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.

OPENING BRIEF OF APPELLANT

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

ASSIGNMENT OF ERROR

1. The trial court erred in granting summary judgment in favor of the defendants when it found, as a matter of law, that one of two six inch high rails placed by the defendants on either side of an Automated Teller Machine were an open and obvious condition for the Plaintiff, and that nothing justified her failure to observe the rails directly beneath her.

QUESTIONS PRESENTED

1. Did the trial court err in granting summary judgment in favor of the defendants when it found, as a matter of law, that one of two six inch high rails placed by the defendants on either side of an Automated Teller Machine were an open and obvious condition for the Plaintiff, and that nothing justified her failure to observe the rails directly beneath her? (A/E 1).

2. Does the "open and obvious" defense operate to give an occupant license to design its premises in a manner that is unsafe and hazardous to its invitees? (A/E 1)

3. Does the "open and obvious" defense only pertain to an occupants duty to use ordinary care to warn invitees of an unsafe condition, and not to that occupants duty to use ordinary care to have the premises in a reasonably safe condition, as stated in the model jury instructions. (A/E 1)

STATEMENT OF THE NATURE OF THE CASE AND MATERIAL PROCEEDINGS

This is a premises liability action brought by Appellant/Plaintiff below Doris Knight Fultz (hereinafter Plaintiff Fultz) against Defendants Delhaize America, Inc. d/b/a Food Lion, Inc., Food Lion, LLC (hereinafter collectively referred to as Defendant Food Lion), and Nationwide Money Services, Inc. (hereinafter Defendant NMS). On August 7, 2004, Plaintiff Fultz walked into a Food Lion located in Roanoke, Virginia, to shop with her daughter-in-law and 3-year-old grandson. After shopping and checking out, Plaintiff Fultz walked to an Automated Teller Machine (ATM) in the vestibule in the front of the store. Defendant Food Lion and Defendant NMS had contracted for Defendant NMS to provide an ATM at that location. On either side of where the feet of an ATM user would be were two six-inch-high metal rails, ostensibly placed to keep shopping carts away from the front of the ATM.[1] (*See* pictures at J.A. 189-90). As Plaintiff Fultz was using the ATM, her toddler grandson moved away from

[1]The trial court ruled on the summary judgment motions before Plaintiff Fultz could ascertain exactly who placed the rails and under whose direction. The depositions that hopefully would have answered these questions were scheduled to take place soon after the Summary Judgment hearing.

her. Plaintiff Fultz stepped to the side to retrieve him and fell over the rails, severely fracturing her arm and elbow.

On January 23, 2006, Plaintiff Fultz filed a complaint against Defendant Food Lion in the Circuit Court for the County of Albemarle. On July 18, 2006, she filed an amended complaint against Defendant Food Lion and Defendant NMS. (J.A. 1-5). On August 9, 2007, Defendant Food Lion filed its Motion for Summary Judgment, and on August 21, 2007, Defendant NMS likewise filed a summary judgment motion. (J.A. 23-26). Both of Defendants' motions alleged that Plaintiff Fultz was guilty of contributory negligence as a matter of law because the rails over which she fell were an open and obvious condition.

On September 5, 2007, the trial court heard and granted Defendants' motions (*See* Transcript at J.A. 96-123). On September 6, 2007, Plaintiff Fultz filed a motion to rehear Defendants' summary judgment motions. Plaintiff's motion to rehear was heard on November 2, 2007. (*See* Transcript at J.A. 161-187). By letter opinion dated November 8, 2007, the trial court denied Plaintiff's motion. (J.A. 193-94). On January 23, 2008, the trial court endorsed Orders granting the motions for summary judgment and denying the motion to rehear. (J.A. 198-199 and 200-01). The clerk entered those Orders that day. Plaintiff Fultz timely filed her Notice of Appeal on February 15, 2008, and filed her

transcripts on March 13, 2008.

STATEMENT OF FACTS

Since the trial court entered summary judgment based only on the pleadings, the available facts are sparse. On August 7, 2004, Doris Knight Fultz entered a Food Lion store in Roanoke, Virginia, to do some grocery shopping with her daughter-in-law and her 3-year-old grandson. After completing her shopping, Mrs. Fultz used the ATM. (*See* Para 9 of Amended Complaint, J.A.1-5). As she was using the ATM, her young grandson began moving away from her. As she turned and moved towards her grandson, she tripped over one of the protruding metal rails and broke every bone in her elbow. (*Id.* and *see* photographs of ATM and rails, J.A. 189 - 90). Plaintiff Fultz believes that her foot caught in a gusset that attached the metal rail to the floor. (*See* Plaintiff's Answers to Food Lion's Interrogatory Number 6, J.A. Vol. 2, 210-211).

Additionally, in her answers to Defendants' interrogatories, Plaintiff Fultz disclosed the opinions of Dennis Proffitt, PhD. (J.A. 94-95). Mr. Proffitt is a professor at the University of Virginia who is the director of the University's Perception Laboratory. The disclosure states that, at the trial of this case, Mr. Proffitt would testify that the rails were not an open and obvious condition to the

users of the ATM. *Id.* The rails would have been out of the field of view of such a user, and thus a user would have to remember that the rails were beneath her. *Id.* It is well accepted that people often do not remember objects that they have briefly perceived after they interact with other stimuli. *Id.* Mr. Proffitt was further expected to testify that people do not look directly down at their feet as they walk or otherwise interact with their surrounding. *Id.*

SUMMARY OF ARGUMENT

This Court has a long history of stressing the importance of allowing juries to be the finders of fact after hearing all relevant evidence. Here, the trial court robbed Plaintiff Fultz of the opportunity of having a jury decide her case by summarily substituting its own opinion regarding questions of fact. As is often the case with summary judgment proceedings, the trial court arrived at its decision without the benefit of hearing any testimony, and instead based its ruling on a bare bones outline of the facts that are contained in the pleadings.

This case demonstrates how insidious the open and obvious defense can be when it is incorrectly applied. Under Virginia law, the open and obvious doctrine relieves a defendant only of the duty to *warn* of certain hazards, it does not provide a license for an owner to design a premises in a manner that is unsafe and hazardous to its customers. Such a doctrine would be absurd.

Here, the Defendants designed an ATM with six-inch-high trip hazards on either side, invited, and in fact required, their customers who needed money to stand in the middle of the hazard, distracted those customers during the time they were using the ATM, and then, when one of their customers predictably tripped over the six-inch-high hazard, blamed her for stepping sideways without first looking *directly down* at her feet.

The trial court erred when it found that the rails at Plaintiff's feet while she was using the ATM were an open and obvious condition. It further erred when it found, as a matter of law, that Plaintiff was not justified in not seeing or remembering the rails when she instinctively stepped towards her grandson who was moving away from her. A reasonable jury could find that, given the totality of the circumstances, Mrs. Fultz acted reasonably immediately before she was tripped by the rails. Accordingly, this Court should reverse the trial court's order granting summary judgment, and allow this case to be decided by a jury.

ARGUMENT

A. Standard of Review

This Court has stated that the decision to grant a Motion for Summary Judgment is a drastic remedy which is available only when there are no

material facts genuinely in dispute. Stockbridge v. Gemini Air Cargo, Inc., 269 Va. 609, 618 (2005) *citing* Sloan v. General Motors Corp., 249 Va. 520, 522 (1995). The Court has further cautioned that discovery ordinarily should not supplant the taking of evidence at trial and that "summary judgment should not be used to short-circuit litigation by deciding disputed facts without permitting the parties to reach a trial on the merits." Stockbridge at 618 (other citations omitted). Additionally, there is no duty upon the plaintiff to fully develop its claims in pretrial discovery. *See* O'Brien v. Snow, 215 Va. 403, 405 (1974). In ruling on a summary judgment motion, the trial court should state the facts and adopt inferences from those facts in the light most favorable to the plaintiff. *See* Bloodworth v. Ellis, 221 Va.18, 23 (1980). Review of the record is limited to the parties' pleadings, requests for admission and interrogatories. Klaiber v. Freemason Associates, 266 Va. 478, 587 S.E.2d 555 (2003).

B. A Question of Fact Existed as To Whether the Rails Were Open and Obvious to a *User* of the ATM

In granting Defendants' summary judgment motions, the trial court found as a matter of law that the rails on either side of the ATM were an open and obvious condition. (J.A. 117-22 and 194). Based on the limited evidence before the court, a question of fact existed on this issue. The pictures of the ATM in the record show the rails from a distance, but this is not a case of a

person falling over the rails as she approached the ATM. Here, Plaintiff Fultz was not required to interact with the rails on her approach to the ATM - they did not obstruct her path as she initially approached the machine from the front.

Once she arrived at the ATM, Plaintiff Fultz's attention was necessarily diverted to using the ATM, as would have been anticipated and intended by the Defendants. At this point, *the rails were directly below her feet*. In order for Plaintiff Fultz to have seen them, she would have had to have been looking directly down as she left the ATM to retrieve her grandson. This Court has specifically held that a person's failure to look down while stepping forward does not in itself constitute contributory negligence: "We have specifically declined to hold that, as a matter of law, a pedestrian's failure to look down while stepping forward must constitute contributory negligence in every case." Little Creek Investment Corp. v. Hubbard, 249 Va. 258, 455 S.E.2d 244 (1995) *citing* City of Suffolk v. Hewitt, 226 Va. 20, 28, 307 S.E.2d 444, 448 (1983). In Hubbard, the plaintiff 'looked straight ahead' but did not see the muffler on the sidewalk at her feet. Little Creek at 260. Based on these facts, a reasonable juror could find that the rails were not open and obvious to a user of the ATM.

Furthermore, a reasonable juror could find that the bracket connecting the rail to the floor was not open or obvious. In answering Defendant's

interrogatory regarding how the fall occurred, Plaintiff Fultz stated, "as she turned and moved towards her grandson, she believes her foot caught in a gusset that held a metal bar to the floor and she fell directly on her elbow." (J.A. Vol. 2, 210-211). As is plainly clear in the picture of the rails, the brackets or gussets actually protrude past the rails into the user area of the ATM. Thus, a user could be clear of the rails, yet still trip on the brackets. Whether or not this design is reasonable or presents an open and obvious condition for a user standing at the ATM is a question of fact for the jury. A reasonable juror would be well within her rights to find that these protruding brackets do not constitute an open and obvious condition.

Finally, the trial court disregarded Plaintiff Fultz's expert disclosure contained in her answers to interrogatories. Plaintiff disclosed Dennis Proffit, Ph.D., who specializes in the areas of human perception and performance and cognitive science, and is head of the Perception Laboratory at the University of Virginia. In relevant part, the disclosure states:

> It is expected that Mr. Proffitt will testify that the rails on either side of the ATM constituted a hazardous condition to users of the ATM, and, for various reasons, were not an open and obvious condition for such users, including Mrs. Fultz. He is expected to testify that the rails would not necessarily be seen by an ATM user, because they would not be in that person's field of view. Consequently, a person would have to remember that the rails are beneath them, and it is well accepted that people often do not

> remember objects they have briefly perceived after they interact with other stimuli.
>
> Mr. Proffitt will testify that, unless warned to do so, people do not look at their feet as they walk or otherwise interact with their surroundings. Furthermore, he is expected to testify that, after performing a task such as using the ATM, people will not necessarily be cognizant of or remember objects that they may have already previously seen. This is especially true in a situation where a person is required to act quickly and instinctively, such as when retrieving a child.

(*See* J.A. 94-95). Mr. Proffitt's anticipated testimony also created a question of fact as to whether the rails on either side of the ATM were an open and obvious condition to a user of the ATM, and accordingly this Court should reverse the trial court's grant of summary judgment on this basis, as well.

C. A Juror Could Find That it Was Reasonable for Plaintiff Fultz to be Distracted by her Grandson

The trial court further found that the escape of Mrs. Fultz's three-year-old grandson was not a sufficient distraction to excuse her not seeing the rails. (J.A. 117-22 and 194). In Paragraph 10 of her amended complaint, Plaintiff Fultz alleged: "[a]s Plaintiff Fultz was using the ATM, her young grandson began moving away from her. As she turned and moved towards her grandson, she tripped over one of the protruding metal rods and broke every bone in her elbow." (J.A. 2). This paragraph alone, without anything else, creates a question of fact sufficient to deny summary judgment.

In Southern Floors and Acoustics v. Max-Yeboah, *and* Food Lion v Max-Yeboah, 267 Va. 682, 594 S.E.2d 908 (2004), a customer fell over a stack of tiles in the aisle of a Food Lion grocery store in Charlottesville. The Plaintiff did not initially see tiles because "he was looking at a freezer case for frozen food." *Id* at 685. Workers then called to him to move as he was standing on glue that was not yet dry. As plaintiff moved, he tripped and fell over the tiles. *Id*. On appeal, the defendants maintained that the trial court should have found plaintiff contributorily negligent as a matter of law because the tiles that he tripped over were an open and obvious condition, which he noticed or should have noticed when he initially entered the aisle. In upholding the trial court, the Supreme Court stated: "While the one-foot high stack of tiles Max-Yeboah tripped over was clearly an open and obvious hazard, Max-Yeboah offered *evidence of an extrinsic condition*, in the form of the Southern Floors employee's yelling and pointing to excuse his inattention." *Id*. at 686. (Emphasis added).

Furthermore, in Shiflett v. Timberlake, 205 Va. 406, 137 S.E.2d 908 (1964), this Court found that the plaintiff's attention was attracted to a "bright display" and this sufficiently excused her failing to see the hazard in front of her. Shifflett at 411. If simply looking at a display in a store is a sufficient distraction

to cause a jury issue regarding the open and obviousness of a condition, attempting to locate and retrieve a *child* must also present a similar question for a jury.

It is undisputed that Mrs. Fultz was distracted by her toddler grandson, and this distraction constitutes the type of extrinsic factors contemplated by the Court in Max-Yeboah and Shifflett. Because a question of fact exists on this issue, this Court should reverse the ruling of the trial court, and allow this case to be heard by a jury.

D. The "Open and Obvious" Defense Applies Only to an Occupant's Duty to Use Ordinary Care to Warn an Invitee of Any Unsafe Condition, Does Not Apply to an Occupant's Duty to Use Ordinary Care to Have the Premises in a Reasonably Safe Condition

Virginia model jury instruction 23.040 describes an occupant's duty to an invitee.[2] It states:

an occupant of premises has a duty to an invitee:

1) to use ordinary care to have the premises in a

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[2] Plaintiff acknowledges that the Model Jury Instructions are not binding authority on this Court. They are, however, what trial courts across the Commonwealth are using. Instruction No. 23.040 is the generally accepted and used instruction in the vast majority of premises liability cases, and if it is an inaccurate statement of Virginia law, this Court should grant this appeal on that basis alone.

reasonably safe condition for an invitee's use consistent with the invitation, but an occupant does not guarantee an invitee's safety; and

2) to use ordinary care to warn an invitee of any unsafe condition about which the occupant knows, or by the use of ordinary care should know, unless the unsafe condition is open and obvious to a person using ordinary care for his own safety.

If an occupant fails to perform either or both of these duties, then he is negligent.

As the instruction states on its face, the open and obvious defense applies only to cases where an occupant allegedly *failed to warn* the invitee. It does not apply to the first prong – an occupant's duty to use ordinary care to have the premises in a reasonably safe condition. This makes sense, because if the defense applied to an occupant's duty to use ordinary care, he could design and maintain his premises in a patently dangerous and hazardous manner. He would not be obligated to ever fix an openly dangerous condition, no matter how many people were injured by it. For instance, if the Defendants in this case had 30 reports of customers tripping over these rails and injuring themselves, the law and common sense dictate that they have an obligation to remove or modify them to prevent further injury. While they might not have a duty to warn of the hazard, they instead have the duty to fix the hazard. To hold otherwise would turn a major purpose of tort law on its head.

E. The Question Then Becomes Whether, Under a Totality of the Circumstances, the Plaintiff Acted as a Reasonable Person Would for Her Own Safety

The trial court's ruling was based primarily on whether the rails around the ATM were an open and obvious condition. Instead, the court's focus should have been whether, *under a totality of the circumstances*, Plaintiff acted with reasonable care. When Plaintiff Fultz's actions are viewed in this manner, it becomes a question of fact whether she was contributorily negligent.

A reasonable juror could find that, while the rails were there during Plaintiff Fultz's approach to the machine, it is reasonable that her attention would have been primarily focused on getting out her ATM card and on the screen portion of the ATM. A reasonable inference is that she would have had to use two hands to get her ATM card out of her wallet, requiring her to let go of the hand of her three-year-old. A further reasonable inference is that three-year-olds do not always stay where they are supposed to stay. A jury would be entitled to find that people generally act in accordance with their common experience, and that having two six-inch rails on either side of an ATM is not part of people's common experience when using an ATM. A reasonable juror could also find that it is possible, and not unreasonable, for a person in a new environment, once her mind engages in a different activity, to not remember an

aspect of her surroundings which she may have seen one time.

A jury could therefore find that it was reasonable for Plaintiff Fultz to not remember or notice the rails after using the ATM. And a jury could certainly find that it was reasonable not to remember or notice the rails when instinctively moving towards her grandson who had wandered off. All of these things, when viewed together, at least create a question of fact regarding whether Plaintiff Fultz acted reasonably when she stepped sideways towards her grandson. Since a question of fact exists regarding any negligence on the part of Plaintiff Fultz, this Court should reverse the trial court.

CONCLUSION

Because a reasonable juror could find that the rails in question were not open and obvious to a user of the ATM, and because a reasonable juror could find that it was reasonable for Plaintiff Fultz to be distracted by her grandson, a question of fact existed on these issues. Accordingly, Appellant Doris Knight Fultz respectfully requests that this Court reverse the trial court, thereby permitting her case to be decided by a jury.

Respectfully Submitted,

Doris Knight Fultz

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5. 3 copies of the Opening Brief of Appellant and of the Joint Appendix were mailed or delivered this 20th day of January, 2009, to the above counsel for appellees, and 12 copies of each were hand-delivered to the Office of the Clerk of the Supreme Court this 20th day of January, 2009, for filing. This same date, an electronic copy of the brief and of the appendix were filed via email at scvbriefs@courts.state.va.us

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

/s/ M. Bryan Slaughter