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 APPELLEE
NATIONWIDE MONEY SERVICES, INC.

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DELHAIZE AMERICA, INC.
d/b/a Food Lion, Inc.,

and

FOOD LION, LLC,

and

NATIONWIDE MONEY SERVICES, INC., Appellees.

BRIEF OF APPELLEE, NATIONWIDE MONEY SERVICES, INC.

COMES NOW appellee, Nationwide Money Services, Inc. ("NMS"), by counsel, and, pursuant to Rule 5:28, *Rules of the Supreme Court of Virginia,* for its Brief of Appellee, hereby states as follows:

STATEMENT OF THE CASE

In July, 2006, the plaintiff below, Doris Knight Fultz ("Fultz") filed her Amended Complaint against Delhaize America, Inc., Food Lion, LLC (both collectively referred to hereinafter as "Food Lion") and Nationwide Money Services, Inc. ("NMS") alleging, among other

things, that, on or about August 7, 2004, Fultz was a customer in a Food Lion grocery store in Roanoke, Virginia, when she was using an automated teller machine ("ATM") located in the store. While Fultz was using the ATM, her young grandson began moving away from her. As Fultz turned to her grandson, she tripped over a metal rod (variously referred to by the parties as "rods," "rails," and "bars") separating the ATM from shopping carts. (J.A. at 2). Fultz alleged that both NMS and Food Lion failed to use ordinary care with regard to the placement, maintenance, and servicing of the subject ATM and that both NMS and Food Lion "failed to warn" the plaintiff of the "unreasonably dangerous condition" presented by the ATM and metal rods. (J.A. at 3-4).

NMS and Food Lion each filed a motion seeking summary judgment. (J.A. at 23-26). On September 5, 2007, fifteen days prior to the scheduled trial date of September 20, 2007, the trial court heard argument and granted summary judgment to NMS and Food Lion. (J.A. at 96-124). On November 2, 2007, the trial court heard argument on Fultz's motion to rehear the grant of summary judgment. On November 8, 2007, the trial court issued an opinion letter in which it denied Fultz's motion for reconsideration. (J.A. at 193-194). On

January 23, 2008, the trial court caused to be entered separate orders denying Fultz's motion for reconsideration and granting summary judgment to NMS and Food Lion. (J.A. at 198-199).

This appeal follows.

QUESTIONS PRESENTED

NMS does not assign error to the court's grant of summary judgment.

Fultz assigns error to the trial court's grant of summary judgment, stating that the trial court erred in determining that (1) the metal rods separating the ATM from grocery carts were an open and obvious condition and (2) that the distraction of Fultz's young grandson wandering away from her as she was using the ATM was not sufficient to relieve her of her obligation to observe the metal rods.

Herein, NMS will refer to the two parts of Fultz's one assignment of error as the "open and obvious" issue and the "distraction" issue. NMS does not agree that the "open and obvious" issue is properly before the Court. In November, 2007, Fultz, by counsel, argued that the question of open and obvious is not a jury question, stating that "[t]here's no analysis about open and obvious

for the jury to determine" (J.A. at 164) and that "the jury is not deciding whether this is open and obvious. The jury is deciding, given all of these factors together, whether Mrs. Fultz's actions were reasonable…." (J.A. at 181). In other words, Fultz agued that the issue for jury consideration is whether she was guilty of contributory negligence.

In her Opening Brief, Fultz sets forth three (3) questions presented. Only Question 1, which addresses both the "open and obvious" issue and the "distraction" issue, appears to relate to the assignment of error set forth by Fultz. Questions 2 and 3 do not appear to relate to Fultz's assignment of error because they address premises design and invitee warnings, matters that Fultz does not raise in her assignment of error.

Because Fultz has already conceded that the "open and obvious" issue is not a question for jury determination, NMS asserts that the questions presented in this appeal are more properly stated as:

> (1) Whether Fultz was contributorily negligent, as a matter of law, when she failed to observe and appreciate that the metal rods were present on either side of the ATM as she approached and used the ATM?
>
> and

(2) Whether the claim of distraction is sufficient to excuse Fultz's contributorily negligent act of failing to observe and appreciate the metal rods as she moved away from the ATM?

STATEMENT OF FACTS

On or about August 7, 2004, Fultz was a customer in a Food Lion grocery store in Roanoke, Virginia. She was there with her daughter-in-law and her young grandson. (J.A. at 2). After completing the shopping, Fultz's daughter-in-law left the store to put the groceries in the car. (J.A., Vol. II at 210-211). Fultz then proceeded to an ATM located in the Food Lion's entry vestibule. (J.A. at 2, J.A., Vol II, at 211). As Fultz was using the ATM, her young grandson began moving away from her. (J.A. at 2). As Fultz turned and moved toward her grandson, she tripped over a metal rod separating the ATM from shopping carts. (J.A. at 2). Later in the course of discovery, Fultz was not able to recall whether she tripped over the metal rod or the rod's supporting brackets. (J.A., Vol. II at 210-211). However, in response to Food Lion's First Requests for Admissions, Fultz admitted that she fell over one of the "metal bars, to include the metal that attaches the bars to the floor." (J.A. at 78).

The trial court found that the metal bars were black and dark in contrast to the flooring, which is white. (J.A. at 194). In the Joint Appendix there are various photographs of the metal bars. (See J.A. at 44, 45, 46, 74, 75, 76, 138, 139, 140, 189 and 190).

PRINCIPLES OF LAW, ARGUMENT AND AUTHORITIES

I. Summary of Argument

The trial court properly found that the metal rods that separated the ATM from the shopping carts were an open and obvious condition, of which neither Food Lion nor NMS was required to warn Fultz. Because the metal rods, which were black and dark in contrast to the white flooring and rose some six inches above the level of the floor and were made of totally different materials, were so open and obvious that no person exercising reasonable care for her own safety would have failed to observe and appreciate them, no warning was required as a matter of law.

The trial court properly found that Fultz's claim that she was distracted by her young grandson was not a sufficient distraction to excuse her contributorily negligent act of failing to observe the metal rods as she moved toward her grandson. Because the claimed distraction was neither unexpected nor substantial, and was of her

own making, Fultz may not rely on it to avoid her contributory negligence.

Because Fultz tripped over an open and obvious condition which, in the exercise of reasonable care for her own safety, she would have observed and appreciated, and because the claimed distraction Fultz offers as an excuse for not observing and appreciating the open and obvious condition was not unexpected, the trial court properly concluded that Fultz was guilty of contributory negligence as a matter of law.

II. **Argument and Authorities**

A. Standard of Review

Rule 3:20, *Rules of the Supreme Court of Virginia,* provides that a party may make a motion for summary judgment and the trial court may grant such motion if it appears that the moving party is entitled to judgment as a matter of law. The trial court may not enter summary judgment if there exists any genuine dispute regarding any material fact. On review, this Court reviews the record applying the same standard required of the trial court in considering a motion for summary judgment, adopting those inferences from the facts that are

most favorable to the nonmoving party, unless those inferences are forced, strained, or contrary to reason. *Dudas v. Glenwood Golf Club, Inc.,* 261 Va. 133, 540 S.E.2d 129 (2001); *Dickerson v. Fatehi,* 253 Va. 324, 327, 484 S.E.2d 880, 882 (1997); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-50 (1986). Summary judgment is not intended as a substitute for trial when genuine issues of material fact exist. Rather, summary judgment allows a trial court to bring litigation to an end, at an early stage, when it clearly appears that a party is "entitled to a judgment in the case as made out in by the pleadings and the admissions of the parties." *Carson v. LeBlanc,* 245 Va. 135, 140, 427 S.E.2d 189, 192 (1993).

B. Plaintiff's Contributory Negligence Bars Her Action

Without citing any authority, Fultz urges this court to use a "totality of the circumstances" analysis with regard to her actions. The proper inquiry is whether Fultz was contributorily negligent as a matter of law for her failure to observe and appreciate the metal rods separating the ATM from shopping carts.

Under Virginia law, 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, 399 S.E.2d

809 (1991). In *Scott,* the plaintiff and her husband were at the City's "Community Market" to sell products. While carrying items from her car, the plaintiff walked "sideways" between a table and a steel beam when she stepped off a five and one-half inch curb and fell, sustaining personal injuries. *Id.*, at 65, 399 S.E.2d at 810. According to the plaintiff, who was familiar with the area, she "forgot the curb was there." *Id.*, at 66, 399 S.E.2d at 810. Finding that the plaintiff did not offer any reasonable excuse for her forgetfulness, this Court, held that she was guilty of contributory negligence as a matter of law.

In *Rocky Mount Shopping Center Associates v. Steagall,* 235 Va. 636, 369 S.E.2d 193 (1988), a plaintiff was injured in a fall on a shopping center premises. The plaintiff in *Steagall* stepped off a sidewalk into a depression measuring eight to twelve inches across and two to three inches deep formed by a recessed water meter cover in the parking lot. The plaintiff admitted that she could have seen it if she had been looking. The plaintiff also admitted that she had not looked down before stepping from the curb. *Id.* At 637, 369 S.E.2d at 194. For the purposes of its ruling on the plaintiff's contributory negligence, this Court assumed, but did not decide, that the evidence created a jury issue as to the owner's possible

negligence with respect to the maintenance of the water meter cover. However, whether the evidence may have created a jury issue on the owner's negligence did not matter. This Court held that the plaintiff "in failing to look and, therefore, see an obvious depression in the parking lot surface" was guilty of contributory negligence as a matter of law. *Id.*

In her case, Fultz has made several admissions as they relate to the subject ATM and metal bars on the date of the accident:

(1) That the ATM and rods were in the location depicted in the photographs attached to Food Lion's Requests for Admissions to Fultz (J.A. at 150-151);

(2) That Fultz tripped and fell over one of the metal bars, to include the brackets, in front of the ATM (J.A. at 151);

(3) That there was adequate lighting in the vestibule area where the subject ATM was located at the time of the subject accident (J.A. at 152);

(4) That Fultz walked directly up to the ATM after leaving the checkout line (J.A. at 153);

(5) That Fultz does not recall seeing the metal bars in front of the ATM as she approached the ATM (J.A. at 153);

and,

(6) That Fultz does not remember anything blocking her view of the metal bars as she approached the ATM (J.A. at 153).

Regarding the objections raised by Fultz in response to the referenced request for admissions, the trial court, by Order dated November 2, 2007, overruled the objections to the above-referenced admissions. (J.A. at 191).

In her Petition for Appeal herein, Fultz relied on a photograph showing the ATM and the metal rods. That photograph appears to be the same as the one included in the Joint Appendix at 190. From that photograph, it is clear that Fultz would have had to not only look down toward the ground to insert her ATM card into the machine, but she would also have had to look down in order to use the keypad and to retrieve money from the machine. Because Fultz admitted that she was using the ATM at the time of the incident, (J.A. at 2), it is a reasonable inference that she had already inserted her ATM card into the machine and was using the keypad. Such inference is not forced, strained, or contrary to reason.

In her Petition for Appeal, Fultz argues that a reasonable juror could find that she had "shopping bags" in her hand. (Petition at 9).

Such an inference is contrary to her own evidence that her daughter-in-law had already left the store "to put the groceries in the car." (J.A., Vol. II, at 210.).

Fultz's case cannot rise above her own evidence. *See Massey v. Firmstone,* 134 Va. 450, 114 S.E. 652 (1922). Fultz cannot reasonably ask this Court to believe that she might have had grocery bags in her hands when she has already admitted, through her interrogatory answers, that her daughter-in-law had taken the groceries to the car.

Fultz also argues that a reasonable juror could make a number of other inferences that would excuse Fultz from her duty to exercise ordinary care for her own safety. Among them are inferences that Fultz would not have been looking anywhere but at the screen of the ATM upon her approach (Opening Brief at 14); that she would have been looking for her ATM card (Opening Brief at 14); that she would have been using two hands to retrieve her ATM card from her wallet, requiring her to let go of her grandson's hand (Opening Brief at 14); that "people" would have generally acted in accordance with their common experience (Opening Brief at 14); and that it would be reasonable that she would have become forgetful about observing

the metal rods (Opening Brief at 14-15).

Such inferences are not only forced, strained, and contrary to reason, but they are not supported by the available facts and evidence. As such, they do not create a genuine issue of material fact sufficient to defeat summary judgment.

Fultz also argues that she may not have tripped over the metal rods, but over the rod's supporting brackets. (Petition at 13). Her own uncertainty about whether she tripped over the metal rod or the supporting bracket does not change the outcome that she was contributorily negligent as a matter of law. As she argues in her Petition, the condition presented by the ATM's metal rods and supporting brackets as shown in the photograph (J.A. at 190) "is plainly clear." (Petition at 13). A reasonably prudent person who was paying attention would have been able to observe and appreciate the condition. Further, because Fultz has already admitted that she fell over one of the "metal bars, to include the metal that attaches the bars to the floor" (J.A. at 151), she has already conceded that she considers the bars and supporting brackets to be one single piece for the purposes of this litigation.

From the available photographs, it is clear that Fultz was

confronted with a condition that was so open and obvious that any reasonable person who was paying attention would have been able to see it. According to Fultz's own admission, there was adequate lighting in the vestibule area where the ATM was located. (J.A. at 152). She admitted that she walked directly up to the ATM upon leaving the checkout. (J.A. at 153). Because Fultz has admitted that she has no recollection of anything blocking her view of the metal bars in front of the ATM, she would not be able to testify that there was anything to prevent her from seeing the metal bars. (J.A. at 153).

Had Fultz been paying attention and looking where she was going, she would have seen the metal rods. That Fultz tripped over one of the metal rods is simply due to her inattention and lack of ordinary care.

Fultz also relies on her expert witness disclosure to argue that the expert's anticipated testimony would have given rise to a jury question on the open and obvious issue. Fultz's reliance is misplaced. The issue of the expert's anticipated testimony is not before this Court. Fultz does not assign error to any action taken by the trial court with regard to it. Also, because the expert never

testified in this matter, neither the parties nor the trial court relied on any testimony from the expert in making their respective arguments or rulings relating to summary judgment. Assuming, for the sake of argument, that the "open and obvious" issue and the expert issue were properly before the court, the expert's anticipated testimony, that "people often do not remember objects they have briefly perceived after they interact with other stimuli" (Opening Brief at 10, J.A. at 94-95) invades the province of the jury by allowing the expert to give testimony on the ultimate issue of the plaintiff's contributory negligence and whether or not the metal rods constitute an open and obvious condition. Because the expert's expected testimony is contrary to Virginia law to the extent that it offers the plaintiff an excuse from her contributory negligence for her failure to exercise ordinary care to observe the metal rods it is not likely that such testimony would be admissible in any event.

Because Fultz could have seen the open and obvious condition presented by the metal bars in front of the ATM had she looked, she is guilty of contributory negligence as a matter of law.

C. Fultz's Claim of Distraction Is Not Sufficient To Excuse Her Failure To Observe And Appreciate The Metal Rods

Fultz argues that even if she failed to observe and appreciate

the metal rods, she is excused from her own contributory negligence because her young grandson distracted her. In support of this argument, Fultz cites the case of *Southern Floors and Acoustics v. Max-Yeboah,* 267 Va. 682, 594 S.E.2d 908 (2004). In *Southern Floors,* the plaintiff fell over a box of flooring tiles that were on the floor in a grocery store aisle. The flooring contractor was working in the aisle when the plaintiff entered it. The plaintiff testified at trial that he did not see the one-foot high box of tiles because his attention was focused on freezer case. When he arrived at the freezer case he stopped. An employee of the flooring contractor called out to him to "go-back" because he was standing in glue that had not yet dried. *Id.* at 685, 594 S.E.2d at 910. As the plaintiff retreated, he tripped over the box of tiles. This Court, in holding that the trial court did not err in refusing to hold the plaintiff contributorily negligent as a matter of law, determined that a plaintiff who is injured by an open and obvious condition has the burden:

> [t]o show conditions outside of himself which prevented him seeing the defect or which would excuse his failure to observe it ... When they do not exist the law charges the party with failure to do what was required of him.

Id. at 686, 594 S.E.2d at 910 (citations omitted).

This Court continued:

> [h]owever, "more is needed than a simple allegation of a distraction to create a jury issue. It [is] necessary for [the] plaintiff to establish that his excuse for inattention was reasonable, i.e., that the distraction was unexpected and substantial."

Id. (*quoting West v. City of Portsmouth,* 217 Va. 734, 737, 232 S.E.2d 763, 765 (1977).

Fultz argues that her young grandson's actions distracted her and such distraction should excuse her from observing and appreciating the metal rods separating the ATM from the shopping carts. She also argues that a jury could infer that she would have to use two hands to retrieve her ATM card from her wallet, forcing her to let go of her young grandson's hand. (Opening Brief at 14). She further argues that a reasonable inference is that "three-year-olds" wander away. (Opening Brief at 14). Assuming, for the sake of argument, that these inferences are fact, the plaintiff argues that she should be excused from her failure to observe and appreciate the metal rods because of actions she affirmatively took in anticipation of using the ATM. Such actions may have been distractions, but they were of her own making and within her control. Moreover, the inference that "three-year-olds" wander away supports a conclusion that it was not unexpected that Fultz's grandson moved away from

her as she used the ATM. Thus, the distractions were neither outside of herself nor the unexpected and substantial distractions that are required under *Southern Floors* and *West* to excuse her inattention and resulting contributory negligence.

Fultz also cites *Shiflett v. Timberlake,* 205 Va. 406, 137 S.E.2d 908 (1964). *Shiflett* does not appear to be as much a "distraction" case as it is a case involving the duty of a storekeeper to discover hidden hazardous conditions. In *Shiflett,* the plaintiff slipped on water on the floor, the water being a condition that did not appear to be otherwise open and obvious. The primary issue in the case was whether the defendant storekeeper exercised ordinary care to prevent an otherwise hidden hazardous condition to exist on the premises and, if such a condition existed, whether the storekeeper exercised ordinary care to correct the condition after he knew, or should have known, of the condition. *Id.* at 410, 137 S.E.2d at 911-12. Whether the plaintiff was contributorily negligent was an issue for the jury because even though the plaintiff may have been looking at a "bright display," *Id.* at 407, S.E.2d at 910, she testified that prior to the fall, she "could see nothing on the floor." *Id.* at 408, S.E.2d at 910.

Fultz, on the other hand, does not argue that she could see

"nothing on the floor" because she was not looking at the floor. By her own admission, her attentions were focused on her grandson, her wallet, and on using the ATM. All of these distractions were ones which she created. Thus, they were not outside of herself or unexpected.

Because the distractions Fultz claims were neither outside of herself nor unexpected and substantial, Fultz cannot excuse her contributory negligence by such distraction. As a result, she is guilty of contributory negligence as a matter of law and the trial court did not err in granting summary judgment to Food Lion and NMS.

D. Virginia Model Jury Instruction 23.040

Fultz does not assign error to any ruling by the trial court in reliance on the instruction. As a result, the discussion is not properly before this Court.

Even if Fultz had properly raised the issue for this Court's consideration, her argument that the "open and obvious" defense is not applicable to an occupant's duty to use ordinary care to maintain a premises in a reasonably safe condition is flawed.

In *Appalachian Power Co. v. Sanders,* 232 Va. 189, 349 S.E.2d 101 (1986), this Court set forth the duties owed to an invitee by an

occupier of a premises, stating:

> [An occupant] is chargeable with constructive as well as actual knowledge of the condition of the property. [An occupant] is subject to liability to its invitee injured as the result of an unsafe condition (one which was not open and obvious to the invitee) if the invitor knew it existed, or by the exercise of reasonable care should have discovered its existence, and failed to remedy the condition or otherwise to protect the invitee against the danger.

Id. at 194, 349 S.E.2d at 105.

In the context of the jury instruction cited by Fultz, the "unsafe condition" in the *Appalachian Power* case is one which is "not open and obvious" to the invitee. As a result, the two parts of the jury instruction necessarily are dependent upon each other.

Moreover, Fultz's argument that the "open and obvious" defense is something other than a means to demonstrate that a plaintiff is contributorily negligent is inaccurate. The contributory negligence defense is available to an occupant regardless of the theory of negligence asserted by an 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 Supply Company, Inc. v.*

Turner, 213 Va. 93, 95, 189 S.E2d 347, 349 (1972).

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 failure to avoid the open and obvious condition. Because Fultz's negligence contributed to her alleged injuries, she is not entitled to have damages from either Food Lion or NMS regardless of her theory of negligence.

Fultz also urges this Court to consider the propriety of Virginia Model Jury Instruction 23.040 in the general context of the design and maintenance of a premises, arguing that an occupier of a premises has a duty to "fix" an existing dangerous condition. While there may be liability for a failure to remedy an unsafe condition of which an occupant knew, or should have discovered, on a premises, there is no duty under Virginia law to "fix" the unsafe condition.

As stated above, because Fultz assigns no error to any ruling by the trial court in reliance on the language of the instruction, the issue is not properly before this Court.

CONCLUSION

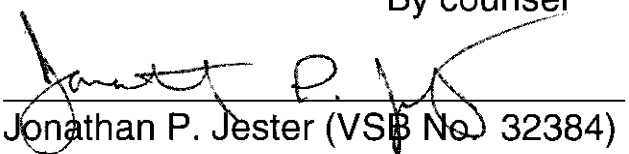
The trial court did not err in granting summary judgment when it determined that Fultz was contributorily negligent, as a matter of law, when she failed to observe and appreciate the open and obvious condition presented by the metal rods that were present on either side of the ATM as she approached and used the ATM and, further, that Fultz's claim of distraction was not sufficient to excuse Fultz's contributory negligence because the distraction was neither unexpected nor caused by conditions extrinsic to the plaintiff.

Based upon the foregoing, NMS respectfully requests that the Honorable Court affirm the decision of the trial court and dismiss Fultz's appeal.

Respectfully submitted,

NATIONWIDE MONEY SERVICES, INC.

By counsel



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CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 5:26(d), *Rules of the Supreme Court of Virginia*, twelve (12) true and accurate copies of the foregoing Brief of Appellee, Nationwide Money Services, Inc., were filed with the Clerk of the Supreme Court of Virginia as well as an electronic copy delivered via email to the Clerk, and that three (3) true and accurate copies of the same was mailed or delivered, postage prepaid, this 17th day of February, 2009 to each of the following:

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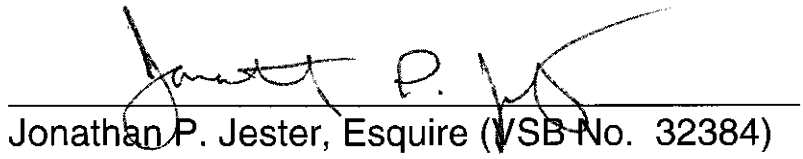

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