc., et al. v. Max-Yeboah, et. al.,
267 Va. 682, 686, 594 S.E.2d 908, 910 (2004) 12, 13, 14

Tazewell Supply Co., Inc., T/A A-Mart v. Turner,
213 Va. 93; 189 S.E.2d 347 (1972) 7, 8, 19

West v. City of Portsmouth,
217 Va. 734, 232 S.E.2d 763 (1977) 13

IN THE SUPREME COURT OF VIRGINIA

DORIS KNIGHT FULTZ, Appellant,

v. Record No.: 080782

DELHAIZE AMERICA, INC.
d/b/a Food Lion, Inc.,
and
FOOD LION, LLC,
and
NATIONWIDE MONEY SERVICES, INC., Appellees.

COME NOW the Appellees, Delhaize America, Inc. d/b/a Food Lion, Inc. and Food Lion, LLC (hereinafter "Food Lion"), by counsel, pursuant to Rule 5:28 of the Rules of the Supreme Court of Virginia, and respectfully submit herewith their Brief of Appellees.

STATEMENT OF THE CASE

Plaintiff, Doris Knight Fultz (hereinafter "Fultz"), filed her Amended Complaint against Food Lion and Nationwide Money Services, Inc. on July 18, 2006. (J.A. at 1-5). According to her Amended Complaint, Fultz alleged that as she was using an ATM (hereinafter "subject ATM"), her young grandson began moving away from her and as she turned and moved towards her grandson, she tripped over one of the protruding metal rods, which were located on either side of the front of the subject ATM. (J.A. at 2). Fultz alleged in her Amended Complaint that Food Lion was allegedly negligent in that it allegedly failed to maintain the premises in a

reasonably safe condition, allegedly failed to properly inspect the property, allegedly failed to warn her of an unreasonably dangerous condition and otherwise allegedly failed to use reasonable care under the circumstances then and there existing. (J.A. at 3).

After extensive discovery, Food Lion forwarded to Fultz its First Requests for Admission, pursuant to Rule 4:11 of the Rules of the Supreme Court of Virginia. (J.A. at 67-76). On August 6, 2007, Fultz responded to Food Lion's First Requests for Admission. (J.A. at 15-22). After hearing argument by counsel for the parties, the Trial Court, by Order, overruled certain objections Fultz made to Food Lion's First Request for Admissions. (J.A. at 191-192).

On or about August 9, 2007, more than one year and six months after Fultz filed her original Complaint in the Circuit Court for the County of Albemarle, Food Lion filed its Motion for Summary Judgment. (J.A. at 23-24). In its Memorandum in Support of Motion for Summary Judgment and in its arguments at the September 5, 2007 hearing on Food Lion and Nationwide Money Services, Inc.'s Motions for Summary Judgment, Food Lion contended that Fultz was contributorily negligent as a matter of law and asked the Trial Court to grant summary judgment in its favor. (J.A. at 56-88 and 96-124).

After hearing argument on the Motions for Summary Judgment, the Trial Court properly granted summary judgment in favor of Food Lion and Nationwide Money Services, Inc. (J.A. at 123). On November 2, 2007, the Trial Court heard argument on Fultz's Motion to Rehear Grant of Summary Judgment. (J.A. at 161-187). On November 8, 2007, the Trial Court correctly denied Fultz's Motion for Reconsideration. (J.A at 193-194).

On January 23, 2008, the Trial Court entered separate Orders granting Food Lion and Nationwide Money Services, Inc.'s Motions for Summary Judgment and denying Fultz's Motion for Reconsideration. (J.A. at 198-199 and 200-201).

QUESTIONS PRESENTED

Based on Fultz's only Assignment of Error, it is respectfully submitted that the question presented in this appeal is more properly stated as:

1. Whether the Trial Court erred in granting Summary Judgment in favor of Food Lion and Nationwide Money Services, Inc. when it held that Fultz was contributorily negligent as a matter of law? (Fultz's Assignment of Error 1).

Fultz sets forth three (3) questions presented in her Opening Brief of Appellant (hereinafter "Opening Brief"). However, only Question 1 appears to be related to her only Assignment of Error because it more closely addresses the issue of whether or not she was contributorily negligent as a matter of law. Questions 2 and 3 appear to relate less to whether Fultz was contributorily negligent as a matter of law and more to allegations of premises design and a so called "open and obvious defense," matters that she does not raise in her Assignment of Error.

Additionally, Question 3 appears to be unrelated to Fultz's only Assignment of Error as the question presented relies on a model jury instruction that was not properly before the Trial Court because the Trial Court granted summary judgment in favor of Food Lion and Nationwide Money Services, Inc. before the trial began and before any proposed jury instructions were submitted to the Trial Court for consideration. Moreover, Fultz's only Assignment of Error addresses whether or not she was contributorily negligent as a matter of law. However, the model jury instruction that she relies on for Question 3 describes the duty of an occupant to an invitee, which is a matter not before this Court.

STATEMENT OF FACTS

The following facts are presented to augment the facts presented by Fultz in her Opening Brief. On August 7, 2004, Fultz was a customer in a Food Lion store in the City of Roanoke, Virginia. (J.A. at 2). After completing her shopping, Fultz walked directly up to the subject ATM after leaving the checkout register. (J.A. at 18). The subject ATM was located in the front vestibule area of the Food Lion store. (J.A. at 17). There was adequate lighting in the vestibule area of the Food Lion store at the time of the subject accident. (J.A. at 17). Fultz does not remember anything blocking her view of the bars in front of the subject ATM as she approached the subject ATM prior to the subject accident. (J.A. at 18-19). Yet, Fultz does not recall seeing the bars in front of the subject ATM as she approached the subject ATM prior to the subject accident. (J.A. at 18).

As Fultz was using the subject ATM, her young grandson began moving away from her and as she turned and moved towards her grandson, she tripped over one of the protruding metal rods, which was located on either side of the front of the ATM. (J.A. at 2). Fultz tripped over one of the bars, to include the metal that attaches the bars to the floor. (J.A. at 16). True and accurate color depictions of the location of the bars, including the brackets, and the subject ATM at the time of the subject

accident are depicted in Exhibit 1 attached hereto. (See also J.A. at 74-76).

ARGUMENT

I. STANDARD OF REVIEW

Rule 3:20 of the Rules of the Supreme Court of Virginia provides, in pertinent part:

> Any party may make a motion for summary judgment at any time after the parties are at issue. If it appears from the pleadings, the orders, if any, made at a pretrial conference, the admissions, if any, in the proceedings...that the moving party is entitled to judgment, the court shall enter judgment in that party's favor.

On review, this Court reviews the record applying the same standard the Trial Court must adopt in considering a motion for summary judgment. *Dudas v. Glenwood Golf Club, Inc.*, 261 Va. 133, 136, 540 S.E.2d 129, 130 (2001). Summary judgment allows a trial court to bring litigation to an end when it clearly appears that one of the parties is entitled to judgment in the case. *Carson v. Leblanc*, 245 Va. 135, 140, 427 S.E.2d 189, 192 (1993). This Court will adopt those "inferences from the facts that are most favorable to the nonmoving party, unless those inferences are forced, strained, or contrary to reason." *Dudas*, 261 Va. at 136, 540 S.E.2d at 130. Summary judgment shall not be granted if any material fact is genuinely in

dispute. *Dickerson v. Fatehi*, 253 Va. 324, 327, 484 S.E.2d 880, 882 (1997).

II. THE TRIAL COURT WAS CORRECT IN GRANTING SUMMARY JUDGMENT IN FAVOR OF FOOD LION WHEN IT HELD THAT FULTZ WAS CONTRIBUTORILY NEGLIGENT AS A MATTER OF LAW

The law in Virginia governing premise liability is well established. In *Tazewell Supply Co., Inc., T/A A-Mart v. Turner*, 213 Va. 93, 95, 189 S.E.2d 347, 349 (1972), this Court held that an owner or occupant of a premises owes a duty to its invitees to use ordinary care to have the premises reasonably safe for his visit. "In the exercise of ordinary care the defendant is required to warn the plaintiff of latent dangers which were or should have been known to him and which were unknown to the plaintiff. But no notice or warning was required if the alleged dangerous condition was open and obvious to a person exercising reasonable care for his own safety." *Id.* (citing *Gottlieb v. Andrus*, 200 Va. 114, 104 S.E.2d 743 (1958)). If it appears that the plaintiff "failed to exercise reasonable care and that such failure was a contributing cause of the accident, she is not entitled to have damages from the defendant." *Id.* Moreover, "[a] person who trips and falls over an open and obvious condition or defect is guilty of contributory negligence as a matter of law." *Scott v. City of Lynchburg*, 241 Va. 64, 66, 399 S.E.2d 809, 810 (1991).

A. The Subject Bars, Including The Brackets, Were an Open And Obvious Condition

In *Tazewell*, the plaintiff tripped and fell over a box that was located on the floor of the defendant's store. *Tazewell*, 213 Va. at 93, 189 S.E.2d at 348. This Court in *Tazewell* determined that the box, which was not the same color as the floor and was 12 to 14 inches wide and about 12 to 14 inches high, was an open and obvious condition to a person exercising reasonable care for his own safety. *Id.* at 94-96, 189 S.E.2d at 349-350. In holding that the box was an open and obvious condition, this Court noted that the store was "well lighted" on the day of the plaintiff's alleged accident. *Id.* at 94, 189 S.E.2d at 348. See also *Gottlieb v. Andrus*, 200 Va. 114, 104 S.E.2d 743 (1958) (stating that the boxes were in plain view and the aisle which the plaintiff entered was adequately lighted).

In this case, the bars in front of the subject ATM, including the brackets, were an open and obvious condition. At the time of the subject accident, the area where the subject ATM machine was located was adequately lit. Fultz walked directly up to the subject ATM and does not remember anything blocking her view of the subject ATM as she approached the subject ATM. It is clear from looking at the pictures of the subject ATM that the bars in front of the subject ATM, including the brackets, were prominent fixtures located in front of the subject ATM and

were a completely different color than the floor of the subject Food Lion store. (See Ex. 1 and J.A. at 74-76). Moreover, the bars in front of the subject ATM, including the brackets, were at a different level than the floor and clearly appear to be made out of different materials. In this case, there was a significant difference between the color and appearance of the bars in front of the subject ATM, including the brackets, and the color and appearance of the floor beneath the subject ATM.

Fultz argues in her Opening Brief that that she did not fall directly over the bars, but instead tripped over one of the brackets securing the bar to the floor. (Op. Br. at 8). However, in her Amended Complaint, Fultz alleged "she tripped over one of the protruding metal rods..." (J.A. at 2). Nowhere in her Amended Complaint does it state that Fultz tripped over the brackets securing the rods to the floor. To the extent that there was an ambiguity as to what Fultz alleges she tripped on, the matter was conclusively established when she admitted in her Answers to Defendants' First Requests for Admission that "she fell over one of the metal bars, to include the metal that attaches the bars to the floor." (J.A. at 16).

Nevertheless, as indicated, *supra*, like the bars in front of the subject ATM, the brackets were not only a completely different color than the floor, but were also at a different level than the floor and appear to be made out

of different materials than the floor. Moreover, Fultz admitted in her Opening Brief that it is "plainly clear in the picture of the bars...[that] the brackets or gussets protrude...into the user area" which also indicates the brackets were "plainly clear" and open and obvious to a user of the subject ATM. (Op. Br. at 9).

Fultz also argues in her Opening Brief that because the bars in front of the subject ATM were at her feet after she became a *user* of the subject ATM, they were no longer open and obvious to her. (Op. Br. at 7-9). However, after becoming a user of the subject ATM, the bars in front of the subject ATM, including the brackets, remained open and obvious to Fultz. The bars did not change shape or color after Fultz reached the subject ATM, nor did they change position relative to the subject ATM. Further, Fultz did not trip and fall over the bars as a *user* of the subject ATM. Instead, she tripped and fell over the bars as she <u>turned</u> and <u>moved towards</u> her grandson. (J.A. at 2).

Fultz cites *Little Creek Investment Corp. v. Hubbard*, 249 Va. 258, 455 S.E.2d 244 (1995) in support of her argument that there is a question of fact as to whether or not the bars in front of the subject ATM, including the brackets, were an open and obvious condition. However, the facts of *Little Creek* are distinguishable from the facts in this case. In *Little Creek*, the

plaintiff's accident occurred outside where the weather was dark, rainy and very windy. *Id.* at 263, 455 S.E.2d at 249. Also, in *Little Creek*, the area of the plaintiff's accident was dimly lit and there was evidence that just before the plaintiff tripped over the muffler there were people walking in front of her, blocking her view. *Id.* at 264, 455 S.E.2d at 249. In this case, the subject accident took place in an adequately lit vestibule area in the front of the Food Lion store and there is no evidence that there was anything blocking Fultz's view of the bars in front of the subject ATM, including the brackets, as she approached the subject ATM or just prior to her accident as she turned and moved toward her grandson. (J.A. at 17-19).

Fultz's reliance on her expert disclosure in her Opening Brief is misplaced because Dr. Dennis Proffitt's expected testimony does not create a genuine issue of material fact in this case. Also, it is unlikely that Dr. Proffitt will be allowed to testify at trial as an expert witness because no specialized skill or knowledge is required to evaluate whether the bars in front of the subject ATM, including the brackets, were an open and obvious condition and it appears that Dr. Proffitt's expected expert testimony is contrary to established Virginia law. See *Board of Supervisors v. Lake Services, Inc.*, 247 Va. 293, 440 S.E.2d 600 (1994).

Had Fultz even casually glanced down while walking up to the subject ATM, or while standing at the subject ATM, or as she moved to find her grandson, she would have seen and been able to avoid the bars that were right next to her. See *Gottlieb v. Andrus*, 200 Va. 114, 118, 104 S.E.2d 743, 747 (1958) ("If, on the other hand, the boxes *were at the plaintiff's feet* at the cereal counter, as she testified, *they were even more open and obvious.*") (emphasis added).

Therefore, based on relevant case law and the specific facts of this case, Fultz was contributorily negligent as a matter of law in failing to observe and appreciate the bars in front of the subject ATM, including the brackets, which were an open and obvious condition to a person exercising reasonable care for their own safety.

B. Fultz Failed to Show An Extrinsic, Substantial And Unexpected Distraction Which Would Excuse Her Contributory Negligence

When a plaintiff is injured by an open and obvious condition, it is her burden to show extrinsic conditions which prevented her from seeing the open and obvious condition or which would excuse her failure to observe it. *Southern Floors and Acoustics, Inc. v. Anthony Max-Yeboah, et al.*, 267 Va. 682, 686, 594 S.E.2d 908, 910 (2004). However, "more is needed than a simple allegation of a distraction to create a jury issue. It [is] necessary

for [the] plaintiff to establish that [her] excuse for inattention was reasonable, i.e., that the distraction was unexpected and substantial." *Id.* (citing *West v. City of Portsmouth*, 217 Va. 734, 737, 232 S.E.2d 763, 765 (1977)). "To hold otherwise would permit a plaintiff in any case to avoid contributory negligence by showing an insignificant reason for failing to be observant." *West*, 217 Va. at 737, 232 S.E.2d at 765.

In *West*, the plaintiff allegedly sustained personal injuries after stepping into a hole in a sidewalk in the City of Portsmouth, Virginia. *Id.* at 734, 232 S.E.2d at 764. The plaintiff in *West* alleged that he did not see the three feet by two and a half feet deep depression because several people who exited a nearby bakery distracted him. *Id.* at 737, 232 S.E.2d at 765. The plaintiff in *West* contended that the distraction of the people exiting the bakery was "outside of himself" and therefore created a question of fact for the jury to decide whether he exercised ordinary care under the circumstances. *Id.* This Court affirmed the judgment of the trial court in granting summary judgment in favor of the defendant because the evidence in the record did not show an unusual, unexpected or extraordinary event which would excuse the plaintiff's contributory negligence. *Id.* at 739, 232 S.E.2d at 766-767.

Fultz contends that being distracted by her grandson and using the subject ATM create a question of fact for the jury to decide whether she exercised reasonable care under the circumstances. However, like in *West*, Fultz fails to offer evidence of an extrinsic distraction that was unexpected and substantial that would excuse her contributory negligence in failing to observe the bars in front of the subject ATM, including the brackets, which were an open and obvious condition to a person exercising reasonable care for their own safety.

In support of her argument that her grandson was a sufficient distraction, Fultz cites *Southern Floors and Acoustics, Inc., et al. v. Max-Yeboah, et al.*, 267 Va. 682, 594 S.E.2d 908 (2004). In *Southern Floors*, the plaintiff tripped and fell over a one-foot stack of tiles, which was an open and obvious condition to the plaintiff. *Southern Floors*, 267 Va. at 686, 594 S.E.2d at 910. The plaintiff in *Southern Floors* offered evidence of an extrinsic distraction in the form of defendant Southern Floors employee's yelling at him and pointing at him to excuse his inattention in tripping over the stack of tiles. *Id.* This Court noted that if believed, the distraction alleged by plaintiff was both unexpected and substantial. *Id.*, 594 S.E.2d at 911.

In this case, as the Trial Court properly held when it found that Fultz was contributorily negligent as a matter of law, no reasonable juror could find that Fultz's alleged distraction, i.e., her grandson, was an extrinsic distraction that was substantial and unexpected. Fultz's grandson was or should have been under her control. The fact that Fultz allowed her grandson to move away from her did not make her grandson an extrinsic distraction. Also, as the Trial Court correctly noted, a toddler is not an unexpected distraction because common sense is that a toddler is likely to run off and someone may have to chase them down in a store. (J.A. at 148). Fultz conceded this point when she admitted "the only way to control a toddler... is to hold their hand, to physically restrain them from walking away, or a two-year-old toddler is going to walk away." (J.A. at 167). A jury question is not created as to whether or not a parent or guardian acted reasonably under the circumstances when they trip and fall over an open and obvious condition as they chase down or, like in this case, being to chase down a toddler in a store. Also, this case is distinguishable from the facts of *Southern Floors* because the distractions in *Southern Floors* were caused by one of the defendants whereas in this case, neither of the Defendants were the cause of Fultz's alleged distractions.

Fultz also cites *Shiflett v. Timberlake*, 205 Va. 406, 137 S.E.2d 908 (1964) in support of her argument that her grandson was a sufficient distraction. In *Shiflett*, the plaintiff slipped and fell on water that had allegedly accumulated on the floor of the defendant's drugstore. *Shiflett*, 205 Va. at 407-408, 137 S.E.2d at 908. This case is distinguishable from the facts in *Shiflett* because the alleged hazard in *Shiflett* was clear water, which was not open and obvious to the plaintiff, whereas the alleged hazard in this case were prominent bars in front of an ATM, which were an open and obvious condition to Fultz. Additionally, in *Shiflett*, the alleged distraction, i.e., the "bright display", (*Id.* at 411, 137 S.E.2d at 912) was at least possibly unexpected to the plaintiff because the defendant created it. In this case, Fultz's alleged distractions were not unexpected and were not created by either of the Defendants.

In support of her argument that using the subject ATM machine creates a question of fact for the jury to decide whether she exercised reasonable care under the circumstances, Fultz argues, *inter alia*, that "her attention would have been primarily focused on getting out her ATM card and on the screen portion of the ATM" and that "she would have had to use two hands to get her ATM card out of her wallet." (Op. Br. at 14).

However, using an ATM and getting her ATM card out of her wallet are not extrinsic distractions, outside of Fultz's control, that are so substantial and unexpected that they excuse her contributory negligence in not appreciating the bars and brackets in front of the subject ATM. Using an ATM machine is a matter of common experience. Moreover, Fultz's arguments rely on facts that are not in the record and in fact, appear to be contrary to facts that are in the record. The Trial Court gave Fultz the opportunity to provide actual additional evidence, which could possibly create a genuine issue of material fact, prior to ruling on Food Lion and Nationwide Money Services, Inc.'s Motions for Summary Judgment and she failed to provide any such evidence. (J.A. at 146).

It was Fultz's intention to use the subject ATM and/or get out her ATM card and therefore these alleged distractions, if they can be termed distractions, were not extrinsic, unexpected and/or substantial. Therefore, because Fultz failed to offer evidence of an extrinsic distraction that was unexpected and substantial that would excuse her contributory negligence in failing to observe and appreciate the bars in front of the subject ATM, including the brackets, the Trial Court was correct in granting summary judgment in favor of Food Lion.

III. THE CONTRIBUTORY NEGLIGENCE DEFENSE IS AVAILABLE TO AN OCCUPANT REGARDLESS OF THE THEORY OF NEGLIGENCE ALLEGED BY AN INVITEE

In her Opening Brief, Fultz argues that the "open and obvious defense" only applies to cases where an occupant allegedly failed to warn the invitee and not to an occupant's "duty to fix." (Op. Br. at 13). In support of her contention, Fultz does not cite to any case law. Instead, Fultz relies on Virginia Model Jury instruction 23.040.

Fultz did not assign any error to any ruling by the Trial Court in reliance on this model jury instruction in her Opening Brief. Further, Fultz's only Assignment of Error addresses whether or not she was contributorily negligent as a matter of law. However, this model jury instruction Fultz relies on describes the duty of an occupant to an invitee. Because the Trial Court correctly determined that Fultz was contributorily negligent as a matter of law, it was not necessary to determine whether or not the Defendants were negligent. Therefore, it is respectfully submitted that Fultz's arguments regarding the model jury instruction are not properly before this Court.

Had she properly raised the issue for this Court's review, it is clear Fultz's argument that the "open and obvious defense" only applies to cases where an occupant allegedly failed to warn the invitee and not to an

occupant's duty to use ordinary care is flawed and contrary to established Virginia law.

In granting Defendants' Motions for Summary Judgment, the Trial Court properly determined that Fultz was contributorily negligent as a matter of law. Fultz's attempt to narrowly construe the contributory negligence defense as only the "open and obvious defense" is misplaced. The contributory negligence defense is available to an occupant regardless of the theory of negligence put forth by the invitee.

It is well established in Virginia that if it appears that the plaintiff "failed to exercise reasonable care and that such failure was a contributing cause of the accident, she is not entitled to have damages from the defendant." *Tazewell*, 213 Va. at 95, 189 S.E.2d at 349. In this case, Fultz failed to exercise reasonable care when she tripped and fell over an open and obvious condition and failed to offer an extrinsic, substantial and unexpected distraction which would excuse her contributory negligence. Because Fultz's negligence contributed to her alleged injuries, she is not entitled to have damages from Defendants regardless of her theory of negligence.

CONCLUSION

In this case, the Trial Court correctly granted summary judgment in favor of Food Lion and Nationwide Money Services, Inc. when it held that Fultz was contributorily negligent as a matter of law. As indicated, *supra*, no reasonable juror could find that, under a totality of the circumstances, Fultz acted with reasonable care. Fultz tripped and fell over the bars in front of the subject ATM, including the brackets, which were an open and obvious condition to a person exercising reasonable care for their own safety and she failed to offer any evidence of an extrinsic distraction that was unexpected and substantial which would excuse her contributory negligence.

Therefore, based upon the foregoing, Food Lion respectfully requests this Honorable Court to affirm the decision of the Trial Court and dismiss Fultz's appeal.

Respectfully submitted,

DELHAIZE AMERICA, INC.
d/b/a Food Lion, Inc.
and
FOOD LION, LLC

BY: /s/ Randall C. Lenhart, Jr.
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CERTIFICATE OF SERVICE

I hereby certify, pursuant to Rule 5:26(d) of the Rules of the Supreme Court of Virginia, that twelve (12) true and accurate copies of the foregoing Brief of Appellees were filed with the Clerk of the Supreme Court of Virginia and three (3) copies were mailed or delivered this 13th day of February, 2009 to **M. Bryan Slaughter, Esquire**, MICHIE HAMLETT LOWRY RASMUSSEN & TWEEL, PLLC, 500 Court Square, Suite 300, P.O. Box 298, Charlottesville, Virginia 22902-0298, counsel for Appellant; and **Jonathan P. Jester, Esquire**, 4480 Cox Road, Suite 225, Glen Allen, Virginia 23060, counsel for Appellee Nationwide Money Services, Inc. This same date, an electronic copy of the foregoing Brief of Appellees was filed via email at scvbriefs@courts.state.va.us. Appellees Delhaize America, Inc. d/b/a Food Lion, Inc. and Food Lion, LLC do not waive oral argument.

/s/ Randall C. Lenhart, Jr.

EXHIBIT 1

AUG 7 2008

CAUTION
WET
FLOOR