In the

Supreme Court of Virginia

At Richmond

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.

REPLY BRIEF OF APPELLANT

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TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF VIRGINIA:

I. This Case Presents Unique Facts, and any Question of Plaintiff Fultz's Contributory Negligence Is One For the Jury

All parties in this case agree on the issue - was sufficient evidence presented by the Defendants, solely on the pleadings, such that Plaintiff Fultz was unquestionably guilty of contributory negligence as a matter of law? In her opening brief, Plaintiff Fultz cited the Court to cases to support her position that reasonable minds could differ as to whether she failed to use ordinary care. In their briefs, Defendants cite cases for why they believe the trial court was correct in its decision to grant summary judgment.

No party has cited a case that is precisely on point – this case presents unique issues that are not contained in other cases decided by this Court. Here, the Plaintiff was invited to the middle of the hazard by the Defendants. If Plaintiff Fultz needed to get money, she had no choice but to stand right between the six-inch-high bars. When she initially approached the ATM from straight ahead, she did not have to negotiate the hazard - the bars were not in her way. The bars only became hazardous when she moved sideways, which she did unexpectedly to retrieve her grandson. Furthermore, while she was using the Defendants' ATM, her attention was diverted away from the

bars directly beneath her. Finally, a reasonable juror could find that having bars directly below one's feet at an ATM is completely unexpected and not part of the common experience, unlike having boxes in a grocery store aisle.

Plaintiff Fultz respectfully requests that this Court adhere to its many, many decisions where it has held that issues of contributory negligence must be decided by a jury. *See e.g. Holland v. Shively*, 243 Va. 308, 311, 415 S.E.2d 224 (1992), *J & E Express, Inc. v. Hancock Peanut Co.*, 220 Va. 57, 62, 255 S.E.2d 481, 485 (1979), *Loving v. Hayden*, 245 Va. 441, 444, 429 S.E.2d 8, 10 (1993). This Court has a long tradition of having cases decided by jurors, and not by trial courts through a summary judgment ruling. Whether or not Plaintiff Fultz should have seen or remembered the bars beneath her feet, or whether it was reasonable for her to be momentarily distracted, are questions that need to be answered by a jury. Plaintiff Fultz respectfully requests that she be permitted to have her day in court.

II. The Opinion of Plaintiff's Expert Also Serves to Create a Question of Fact

Finally, the opinion of Plaintiff's expert, Mr. Dennis Proffitt, also creates a question of fact. In their respective briefs, Defendants Food Lion and NMS summarily reject the disclosed expert opinion. Mr. Proffitt is the head of the University of Virginia's Perception Laboratory, and has devoted his life to

researching and explaining how people perceive their environment. Defendant Food Lion states that Mr. Proffitt's opinion does not create an issue of fact, despite Mr. Proffitt's opinion directly countering Food Lion's stated position. Food Lion then continues that it would be "unlikely" that Mr. Proffitt would be permitted to testify. Defendant NMS asserts that Mr. Proffitt's opinion is not properly before this Court.

Of course, procedurally, this case is before the Court as a result of Defendants' summary judgment motions that were granted. As the rules permit, the summary judgment motions were supported by the pleadings. In her response to Defendants' motions, Plaintiff Fultz cited the disclosure, which was in the form of an interrogatory response, and also made the disclosure an exhibit. (R. 89-95). Accordingly, Mr. Proffitt's opinion was a pleading that was properly used in opposition to Defendants' motions.

The Defendants chose to file their motions prior to seeking a ruling from the trial court regarding Mr. Proffitt's opinions. They now ask this Court to essentially make an evidentiary ruling and dismiss Mr. Proffitt's proposed testimony out of hand. Because of the unique issues of this case, including the diversion of Plaintiff Fultz's attention required by the ATM, Plaintiff believes that Mr. Proffitt's opinions are relevant and admissible. Defendants

disagree. Whether Mr. Proffitt should be permitted to testify is not currently before this Court, but the substance of his opinions may be used by Plaintiff Fultz as another component that creates a question of fact regarding any contributory negligence. Plaintiff Fultz does not believe that Mr. Proffitt's testimony is necessary to create such a question, but Defendants have shown no valid reason why this Court can disregard his opinions at this stage of the proceedings.

III. Conclusion

For the reasons stated herein, in her opening brief, and during oral argument, Appellant Doris Knight Fultz respectfully requests that this Court reverse the trial court, thereby permitting her to have her case decided by a jury.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that:

1. The appellant is Doris Knight Fultz.

2. Counsel for the appellant is:

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3. The appellees are Delhaize America, Inc. d/b/a Food Lion, Inc., and Food Lion, LLC, and Nationwide Money Services, Inc.

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5. 3 copies of the Reply Brief of Appellant were mailed or delivered this 3rd day of March, 2009, to the above counsel for appellees, and 15 copies of the same were hand-delivered to the Office of the Clerk of the Supreme Court this 3rd day of March, 2009, for filing. This same date, an electronic copy of the brief was filed via email at scvbriefs@courts.state.va.us

6. Counsel for Doris Knight Fultz desire oral argument, in person.

/s/ M. Bryan Slaughter