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Clerk, Supreme Court of Appeals
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Record No. 5248

In the Supreme Court of Appeals of Virginia at Richmond

MARY D. GALL

v.

THE GREAT ATLANTIC & PACIFIC TEA COMPANY

FROM THE CIRCUIT COURT OF FAIRFAX COUNTY

RULE 5:12—BRIEFS.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 5248

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 6th day of October, 1960.

MARY D. GALL, Plaintiff in Error,

against

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, Defendant in Error.

From the Circuit Court of Fairfax County

Upon the petition of Mary D. Gall a writ of error is awarded her to a judgment rendered by the Circuit Court of Fairfax County on the 15th day of April, 1960, in a certain motion for judgment then therein depending wherein the said petitioner was plaintiff and The Great Atlantic & Pacific Tea Company, a corporation, was defendant; upon the petitioner, or some one for her, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of three hundred dollars, with condition as the law directs.

RECORD

* * * * *

Filed in Circuit Court Clerk's Office Jul 14, 1959.

THOMAS P. CHAPMAN, JR.
Clerk Fairfax County, Va.

MOTION FOR JUDGMENT.

Comes now the Plaintiff, Mary D. Gall, and moves the said Court for judgment and execution of judgment against the Defendant, The Great Atlantic & Pacific Tea Company, a corporation, doing business in the City of Falls Church, Fairfax County, Virginia, in the amount of One Hundred Thousand Dollars ($100,000.00) for the following:

1. That on or about September 19, 1958, the Defendant corporation owned, operated and maintained a food store at 155 Hillwood Avenue, City of Falls Church, Fairfax County, Virginia.

2. That on the aforesaid date, the Plaintiff entered the said store at the express and implied invitation of the Defendant as its business invitee, for the purpose of purchasing certain merchandise.

3. That while on the premises owned, operated and maintained by the Defendant, and while exercising due care, the Plaintiff slipped and fell on certain grapes that were lying on the floor in front of one of the counters from which the Plaintiff was selecting merchandise for purchase.

4. That the Defendant knew, or in the exercise of ordinary care, should have known that the said grapes were on the floor or likely to fall on said floor from the fruit bins above, and that the grapes were inherently dangerous to the safety of its customers; that the Defendant failed to exercise ordinary care in keeping its floor free of said grapes, page 3 } in providing inadequate bins for the said fruit and in uegliegntly stacking said grapes, and that the Defendant failed in its duty to the Plaintiff, its business invitee, by its failure to keep the floor free of said grapes, and by its failure to warn Plaintiff of the possibility of debris on the floor of the fruit section.

5. That the Plaintiff, as a result of slipping and falling on said floor in the manner aforesaid, has suffered severe bodily injuries of a permanent nature that have caused her much physical pain and mental anguish; that as a result of the

injuries sustained, the Plaintiff has had to spend large sums of money for medical attention and treatment and for medication, that further, she has lost large sums of money as a result of not being physically able to work at her regular employment; that she continues to suffer great physical pain and mental anguish and is even now under the care of a doctor and requires medication; that she will be required to spend large sums of money in the future for medical care, treatment and medication, and that she will not be able to return to her employment for some time to come.

WHEREFOR, the Plaintiff moves the said Court for judgment in the amount of $100,000.00.

MARY D. GALL
By LOIS H. MILLER
Her counsel.

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* * * * *

Filed Jul 31, 1959.

THOMAS P. CHAPMAN, JR.
Clerk of the Circuit Court of
Fairfax County, Va.

ANSWER AND GROUNDS OF DEFENSE.

Comes now the defendant, by its attorneys, and for its answer and grounds of defense to the motion for judgment exhibited herein alleges and states as follows:

1. The defendant admits the allegations of the first numbered paragraph of the motion for judgment.
2. The defendant admits the physical presence of the plaintiff in its store at the approximate time and place aforesaid.
3. The defendant denies the allegation that plaintiff was exercising due care, and denies that plaintiff slipped and fell "on certain grapes" as alleged in the third numbered paragraph of the motion for judgment.
4. The defendant denies that it had knowledge, actual or constructive, of the fact that a grape or grapes were on the

floor. It denies that it is charged with any knowledge that grapes are "inherently dangerous" to the safety of its customers, and further denies the fact thereof; it denies knowledge, actual or constructive, that grapes are likely to fall from the fruit bins, and further denies the fact thereof; it denies further the allegation that it failed to provide adequate bins, or that it was negligent in stacking said grapes; and it denies the legal duties pleaded in the last sentence of paragraph numbered 4, and moves the Court to
page 5 } strike said sentence as being an inaccurate pleading of the duties which the law places upon proprietors of realty.

5. The defendant is not advised as to the verity of either the nature or extent of the injuries alleged in paragraph numbered 5, and, therefore, denies the same. Defendant reserves unto itself, if such reservation be necessary, the right to call upon the plaintiff to amplify her allegations of damages contained in this paragraph.

And now by way of further answer to the motion for judgment, Defendant pleads that its duty was, and is, to exercise due care to maintain its premises in a reasonably safe condition for business invitees. It is not an insurer of the safety of its business invitees, and it states affirmatively that it exercised every reasonable precaution to maintain its store in a reasonably safe condition, and further that said store was, in fact, reasonably safe. It further pleads that it had no knowledge, actual or constructive, of the presence of the grapes upon the floor, and it states that if said grapes were upon the floor at the time and place in question, its presence was as equally apparent to the plaintiff as to this defendant, and this defendant intends further to rely upon the contributory negligence of the plaintiff as an additional bar to the maintenance of this action.

And now having fully answered the motion for judgment, Defendant prays that it may be dismissed with its costs in this behalf expended.

THE GREAT ATLANTIC &
PACIFIC TEA COMPANY
By CHARLES H. DUFF
Its Attorney.

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MOTION FOR BILL OF PARTICULARS.

Comes now the defendant, by its attorneys, and moves this Honorable Court for the entry of an Order requiring the plaintiff to amplify her motion for judgment in the following particulars:

1. Please describe with particularity the exact counter in front of which plaintiff fell as alleged in the third numbered paragraph of the motion for judgment.
2. Was plaintiff hospitalized as a result of her injuries? If so, please state the name of the hospital, and the period or periods of such hospitalization.
3. What was the nature of the plaintiff's employment prior to the accident?
4. Has the plaintiff returned to this employment, or any other, since the date of the accident? If so, please furnish the date of return.
5. Please state the names and addresses of all physicians who have treated the plaintiff for her injuries and the approximate number of times of plaintiff's visits to said physicians.
6. What is the nature of the permanent injuries claimed to have been sustained by the plaintiff?
7. Please furnish a list of all monetary losses which plaintiff claims to have sustained, including loss of income, etc.

THE GREAT ATLANTIC &
PACIFIC TEA COMPANY
By CHARLES H. DUFF
Its Attorney.

Filed Jul 31, 1959.

THOMAS P. CHAPMAN, JR.
Clerk of the Circuit Court of
Fairfax County, Va.

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Filed Nov. 12, 1959.

THOMAS P. CHAPMAN, JR.
Clerk of the Circuit Court of
Fairfax County, Va.

INTERROGATORIES TO THE DEFENDANT.

Now comes the Plaintiff and propounds the following Interrogatories to the Defendant, such Interrogatories to be answered by the Defendant, under oath, on or before the date specified on the attached subpoena:

1. The name and address of the manager of the store at the time of Plaintiff's injury.
2. Name and address of the manager of the produce department at the time of Plaintiff's injury.
3. Name and address of employees of the store at the time of Plaintiff's injury.
4. Describe procedure for cleaning the floor areas in the produce section, how frequently, what materials were used for cleaning the floors, and who had been cleaning the floor in the produce section at the time of the injury.
5. Who was responsible for placing grapes in bins and maintaining them there on the day of the injury.
6. Who was responsible for selection and design of type of bin in which grapes were stacked on this particular day.
7. How long had store been opened at time of

page 11 } injury.

8. Who was responsible for keeping the floor area of the produce section clean on the date of the injury.
9. Have any of the persons to be called as witnesses at the trial furnished written statements, and if so, in whose custody are the statements.
10. What type of floor is used in the produce department area.

MARY D. GALL
By Counsel.

LOIS H. MILLER
Wright Building
Vienna, Virginia
Counsel for Plaintiff.

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ANSWERS TO INTERROGATORIES.

COMES NOW, the defendant herein, by counsel, and voluntarily supplies the Answers to the Interrogatories requested previously by the plaintiff, and says in answer thereto:

1. Mr. E. S. Shaeffer, 820 So. Wayne Street, Arlington, Virginia, is the name of the manager of the store at the time plaintiff was injured.
2. Mr. Elmer Johnson, Temple Trailer Park, Alexandria, Virginia, was the manager of the produce department at the time of plaintiff's injury..
3. Defendant says that it should not be forced to answer Interrogatory No. 3, for the material requested therein is immaterial and irrelevant.
4. The floors are cleaned every 10 or 15 minutes by a broom.
5. Employees.
6. Mr. Elmer Johnson.
7. The store usually opens at 9:00 o'clock A. M.
8. Employees.
9. The defendant submits that the material in the 9th numbered interrogatory is of no consequence to the issue joined, and the defendant respectfully declines to answer.
10. Asphalt tile.

THE GREAT ATLANTIC &
PACIFIC TEA COMPANY
By NORMAN F. SLUNKER
Its Attorney.

Filed Jan. 15, 1960.

THOMAS P. CHAPMAN, JR.
Clerk of the Circuit Court of
Fairfax County, Va.

page 21 } INSTRUCTION NO. D.

The Court instructs the jury that Mrs. Gall was under a duty to exercise reasonable care for her own safety while in the defendant's store. This duty required her to see and avoid any dangerous condition which would have been seen by a reasonably prudent person under similar circumstances.

If you find from the evidence that Mrs. Gall was guilty of any negligence which contributed to her injuries, you must find in favor of the defendant. You are not permitted to balance the negligence of the plaintiff and the defendant, if any, and find against the party guilty of the greater negligence. Under the law of this Commonwealth any negligence on the part of the plaintiff which contributed to her injuries will bar her recovery regardless of how negligent you might find the defendant to have been.

3/23/60.

H. L. C.

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JUDGMENT ORDER.

THIS MATTER came on for trial the 23rd day of March, 1960, upon all pleadings heretofore filed and all parties were present in open court together with their attorneys; whereupon a jury was duly empaneled and selected according to law, and testimony taken; whereupon

At the close of the plaintiff's evidence and again at the close of all of the evidence, the defendant moved the Court to strike the plaintiff's evidence and to enter judgment in its favor. Both of said Motions were denied by the Court and exceptions taken by the defendant; whereupon the jury was instructed by the Court, argument of counsel was heard, and the case submitted to the jury.

AFTER DUE DELIBERATION the jury returned its verdict on the issues drawn in favor of the defendant; whereupon the plaintiff moved the Court to set aside the verdict and to grant her a new trial, and argument of counsel was heard; and

THE COURT BEING OF THE OPINION that the plaintiff's Motion should be denied and that the verdict should be approved and judgment entered thereon; it is therefore

ORDERED, ADJUDGED AND DECREED that the plaintiff recover nothing of the defendant in this action, to which

ruling the plaintiff duly noted her exception and indicated her intention to apply to the Supreme Court of Appeals for a writ of error; whereupon it is further

page 48 } ORDERED, ADJUDGED AND DECREED that prior to said application the plaintiff shall post appropriate bond for costs in the amount of $250.00.

AND THIS ORDER IS FINAL.

HARRY L. CARRICO, Judge.

Entered April 15th 1960.

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

Mary D. Gall, Plaintiff in the above-styled cause, pursuant to Rule 5:1, Section 4, of the Rules of the Supreme Court of Appeals of Virginia, hereby gives notice of appeal and assigns the following errors alleged to have been committed by the Trial Court:

1. The Court erred in giving, over Plaintiff's objection, an instruction on contributory negligence (Defendant's Instruction "D") in the absence of sufficient evidence to justify it.
2. The Court erred in allowing in evidence, over Plaintiff's objection, testimony of the store's manager concerning absence of prior accidents.

MARY D. GALL
By LOIS H. MILLER
Her counsel.

Filed Jun 6, 1960.

THOMAS P. CHAPMAN, JR.
Clerk of the Circuit Court of
Fairfax County, Va.

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ASSIGNMENT OF CROSS-ERROR.

COMES NOW the defendant, The Great Atlantic & Pacific Tea Company, a corporation, by counsel, and pursuant to the Rules of the Supreme Court of Appeals of Virginia assign the following cross-error which it alleges to have been committed by the Trial Court:

1. The Court erred in denying the defendant's Motion to Strike the plaintiff evidence, said motion made at the close of the plaintiff's case on the ground that there was no evidence showing that this defendant had created the dangerous condition alleged to have existed or had the requisite notice or knowledge of the existence of said dangerous condition.

THE GREAT ATLANTIC &
PACIFIC TEA COMPANY, A
CORPORATION
By CHARLES H. DUFF
Its Attorney.

Filed Jun 14, 1960.

THOMAS P. CHAPMAN, JR.
Clerk of the Circuit Court of
Fairfax County, Va.

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MARY D. GALL,
plaintiff, was called as a witness for and on her own behalf and, having been previously duly sworn, assumed the witness stand and, upon examination, testified as follows:

DIRECT EXAMINATION.

By Mr. Sherry:
Q. Would you please state your full name and address?

Mary D. Gall.

A. Mary D. Gall, 807 Park Street, Vienna, Virginia.

Mr. Sherry: Can everyone in the Jury hear Mrs. Gall? Keep your voice up, Mrs. Gall.

page 13 } By Mr. Sherry:

Q. Have you ever been in the A & P store in Falls Church, Virginia?

A. Yes.

Q. Is that the one at 155 Hillwood Avenue, do you know?

A. Yes.

Q. How many times have you been in there?

A. Well, many times.

Q. When was the last time you were in there?

A. September the 20th, 1958.

Q. September 20, 1958. And when was the time before that?

A. September 19, 1958.

Q. And on September 19, 1958, do you recall what day of the week that was?

A. Friday.

Q. And what time, to the best of your recollection, did you go to the A&P store?

A. Well, between 5:30 and 6:00.

Q. And where had you been?

A. At work.

Q. And where do you work?

A. Giant Food Store, Colonial Village.

Q. And what did you do at the Giant Food Store?

A. I was bakery manager.

page 14 } Q. And how long had you been working for Giant?

A. Three years.

Q. What was your pay with Giant?

A. Seventy dollars a week plus the bonus every three months.

Q. And what was the bonus based on?

A. On what we made at the bakery.

Q. Now, when you went to the A&P on September 19, that Friday afternoon, why did you go there?

A. To buy some coffee.

Q. And how many entrances are there to the store?

A. Just one main entrance.

Q. Is that the entrance you used?

A. Yes.

Mary D. Gall.

Q. Did you pick up a basket?
A. No.
Q. Where did you go when you entered the store?
A. I went in to get my coffee.
Q. Now—
A. (Interposing) I had to pass the cashier and you have to go through the produce department for the coffee.
Q. Was there anyone in the produce department when you went in there?
A. Just a few customers.
Q. Did the store in general appear crowded?
page 15 } A. No.
Q. Did anything attract your attention to the produce department?
A. Well, the grapes did.
Q. Why?
A. Well, they looked nice. They were red and nice and piled up real nice.
Q. Where were they piled?
A. In a bin.
Q. And was that bin on the right side or the left side?
A. Left side.
Q. Did you stop there?
A. Well, I looked at everything and then I stopped at the grapes.
Q. Did you touch or handle the grapes in any way?
A. No.
Q. What did you do then?
A. As I walked away I slipped and fell back against the counter.
Q. Can you describe just how you slipped and fell?
A. As I was going away from the grapes my foot slipped and my knee turned and I fell back against the counter and threw my arm and there just happened to be a woman there, she caught me.
Q. Which foot slipped?
page 16 } A. My right foot, and my left went under me, left leg went under me.
Q. Did you see what caused your fall?
A. Yes. It took me a little while to get over it because I was dazed and embarrassed and I didn't know what to do. I tried to straighten myself. My leg felt sort of numb and I shook it and as I was walking away I wanted to see what

Mary D. Gall.

I had slipped on and it was grapes because I could see the skid mark through the grapes.

Q. Were you directly in front of the place where the grapes were piled at that time?

A. Yes.

Mr. Duff: He is not to lead the witness, please.

The Court: Don't lead the witness. You may ask her where she was. If you asked her if she was in front of the grapes there's only one answer the witness might be expected to give.

By Mr. Sherry:

Q. What was the appearance of the floor?

A. Well, there were grapes on the floor, scattered, and my skid mark was through the grapes.

Q. Now all this time did you see any employee of the store in that vegetable and produce section?

A. No, I didn't.

Q. When was the first time that you saw an page 17 } employee in the produce section?

A. Well, after I had composed myself and was able to move, why, as I went up the aisle I saw him coming out from the back with some more boxes of produce to put up.

Q. How was he carrying the produce?

A. They were on something because he was pushing them.

Q. And was this close or far from the place where you had fallen?

A. Well, it was about from like here to you (indicating).

Q. And what was there, a door or passageway?

A. A door to the right.

Q. Did you notice whether that door had been opened or closed?

A. It was open.

Q. Did you speak to this person?

A. Yes, I did.

Q. What did you say?

A. I said to him, why don't you clean up those grapes, and he said I will.

Q. Did you say anything else to him?

A. No, I was kind of stunned and embarrassed.

Q. What did you do then?

A. Then I walked around and got my coffee and I went

Mary D. Gall.

up to where the manager's office is and asked to see the manager.

Q. Where is that in relation to the produce
page 18 } counter?

A. That's completely around the store. I went completely around to get to the coffee. They have meat, fish, you pass the fish and around to the meat and off up to the coffee. The coffee is just opposite of the produce. It was then—

Q. (Interposing) Did you see the manager?

A. I asked for him. I don't know where he was, he was in the back someplace and I imagine it was the assistant manager who said they would get him and I waited until he ultimately came.

Q. Did you ultimately see the gentleman sitting at the witness table?

A. Yes, I did.

Q. Did you discuss your fall with him?

A. What? Yes, I did.

Q. What did he and what did you say?

A. I told him I had slipped on some grapes over there and he said, did you hurt yourself? I said yes, I did, I hurt my back and arm. At that time that's all I could think of.

He looked over and said I told the boy to keep the grapes off the floor. I said you don't have to tell him, I already told him to clean them up.

Q. Did he get any further information from you, your name?

A. Yes, he took everything down, my name and
page 19 } everything.

Q. And then what did you do?

A. I went, I drove home.

Q. What day of the week was this?

A. Friday.

Q. Did you go to work the next day?

A. Yes, I did.

Q. Was it a regular work day?

A. Yes, it was.

Q. What were your regular working hours on that day?

A. 8:00 to 5:00.

Q. Did you work a full day?

A. No, I didn't.

Q. What time did you leave?

A. I left about 1:00.

Q. Why did you leave?

Mary D. Gall.

A. Well, I was hurt and I couldn't stand it and I was miserable. I was going to see a doctor.

Q. What kind of work do you do at the Giant?

A. Oh, manage, write up orders, order, take care of customers, put things in place, unload the cabinet as it comes in.

Q. What do you mean by unload the cabinet?

A. The bakery stuff comes on big trays, big bakery trays, big ones, and they come in tall cabinets and there's about 25 in a cabinet and all the stuff comes on there so it
page 20 } wouldn't be mashed. It's all laid out on each tray. I have to take it out and get it out in place so the cabinets can go back to the bakery.

Q. How much do these trays weight, do you know?

A. Oh, I don't know, they're pretty heavy sometimes.

Q. How long had you been doing this work before the accident?

A. Three years.

Mr. Duff: I didn't hear the answer.

The Witness: Three years.

By Mr. Sherry:

Q. And prior to this time when you left on that day following the accident, had you ever had to leave work because you were unable to do the work?

A. No.

Q. What did you do after you left the Giant that Saturday?

A. I called my husband first. When the girl came in I told the manager I couldn't work, that my knee and my back was bothering me and I called my husband and asked him to—when the other girl came in to relieve me, I couldn't leave until she came in—when she came in I called my husband and told him to make an appointment with the doctor.

Q. Then what did you do?

A. Well, he told me—

page 21 } Q. (Interposing) Don't tell me what your husband said. Just what did you do?

A. I went home. I mean, I went into my car and I had a hard time bending my knee to get my leg in the car and when I did I went down to the A&P, back again to see the manager.

Q. Was this the same A&P in Falls Church?

A. Yes.

Q. And did you see this gentleman (indicating?)

A. Yes, I asked for him again.

Mary D. Gall.

Q. And what did you say to him and what did he say to you?

A. I told him that I was sorry I had to report something to him and he says, what is it, and I says, well, I did hurt myself yesterday and I says I also hurt my knee but I couldn't think at the time that I did, I couldn't remember what I had hit. And he says well you didn't tell me about your knee. I says I was so shook up I couldn't think yesterday and he says, yes, you were shook up.

So he took his paper out and wrote down about my knee, too.

Q. And then what did you do?

A. I asked him if he wanted me to go to his doctor, if A&P had a doctor and he says, no, I don't care who you went to. He says, it is up to you. So I went home and went to my doctor.

page 22 } Q. Which doctor is that?

A. Dr. Tessitore.

Q. And when did you go to Dr. Tessitore's office, or did he see you at home?

A. I went to his office.

Q. When did you go to Dr. Tessitore's office?

A. Well, they only had special appointments on Saturday evening. I think they started at 5:00 and I think that's when I went. They didn't have office hours in the afternoon.

Q. And what happened when you went to Dr. Tessitore's office?

A. I told him I had fallen and told him all about it and he had x-rays of my arm and my knee.

Q. Now, that was on that Saturday?

A. That's right.

Q. Did you go back to Dr. Tessitore's again?

A. Yes.

Q. When?

A. Oh, many times after that.

Q. When was the next time?

A. The Monday after that.

Q. Did you go to work that Monday?

A. No.

Q. When was the next time you went back to work?

A. A week later.

page 23 } Q. Why did you not go to work that week?

A. Well, I just couldn't. I was too sore, I hurt, my knee hurt, my arm hurt, and my back hurt.

Mary D. Gall.

Q. You say you went to work a week later?
A. Yes.
Q. And how long did you continue at work after you went back?
A. One week.
Q. Then what happened?
A. Then I couldn't work again so I was off again.
Q. Well, had you been seeing Dr. Tessitore at that time?
A. Yes.
Q. How often was that?
A. After work I'd come down and get an ultrasonic diathermy treatment.
Q. How often had you been seeing him during that period?
A. Quite often.
Q. Now, this second time you were off, how long were you off work then?
A. Three weeks.
Q. And you then returned?
A. That's right.
Q. And how long did you work this time that you returned again?
page 24 } A. One week.
Q. And did you stop work after the week?
A. That's right.
Q. Why did you stop work?
A. Well, I just couldn't continue. I tried twice and I just couldn't.
Q. How did your work affect you?
A. Well, there was a lot of work to do. My doctor told me to try not to pick up anything heavy but you had to pick up things heavy in the bakery. I had a helper but she had other things to do, but I just couldn't be picking up the things, it was too much on my back, I couldn't stand it, neither could my leg. It was all swollen and my arm bothered me and I had headaches.
Q. Have you been back to work since then?
A. No.
Q. Now, what did you say your address was?
A. 807 Park Street.
Q. Where is that?
A. Vienna.
Q. How long have you lived there?
A. Since May 21, 1955.
Q. Does your family live there with you?
A. That's right.

Mary D. Gall.

Q. And who is in your family?
page 25 } A. My husband and my two sons.
Q. How old are your two sons?
A. Seventeen and nineteen.
Q. How big is the house?
A. It is a brick rambler, six rooms.
Q. Does it have a garden?
A. No.
Q. Now, prior to September 19, 1958 who did the housework in the house?
A. Well, I did.
Q. Just what did you do?
A. On my days off I did washing and ironing, or evenings.
Q. Did you do the cooking?
A. Yes, I did. I always did the cooking.
Q. What about the general cleaning?
A. Yes. I sometimes had help. If I didn't get through my youngest boy would help me because he was around.
Q. Have you been able to perform the same duties around the house since September 19, 1958?
A. No, I haven't.
Q. Who does the housework now?
A. My boy.
Q. Now, did you have any types of social activities that you engaged in prior to September 19, 1958?
A. Yes, I did.
page 26 } Q. What were they? Could you describe them?
A. I went to affairs up the church and down the firehouse.
Q. How often?
A. On Mondays and Thursdays.
Q. What did you do at the church?
A. Well, I helped out when they had anything going on like bake sales or dinners, helped in the kitchen.
Q. Now, since September 19, 1958 have you been able to engage in those same activities?
A. No.
Q. What are your complaints at the present, Mrs. Gall?
A. Well, everything hurts me. My leg hurts me, my back hurts me, and mostly my head.
Q. Where on your head?
A. Right back in here (indicating). I get ear aches occasionally.
Q. When does it hurt you?
A. Well, it hurts me just any time at all but mostly if I

try to do something that should be done and it is a little too much for me.

Q. Are you still going to the doctor?

A. Yes.

Q. Which doctor?

A. Dr. Tressitore.

page 27 } Q. Have you continued to go to him regularly all through this period?

A. Yes.

Q. Have you been taking any type of medication?

A. Yes.

Q. Where have you been purchasing the medication?

A. The Vienna Pharmacy, Vienna.

Q. How often do you take medication?

A. Well, just about every day.

Q. Have you experienced any difficulty in sleeping?

A. Yes.

Q. In what way?

A. I just can't sleep. My back bothers me, I just can't lay and just can't sleep. Everything bothers me.

Q. How old are you?

A. 42.

Q. And how old were you at the time *if* this accident?

A. 40, I think.

The Court: When is your birthday?

The Witness: January 6.

By Mr. Sherry:

Q. What year?

A. 1918.

Q. Now, at the time of the accident did you notice anything unusual about your period?

page 28 } A. Yes, when I came home besides hurting myself, I discovered that I had started my period.

Q. Was it time for that to occur then?

A. No, it wasn't.

Q. How far off was it?

A. About a week.

Q. And has that continued?

A. Yes, it has.

Q. Have you gone into menopause?

A. That's what the doctor tells me.

Q. What have you noticed unusual about your functions since then?

Mary D. Gall.

A. Well, it was too often at first, every two weeks or so, and then 17, 18 days and then 38 and then 40.

Q. Had you been regular before that?

A. Yes.

Q. When did you first notice this?

A. When I fell.

Q. That same day?

A. That's right.

Q. Prior to this time had you and your husband enjoyed normal sexual relations?

A. Yes.

Q. Have you been able to enjoy normal sexual relations since then?

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The Witness: No.

By Mr. Sherry:

Q. Now, to get back to the time you were in the produce section at the store, did you touch any of the grapes?

A. No, I didn't.

Q. Well, just what did you do with respect to
page 34 } grapes?

A. I just looked at them.

Q. Well, what was there about them that attracted you?

A. Well, they looked nice and they were laid out real nice on the counter. They were piled up on the counter, on the bin or counter, whatever you want to call it, the bin.

Q. I'm sorry, I can't hear you.

A. They were piled up on the bin or counter, I don't know what it was, but they were piled up on this counter.

Q. Was anyone else standing near the grapes when you came in there?

A. No.

Q. Did you see anyone else touching the grapes?

A. No.

Q. Could you tell whether anyone else had touched the grapes?

Mary D. Gall.

Mr. Duff: Objection, your Honor, that calls for a pure conclusion.

The Court: Objection sustained.

By Mr. Sherry:

Q. Have you worked in grocery stores?

A. Yes.

Q. Where and when?

A. Giant Food.

Q. Always in the bakery department?

A. Yes.

page 35 } Q. Have you ever worked in the produce section?

A. No.

Q. Have you worked in any other grocery?

A. No.

Q. Did these grapes appear to have been piled regularly or irregularly?

Mr. Duff: Objection, your Honor, that again calls for a conclusion.

The Court: That would depend on what he means.

The Witness: Pardon me?

Mr. Sherry: Don't answer the question.

Mr. Duff: I think she has already answered it in previous testimony. She answered they were piled nicely.

The Court: When is a grape piled regularly and when is it not? That is the trouble with the question.

By Mr. Sherry:

Q. Did the grapes appear to be in bunches or were there loose grapes in the pile?

A. In bunches.

Q. Did you get the name of the woman who helped you up?

A. No, I didn't.

Q. Do you know who she was?

A. No, I don't.

Q. Did you ask the produce man who came out with the produce later, did you ask him his name?

page 36 } A. No, I didn't.

Q. Now, was this the only produce man you saw there or did you see anyone else in that section?

A. That's the only one.

Q. Did you see anyone sweeping in the section?

A. No.

Mary D. Gall.

Q. Or cleaning up in any way?
A. No.

Mr. Sherry: That's all, your Honor.
The Court: All right, Mr. Duff.

CROSS EXAMINATION.

By Mr. Duff:
Q. Mrs. Gall, did I understand you to say that your age now is 42, ma'am?
A. That's right.
Q. You have two children?
A. Yes.
Q. How long have you worked at the Giant Food Store?
A. Since August 15, 1955.
Q. Where did you work before then?
A. No place.
Q. You were a housewife before?
A. That's right.
Q. So, at the time of this accident you had worked about three years and some few months?
page 37 } A. Until I fell, yes.
Q. During that time you were at the same Giant store?
A. No.
Q. Different ones?
A. Two different ones.
Q. And all of them sold produce, I assume?
A. That's right.
Q. And was your department in the store itself?
A. It wasn't.
Q. It wasn't outside in the vestibule, was it?
A. No.
Q. Now, may I inquire, do I understand you correctly that you were not selecting any merchandise from this grape counter?
A. That's right.
Q. Did you sign the suit papers in this case, Mrs. Gall? Do you know?
A. I signed one paper when the man came out.
Q. I ask you if you recall signing a paper that contains this language, "While on the premises owned, operated, and maintained by the defendant, the plaintiff slipped and fell on certain grapes that were lying on the floor in front of one

of the counters from which the plaintiff was selecting merchandise for purchase." Is that true?

A. No.

page 38 } Q. That's not true?

Mr. Sherry: Your Honor, it can be shown that she did not sign this and I don't think she did, according to this—

Mr. Duff: (Interposing) She is certainly bound by it.

The Court: If that document is signed by counsel, she is bound as if she signed it herself.

By Mr. Duff:

Q. That statement in this suit, you feel, is not an accurate statement?

A. I don't understand the question.

Q. Ma'am, I am just asking you, is the statement in your suit papers—I'll read it again to you and ask you if that is accurate, that's all.

"While on the premises owned, operated, and maintained by the defendant and while exercising due care, the plaintiff slipped and fell on certain grapes that were lying on the floor in front of one of the counters from which the plaintiff was selecting merchandise for purchase."

Now, is that correct or is it not correct?

A. No.

Q. All right. Now, Mrs. Gall, you are aware of the fact, are you not, that on Thursdays, Fridays, and Saturdays there are normally more customers in supermarkets than the rest of the week? That's true, isn't it?

page 39 } A. Yes.

Q. That was true in the store you worked, was it not?

A. Yes.

Q. You assume it is true in all of them, from your own knowledge?

A. Yes.

Q. As you went into the store did I understand that this produce department was on the left, is that what you said, the bins were on the left as you walked in the store?

A. The produce is on the right.

Q. Produce is on the right. What was your testimony about the bins being on the left as you walked in?

A. There was one in the middle there where they put

Mary D. Gall.

fruits and different things on it, on the left of the produce.

Q. Let me understand. These grapes that attracted your attention were they on a table or where they up the side of the wall in the bins?

A. They were on the table.

Q. They were on the table, were they not?

A. Yes.

Q. And that table is out from the wall some eight or ten feet, is it not, or do you recall?

A. I didn't measure it. I don't know.

Q. I am aware you didn't measure it. I just wondered if that is a fair estimate.

page 40 } Now, you have testified that you didn't see any clerks around there at the time. You are not telling this Jury that you know positively there were no employees in that area, are you?

A. There was no one there at the time.

Q. You are saying you didn't see anyone?

A. No, I didn't.

Q. All right. Now, Mrs. Gall, as a matter of fact, you don't know how the grapes that you fell on got on the floor, do you? As you sit on this witness stand today can you tell us how those grapes got on the floor?

A. No.

Q. As a matter of fact, you do not know, do you, ma'am, how long they'd been on that floor?

A. No.

Q. They could have been on there a-half an hour, couldn't they?

A. Yes.

Q. They could have been on there five minutes, couldn't they?

A. Well, I don't know.

Q. You really don't know, isn't that true?

Mrs. Miller: Let her answer, Mr. Duff.

Mr. Duff: I am sorry.

The Witness: I was there longer than five page 41 } minutes in the produce department.

By Mr. Duff:

Q. Had you not just gone into the store when this happened?

A. Yes.

Q. All right.

Mary D. Gall.

Now, Mrs. Gall, I am not clear on one thing. Did you describe how many grapes there were on the floor or can you tell us?

A. I didn't count them.

Q. Was there more than one?

A. Yes.

Q. Was it a bunch?

A. No.

Q. It was not as many as in a normal bunch?

A. It wasn't a bunch.

Q. And would you say it was three or four?

A. I didn't count them.

Q. I see. And did you see these grapes as you walked up to the grape display?

A. I didn't look at the floor.

Q. So you didn't see them, that's your answer?

A. I don't look down when I shop.

Q. Did you have a basket, Mrs. Gall?

A. No.

page 42 } Q. Were you carrying anything in your arms, ma'am?

A. No.

Q. Now, may I ask you have you seen any other physicians besides Dr. Tessitore?

A. Yes.

Q. Whom else, ma'am?

A. Dr. May (sic).

Q. Is that Virgil May in Richmond?

A. That's right.

Q. When did you go to see him, just approximately. I don't want exact dates.

A. Mrs. Miller would know.

Q. I will withdraw the question and ask you, did you go to see Dr. May on your own or were you referred to him by someone else?

A. Mrs. Miller.

Q. Mrs. Miller referred you to Dr. May?

A. That's right.

Q. Isn't it a fact that Mr. Wilbur Allen in Richmond referred you to Dr. May?

A. Mrs. Miller sent me up there.

Q. All right. Mr. Allen in Richmond did represent you in connection with this case, did he not?

Mary D. Gall.

Mr. Sherry: I don't see the relevancy of who represented her in connection with this case. I don't see what
page 43 } this has to do with the matter at issue.
Mr. Duff: I think it is proper, your Honor.
The Court: Objection overruled.

By Mr. Duff:
Q. Did not Mr. Allen in Richmond represent you at one time?
A. Yes.
Q. He doesn't now, does he?
A. No.
Q. Now, Mrs. Gall, in reference to your income that you have testified was $70 per week, was that your gross income or your take-home pay after taxes?
A. Gross.
Q. That was your gross income?
A. Yes.
Q. May I inquire what you actually took home after deductions for taxes? Do you know, ma'am?

Mr. Sherry: I think the amount of her pay is based on her gross income.
The Court: Objection sustained.
Mr. Duff: Note our exception please.

By Mr. Duff:
Q. What kind of shoes did you have on that day, ma'am?
A. White.
Q. Were they flat?
page 44 } A. Wedges. It is flat shoes. You have to wear flat.
Q. Now, you went to work the next day and I think you testified you worked from 8:00 until 1:00 and then had to go home?
A. Yes.
Q. And then there was a period of time elapsed and sometime in October you went back and worked for a week, is that correct? I just want to be sure I understand.
A. A week from the time I fell I went back.
Q. And then how long did you work that time?
A. A week.
Q. And then you were off for about three weeks and you went back and worked another week?
A. I went back twice.

Mary D. Gall.

Q. Now, Mrs. Gall, I'm almost through here. Just to be sure that I understand this, you were not, you didn't fall to the floor, did you? You didn't go all the way down?
A. No.
Q. You were not knocked unconscious?
A. Well, I was dazed or shocked.
Q. Did you hurt your head anywhere, ma'am?
A. Well, I fell back against the counter.
Q. I realize that, that is your testimony. Did you hurt your head in any way?

Q. I don't remember what I did except that I
page 45 } did have a bruise on my arm and I hit my back.

Q. You were not hospitalized as a result of this?
A. No.
Q. Were you bleeding anywhere as a result of this?
A. Not at that time.
Q. How many times did you see Dr. May in Richmond?
A. Three.
Q. Do you know if he sent any reports to Dr. Tessitore?
A. Yes.

Mr. Duff: No further questions.

RE-DIRECT EXAMINATION.

By Mr. Sherry:
Q. Since you have been questioned about Mr. Allen, who sent you to Mr. Allen?
A. Mrs. Miller.
Q. And Mr. Allen is an attorney at Richmond?
A. Yes.

Mr. Sherry: That's all.
The Court: Mrs. Gall, was the counter you fell against the one that grapes were on or were they on a different one?
The Witness: The one that the grapes were on.

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Mr. Sherry: Mrs. Gall, do you recall how long it was from when you entered the Fruit and Produce Section until you first

observed the attendant enter the Section from the back room?

Mr. Duff: Objection, your Honor, this is going right over the same old ground as before.

The Court: You have had every opportunity to cover this, Mr. Sherry.

Objection sustained. Step down, Mrs. Gall.

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ELMER SCHAEFFER,

was called as a witness for the plaintiff and having been previously sworn, assumed the witness stand and, upon examination, testified as follows:

DIRECT EXAMINATION.

By Mr. Sherry:

Q. Would you please state your full name and address?

A. Elmer Schaeffer, 724 South Wayne Street, Arlington, Virginia.

Q. What was your employment on September 19, 1958?

A. I was the store manager at the A & P at Hillwood Avenue in Falls Church.

Q. And were you also so employed on September 20, 1958?

A. Yes.

Q. On September 19, 1958, did you have occasion to see the plaintiff, Mrs. Gall?

A. Yes, I did.

Q. And did she advise you she had fallen?

A. Yes, she did.

Q. And did you have occasion to see her again on the following day, September 20?

A. Yes.

page 99 } Q. And did she advise you that she was going to a doctor?

A. Yes, she did.

Mr. Sherry: That's all.

Elmer Schaeffer.

CROSS EXAMINATION.

By Mr. Duff:

Q. Mr. Schaeffer, when Mrs. Gall advised you that she had fallen, did she tell you where she had fallen, sir?

A. She said she had fallen on the other side of the store in the Produce Department.

Q. Did she tell you what she had fallen on?

A. She said she slipped on a grape.

Q. On a grape.

Did you know that any grapes were on the floor on the other side of the store?

Mr. Sherry: Objected to, your Honor. This exceeds the scope of direct examination.

Mr. Duff: May it please the Court, I think it is merely in clarification of that. He was asked by Mr. Sherry was a report made of the accident. Now, Mrs. Gall has testified as to what she reported, and this is part of her case. A report was made, it has been developed through this man. I think we are thoroughly entitled to explore that.

Mr. Sherry: Your Honor, my question was whether or not she reported to him she had been injured. The question that has just been asked by counsel goes to some-
page 100 } thing, whether or not this gentleman knew there were grapes on the floor. I think that is a matter of their case for defense. It does not have anything to do with the very limited matter of my direct examination.

The Court: Objection sustained.

By Mr. Duff:

Q. Mr. Schaeffer, you were asked by Mr. Sherry whether a report was made to you and you answered, yes.

I ask you now, will you tell this Jury precisely what Mrs. Gall told you in that report?

A. Well, she said she had slipped on a grape on the other side and she thought she ought to report it because she didn't know how bad she was hurt or whether she was hurt at all. She was shook up.

Q. In response to what she told you in this report that was made to you, what, if anything, did you say to her?

A. Well, I can't recall what I did say or whether I did say anything or not.

Q. Were you in the Courtroom this morning when she testi-

Elmer Schaeffer.

fied you made the statement with reference to telling the boy to keep the grapes off the floor?

A. Yes, sir.

Q. Do you recall whether or not you made that statement?

A. Well, I don't recall. It is possible that I may have. But that is a general statement to make to the

page 101 } boys that work in the Produce Department or anywhere in the store, to keep the floor clean and if anything is on the floor to clean it up, not at that particular time but any hour I go around through the store.

Q. If the statement was made, that's all you meant by it, is that right?

A. Yes.

Mr. Duff: No further questions.

Mr. Sherry: No further questions.

The Court: You may step down.

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Mr. Sherry:

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Now, as is stated by Mr. Duff first, if the thing didn't get there by the negligence of the employees, of the storekeeper and section, if the employees or the storekeeper had no notice, then the storekeeper was not liable.

First, let's consider the question of how the grape got there. We have no direct evidence on the point but we do have the plaintiff's testimony that when she went in the department, there was no one else there, there was no one near the grapes. She didn't touch the grapes and the grapes were neatly piled up.

Now, I think from this, that a jury could infer that the grapes were neatly piled up and they were piled up by an employee of the defendant's store and at the time the em-

ployee piled the grapes up, two or three or four or five grapes fell on the floor.

Virginia is one of the leading jurisdictions which permits a jury to determine which one of the diverse inferences they will accept when in essence the factual evidence is

page 105 } not in dispute.

The other thing is the question raised by the testimony that all during the time Mrs. Gall was in this section, there was no employee of this store in the Produce Section. I think this is important because I think that the jury could find that a reasonable man would realize that on a busy time such as a Friday evening, which are Mr. Duff's own words, that things such as grapes are liable to be knocked on to the floor of a Produce Section and I think that the reasonable man would also know that if there were grapes on the floor, there was a likelihood that some one would slip and fall.

In fact, I think the testimony of Mr. Schaeffer that there was a general instruction to all employees to watch out for things on the floor is evidence that this storekeeper was cognizant of the dangers to customers from matters such as grapes on the floor.

Nevertheless, what do we have here at 6:00 or 5:30 on a Friday evening ? We have an unattended Produce Section.

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This is the crux of our case. Had an attendant been on duty in the Produce Section at the time that these grapes had fallen, he would have seen them, he would have picked them up and Mrs. Gall would never have been injured. But there was no attendant for this 8 or 10 minutes she was in there until he came out and I think the jury is also entitled to infer that he had been in the back room for some time loading this cart of his and that all during this time, the Produce Section was unattended and I think that the jury can find that this conduct was negligence on the part of the defendant.

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ELMER SCHAEFFER,
was recalled as a witness for the defendant and having been previously sworn, assumed the witness stand and, upon examination, testified as follows:

DIRECT EXAMINATION.

By Mr. Duff:

Q. Mr. Schaeffer, you have been introduced to this jury when you were called just a minute ago so I'll eliminate the preliminaries and ask you if you will tell the jury, please sir, when did the store on Hillwood Avenue open for business?

A. 1955.

Q. Was it a new store then?

A. It was a brand new store at that time.

Q. Would you characterize this store as a small one or a large one or a medium size one?

A. I would think it would be a medium size super market as of today. At that time, it would have been a large

page 109 } one.

Q. I see.

Do you know from your experience as a Manager of the super market, how many people make purchases there in an average week?

A. I'd say about 8,000, thereabouts.

Q. Are those purchases distributed equitably among the six days or is there any overload of purchases at any particular time?

A. Well, on Thursday, Friday and Saturday, the usually run, well, 1,000 to 1,500.

Q. 1,000 to 1,500 purchases?

A. That's right.

Q. That does not mean that that is all the people that come in the store?

A. No. That is the sales range on the register. Each individual sale there may be four or five people going on one sale.

Q. I understand.

Mr. Schaeffer, did you attempt to keep a clean, neat store?

A. I surely tried.

Q. During the year immediately preceding Mrs. Gall's fall, how many people fell in your store on any debris?

Elmer Schaeffer.

Mr. Sherry: Your Honor, I object. I don't see what relevancy there is to the issue. There is no doubt
page 110 } Mrs. Gall fell.

Mr. Duff: Under the Supreme Court of this State, it was held in three different cases, the instances where the allegation is a dangerous condition in the store, it is perfectly proper to show the existence or the lack of existence of other falls at the location involved.

I would cite, your Honor, to the State Planters Bank Case in Richmond, where the claim was a defective carpet on the floor and that had been there for more than 11 years, and the Court there allowed evidence of the fact that 600 persons daily had used the steps and that the plaintiff was the only person known to have been injured on the steps.

The Court: The objection is overruled.

Mr. Duff: Thank you, sir.

By Mr. Duff:

Q. Would you tell this jury, Mr. Schaeffer, if you will, sir, in the 12 months preceding September 19, 1958, how many people had fallen in your store as a result of debris in the store?

A. Three.

Q. Is that other than Mrs. Gall?

A. She is the fourth.

Q. She is the fourth.

Now, Mr. Schaeffer, would you tell the jury and the court a little bit about the procedures, the methods that
page 111 } you, as the Manager, had in force for caring for the safety of the floor, the sweeping of it and so forth?

A. Well, we usually try to put in a practice to sweep the floor whenever it is dirty. Sometimes it is every 30 minutes, sometimes it take 45 minutes and maybe they don't sweep it for an hour. And sometimes it might be every 10 minutes.

Now, we can't control the debris that is on the floor for the simple reason of customers picking up lettuce, grapes, cabbage, and so forth and it is not their floor and if they drop something on it, they're not going to pick it up. It is up to us to keep it clean and it has always been a general practice of mine to keep the clerks alert to keep the floors clean.

Q. Now, would you tell this Jury, sir, whether or not you, as the Manager, would make any regular inspection of your store?

Elmer Schaeffer.

A. Well, I go around through the store practically every hour inspecting the departments.

Q. About once an hour?

A. Sometimes more often and sometimes it is an hour and a half to two hours.

Q. And what you might do, as well as your clerks, I ask you would that depend to some degree on the day of the week and the number of customers in the store?

A. Oh, yes, on busy days, you have to make
page 112 } more frequent visits to the departments.

Q. Now, will you tell the Jury, how do you receive your grapes from the warehouse, how are they packed?

A. They are packed in boxes, wooden boxes.

Q. Do they come in bunches?

A. Oh, yes, grapes are all in bunches.

Q. What is the method of having the grapes transfered from the boxes on to the display counters?

A. We open the boxes in the back room and bring the grapes out to the display and we pick up each individual bunch out of the box and put it on a piece of parchment paper and lay it on the pile so one bunch of grapes won't be hooked into the other bunch.

Q. Is the paper you are talking about, interleafing paper? (Indicating.)

A. Yes.

Q. One of these goes—

A. (Interposing) Under every bunch, interleafing paper.

Q. You have heard Mrs. Gall's testimony this morning that this display was stacked neatly. Do you agree with that, sir?

A. Yes, sir.

Q. Do you often scrub the floors in the store?

A. The floors are scrubbed every night or every morning before 9:00 o'clock, before the store is opened.

page 113 } Q. Would you tell this jury about some of the other factors that enter into debris being on the floor. You mentioned customers. Anything else that causes debris to get on the floor of a super market?

A. Children will run up to the grape pile occasionally and pull a bunch of grapes off. Or the mothers would send them to go over and get a head of cabbage. When they pick it up, a leaf may fall off. Or they pick up a bunch of celery and there might be some loose leaves fall off of that. It is not only the employees or the adults, it is the children as well.

Elmer Schaeffer.

Q. All right, Mr Schaeffer I want to ask you directly what was objected to when you were called by the other side.

Did you know any grapes were on the floor the day she was in there?

A. Not at that time, no, sir.

Q. You had no knowledge of that at all?

A. None.

Q. Could those grapes have been knocked off there by a customer?

A. It is possible.

Q. With reference to the display counter, will you describe for the jury, please, what this table looked like as best you can, with words so we can understand what it was?

page 114 } A. The display table is 4 by 8 feet. The side is an inch and a half and has a 6 inch plyglass (sic) around to keep the fruit from falling off.

Q. Does that go all around the table?

A. All around the table.

Q. And the grapes are put in there?

A. Yes.

Q. Mr. Schaeffer, is that the normal way that grapes are displayed in other super markets?

A. I think in all super markets in this area they are displayed just like that.

Q. You have been in the Courtroom all day, have you not, sir?

A. Yes, sir.

Q. There has been some testimony here about the fact that Mrs. Gall didn't see anybody in the Produce Department. Let me ask you this, how many men at one time will normally be on duty at one time in the Produce Department?

Mr. Sherry: Your Honor, I think this question should be confined to this specific time. We should find out whether or not he knows. Mrs. Gall's testimony was he was on the other side of the store and whether he has any personal knowledge of who was there, where they were—

The Court: I understand Mr. Duff accepted that.

Mr. Duff: I have no objection.

page 115 } By Mr. Duff:

Q. Do you know who was on duty in the Produce Department about 6:00 o'clock on the afternoon of September 19, 1958?

Elmer Schaeffer.

A. Well, on that afternoon, Friday afternoons, there is usually three or four people in that department.

Mr. Sherry: I move the answer be stricken. The question was, who was on duty.

Q. Do you know who was on duty, the names of the people?
A. I would not know unless I looked at the records for sure.
Q. Do you know how many were on duty then?
A. Then I'd have to look at the records to make sure exactly how many were on duty.
Q. It is nothing unusual, is it, sir, for your people in the Produce Department to go to the back of the store?

Mr. Sherry: I object, your Honor, it is his witness.
The Court: Don't lead him, Mr. Duff.
Mr. Duff: All right.
May I ask the court's indulgence for just a minute?

By Mr. Duff:
Q. Mr. Schaeffer, did you know when Mrs. Gall came to tell you of her slip, did you know that she had been in the store for at least five full minutes?
A. Well, she had a pound of coffee so she probably was in there that long.
page 116 } Q. One last question comes to mind, when people, customers, when people, customers, come into your store, how do they normally, where do they go when they walk in the front door? Is there any channel they follow?
A. They go to the right, straight across the front of the building to the Produce Department.
Q. That is the normal way they go?
A. The normal procedure.
Q. And the Produce Department is in line with this normal channel, I assume?
A. Well, the Produce Department goes the other direction.
Q. Can you keep your floor completely clean of all debris at all times?

Mr. Sherry: Your Honor, I object. He has testimony that three people have fallen on debris.

Elmer Schaeffer.

CROSS EXAMINATION.

By Mr. Sherry:

Q. When you said three people had fallen other than Mrs. Gall, you meant three people had reported falls to you, is that correct?

A. That's right.

Q. In other words, you don't know whether other people had fallen and not reported the falls?

A. It seems to me somebody would have seen them.

Q. You were asked by counsel the question,
page 117 } could those grapes have been knocked down there
by a customer and you answered, yes.

Let me ask you a question. Could those grapes have been knocked down there by an employee of the store?

A. Possibly.

Q. Same answer?

A. (Nod of head.)

Q. Who determines how often you sweep the floor in the store?

A. Well, if I see—when I go by, I make the decision or a clerk that's in charge of the weighing scales or any producemen that come by and see the debris on the floor.

Q. I see.

So there is no regular pattern of sweeping the floor?

A. Well, we try to sweep it whenever we see any debris on it at all.

Q. And you know a number of things can cause debris to fall on the Produce Section floor?

A. Occasionally, yes, sir.

Q. In other words, you said employees, customers, children of customers. There are a number of agencies that could cause anything from lettuce leaves to grapes to be caused to fall on the floor?

A. Occasionally it happens.

Q. Now, you said that grapes are packed in
page 118 } parchment in bunches. Why is that?

A. That is to keep one bunch from catching on to another bunch. That is, the customer would pick it up, should pick it up in the paper or off the paper. If we had no paper, as she would pick it up, the grapes would be hooked into the next bunch. We do that to keep from having loose grapes on the floor because that is a loss.

Elmer Schaeffer.

Q. You mean that if they were just packed one bunch on top of the other without paper, if someone were to lift a pile off, a couple of grapes would fall off on the floor?

A. One bunch would hook into the other one.

Q. And grapes would fall apart?

A. People like to have grapes all in one bunch.

Q. Was there ever a time when you didn't use parchment?

A. Years ago, yes.

Q. Were you in the same business years ago when you didn't use parchment?

A. Yes, sir.

Q. Have you seen or are you familiar with the appearance of a pile of grapes years ago when you didn't use parchment?

A. Yes, sir.

Q. And if you saw a neat pile of grapes without parchment, would you be likely to infer that that pile had just been put on there and nobody had come along and taken the grapes from it?

Mr. Duff: Objection. I don't think it is proper
page 119 } to ask any witness to infer. It is a conclusion.
The Court: Objection sustained.

By Mr. Sherry:

Q. What would be the appearance of a pile of grapes without parchment when it was first set out? Would it appear neat?

A. Yes, it would appear neat.

Q. Now, what would be the appearance of that same pile of grapes without parchment after somebody had taken some grapes?

Mr. Duff: Your Honor, this is asking for a conclusion.

The Court: I don't think so. It is asking how something looks, if he knows.

Mr. Duff: It is a conclusion of what it looks like.

The Witness: Well, a lot of times if you don't use parchment, when they pick a bunch of grapes up, they pull a lot of grapes off the other bunches and it does not look near as neat or good.

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page 120 }

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MRS. MARY D. GALL,
plaintiff, was recalled as a witness for and on her own behalf, and having been previously sworn, assumed the witness stand and, upon examination, testified further as follows:

FURTHER RE-DIRECT EXAMINATION.

By Mr. Sherry:
Q. On September 19, 1958, when you were looking at the grapes, were the grapes laid in bunches in parchment like this? (Indicating.)
A. No, sir.
Q. Another thing, the table was described as having, I believe it was, a 6 inch glass panel around it. Did you see a glass panel around it?
A. No, sir.

Mr. Sherry: That's all.

RE-CROSS EXAMINATION.

By Mr. Duff:
Q. Mrs. Gall, you maybe did not see it but you are not able to tell this jury under oath, it was not around that table?
A. Yes, sir.
Q. What?
A. It was not around the table.
Q. You don't think it is possible that you might
page 121 } be mistaken?
A. No, sir.

Mr. Duff: No further questions.
The Court: Step down.

* * * * *

ELMER NEWTON JOHNSON,
was called as a witness for the defendant and having been previously sworn, assumed the witness stand and, upon examination, testified as follows:

Elmer Newton Johnson.

DIRECT EXAMINATION.

By Mr. Duff:

Q. Mr. Johnson, what is your full name, sir?

A. Elmer Newton Johnson.

Q. May I inquire if you were employed at the A & P on September 19, 1958, sir?

A. Yes, sir, I was.

Q. In what department?

A. Produce Department.

page 122 } Q. Do you recall a display of grapes being on a table on that day?

A. Yes, sir.

Q. Can you describe for the jury the appearance of the table?

A. Well, it is a table about 8 feet in length.

Q. Talk up good and loud so these gentlemen can hear you.

A. It is a table about 8 feet in length, about 4 feet wide and has a glass guard around the table, about a 6 inch glass guard, and the grapes are displayed underneath it and taken out of the box and put on the table in a sheet of parchment paper or in its leafing paper.

Q. Was that the way the grapes were displayed on that day?

A. Yes, sir.

Mr. Duff: I have no further questions. Thank you, sir.

CROSS EXAMINATION.

By Mr. Sherry:

Q. Is this table still in use?

A. Yes, sir.

Q. When was it put in?

A. A day or two before the store was opened.

Q. Have you been employed at that store ever since it was opened?

A. Yes, sir.

Q. In the Produce Department?

page 123 } A. Yes, sir.

Q. And what were your hours on September 19, 1958?

A. I believe they were from 7:00 until 4:00.

Mr. Sherry: That's all.
Mr. Duff: Thank you, sir.
The Court: Is this plyglass a removable thing?
The witness: It is stationary.
The Court: How is it attached to the table?
The Witness: With screws.
The Court: All right.
Mr. Sherry: One minute.

By Mr. Sherry:
Q. You were there from 7:00 to 4:00 that day?
A. Yes, sir.
Q. So then when you left at 4:00 o'clock, you don't know what happened after that, is that correct?
A. No, sir, but as a rule, most of the time, I stayed until 6:00.
Q. But that day you left at 4:00?
A. I am not positive I left at 4:00.
Q. Oh, you are not sure?
A. No, sir.
Q. Have you discussed this testimony with Mr. Schaeffer with regard to the manner in which the boxes were opened in back and the grapes were brought in front?
page 124 } A. How is that again, sir?
Q. Had you discussed this matter with Mr. Schaeffer recently?

The Court: You haven't got his answer to the question about the testimony yet.

Q. Have you discussed your testimony with Mr. Schaeffer?
A. No, sir, I haven't.
Q. Were you told in advance by anybody what questions you would be asked or what the subject matter of the questions would be?
A. Yes, sir.
Q. And who asked you?
A. I talked to Mr. Duff.
Q. I see.
Was that 6 inch high thing around this table, was it glass or plastic?
A. It is unbreakable glass.
Q. Unbreakable glass?
A. Yes, sir.
Q. And when grapes were put on the table, were they ever

Elmer Newton Johnson.

placed above the level of this 6 inches? Did they come up in a mound?

A. No, sir.

Q. They were always below the level?

A. Not below, maybe an inch above the glass, not much more than that, I'd say, maybe 2 inches.

page 125 } Q. Couldn't have been more than 2 inches?

A. No, sir, we try to keep it almost level with the glass, if possible.

Q. What do you do, unpack these boxes, open the boxes and put them on to some type of dolly that you push?

A. No, we usually have a cart. We wheel the grapes out on the floor and then take them out of the boxes, bunch by bunch and place them on the interleafing paper and place them on the table.

Q. And the dolly is only for grapes or do you put other things that you are going to load on it?

A. You mean the cart that is pushed out with the grapes?

Q. Yes.

A. Not necessarily.

Q. In other words, it could have spinach on it and other things?

A. Usually not everything at one time.

Q. Where do you load this cart?

A. In the back room, in the back.

Q. I beg your pardon?

A. In the receiving room in the back.

Q. And how far away is that from the Produce Department? Is that—

Mr. Duff: (Interposing) May it please the court, I object. I think we are getting far afield from the two

page 126 } questions that I asked.

The Court: Actually, the only right Mr. Sherry has was considering that which you brought out and that was about how the piece of glass was attached to the table.

RE-DIRECT EXAMINATION.

By Mr. Duff:

Q. I do want to ask you one or two more in view of what was asked here.

Mr. Sherry asked you, had you talked with me about this case and you had?

A. Yes, sir.

Q. And I told you, you'd probably be asked this very question by counsel, didn't I?
A. Yes, sir.

The Court: Which very question?
The Witness: How the grapes were displayed.

By Mr. Duff:
Q. Did I not tell you you'd be asked by counsel whether you'd spoken with me?
A. Oh, yes.
Q. Regardless of whether you left that store at 4:00, 5:00 or 6:00 o'clock, I want to be sure I understand and I ask you this, is it your testimony that these interleafing, interlining papers and that glass guard were on that table on September 19, 1958?
page 127 } A. Yes, sir.

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JOHN FIELDS,
was called as a witness for the defendant and having been previously sworn, assumed the witness stand and, upon examination, testified as follows:

DIRECT EXAMINATION.

By Mr. Duff:
Q. Mr. Fields, you were sworn as a witness this morning. I want to ask you just two very brief questions and that's all.
Will you tell the jury your name?
A. John Fields.
Q. Where do you live?
A. 519 Imboden Street, Alexandria.
Q. On September 19, 1958, would you tell the Gentlemen of the jury and his Honor where you were working?
A. I was working at the A & P in Falls Church.
page 128 } Q. Have you ever seen one of these before? (Indicating) Take a look at it.
A. Yes, sir, I have.
Q. What is that?
A. That is to display grapes on.
Q. You'll have to talk up.
A. We display our grapes on this.

John Fields.

Q. You display your grapes on this?
A. Yes.
Q. What do you call it?
A. Interleafing paper.
Q. Were you in the store on September 19, 1958?
A. Yes, I was.
Q. I'll ask you to tell his Honor and the Gentlemen of the jury whether or not the grapes that were displayed on this paper?
A. Yes, sir, they were displayed on the paper.
Q. All right, sir.
Do you recall the table they were displayed on?
A. Yes, I do.
Q. Will you describe to the gentlemen of the jury what that table looked like?
A. Well, the table is about 8 by 4 feet, has around a 6 inch guard around, glass guard, around.
Q. Does that go all the way around?
page 129 } A. That goes all around the table.
Q. Was that guard on this table on that day?
A. Yes, it was.
Q. Do you know, Mr. Fields, is that the same table that is down in that store right now?
A. Yes, sir, it is the same table.
Q. Has it been changed in any way whatsoever?
A. No, it has not.
Q. Have you been in the store all the time since then?
A. Yes, I have.

Mr. Duff: No further questions.

CROSS EXAMINATION.

By Mr. Sherry:
Q. What day of the week was September 19, 1958?
A. What day of the week it was?
Q. Yes.
A. Thursday.
Q. What were your hours that day?
A. What was my hours?
Q. What hours did you work?
A. I was working from 9:00 to 6:00.
Q. Did you work the same hours every day?
A. At the present time, then, I was on the scales. I was a scale man.

John Fields.

Q. Did you work the same hours, 9:00 to 6:00,
page 130 } every day of the week or did your hours change?
A. Yes, every day in the week when I was on the scales.
Q. Have you ever measured that table?
A. No, I never have measured it.
Q. Are you good at gauging distances, sizes?
A. Fair.
Q. How do you know that table was 8 by 4?
A. Approximately 8 by 4, I would say.
Q. What is an approximate size of this table? (Indicating.)

The Court: That's two tables there.

Q. The first table, this first section?
A. Around 10 by 3.

(Mr. Sherry measured length and width of the table.)

Q. Actually, Mr. Fields, my estimate of this table—

Mr. Duff: (Interposing) May it please the court—
The Court: (Interposing) Objection sustained.

By Mr. Sherry:
Q. Mr. Fields, isn't it a fact that somebody told you that table was 8 by 4?
A. No, no one told me.
Q. And isn't it a fact that somebody told you that guard was 6 inches high?
A. No.
Q. Have you discussed your testimony here with Mr. Duff?
A. Yes, I have.
page 131 } Q. Was anyone else present?
A. Mr. Schaeffer and Mr. Johnson.
Q. And at the time all three of you were present. Were you advised that you would be asked as to the size of that table?
A. Mr. Duff said it might be asked.
Q. And did somebody, while the three of you were present, state how large that table was?
A. Mr. Johnson said he thought it was around 8 by 4.
Q. And is that why you said—
A. (Interposing) No, that's not why I said it.
Q. Mr. Johnson said it?

John Fields.

A. He said it.

Q. And is that why you think it is 8 by 4, because Mr. Johnson said so?

A. Not because he said so.

Q. Because you are able to estimate correctly the size of the table?

A. Not exactly.

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CLOSING ARGUMENT OF MR. SHERRY.

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page 160 }

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We feel that the evidence in this case would sustain two inferences from which you could find that the
page 161 } storekeeper did not exercise this ordinary care that he owed to Mrs. Gall, one of his customers.
The first is based on the actual negligence of the storekeeper.

Now I think it is reasonable to assume that a reasonable man, a reasonable storekeeper knows that the grapes on the floor of a store are or can be a danger to somebody walking about, someone can slip and fall on a grape just like Mrs. Gall did here. If the storekeeper or his servants, that is, the men working in the store, were responsible for those grapes being on the store, they were responsible for this dangerous condition. I think that you will agree that this was a breach of this duty of reasonable care that they owed to Mrs. Gall. So that if those grapes were on the floor as a result of an act of one of Mr. Schaffer's employees, the storekeeper was negligent.

I think you can infer that this is how those grapes got there because I think that there is evidence in front of you to show that when Mrs. Gall went in, their produce department was empty. As I recall her testimony, there were no other customers there. She saw this pile of grapes which were

piled very neatly. She also was very positive that these grapes were not piled on any tissue. This was a busy Friday afternoon and I am sure the people in the produce department were rushed.

Now it is up to you as to whether you believe Mrs. Gall or the A&P's witnesses as to whether or not you
page 162 } believe the grapes were piled here. But you have her testimony that they were not and this, coupled with Mr. Schaffer's testimony that if they weren't packed in parchment they could be put in a neat pile but when a customer would come along it would disarrange the pile and upset them and make loose grapes. So, I think from that you can infer here is this neat pile, no parchment. You are entitled to infer as reasonable men there is only one way these grapes got on the pile. As they were being put on the pile by the clerk in the store they fell on the floor.

Now if you accept this inference, then we have proven that the defendant was negligent.

There is an alternative. Suppose you are not willing to accept this inference that this is how the grapes got there but you say I don't know how the grapes got on the floor. Then think of this, grapes are on the floor, Friday, 5:30, 6:00 in a busy A&P. The produce section unattended. Now, they had other accidents of people slipping. There is no doubt that they had rules and regulations as Mr. Schaffer testified. There were instructions to all of the employees if you saw something on the floor, pick it up, sweep it out of the way, get it out of the way because the A&P was fully aware that debris, grapes and things like that, could fall on the floor.

Mr. Schaffer testified that as you lifted up a bunch of grapes it could become tangled with other bunches
page 163 } and grapes could fall on the floor. Nevertheless, this area was unattended for the full time that Mrs. Gall was there, the time it took her to go in and look at the grapes, fall down and be helped up, compose herself and then finally, out comes an attendant pushing a cart of grapes. The attendant had been in the back room, undoubtedly, unloading this cart of grapes so it is reasonable to infer for sometime this area had been unattended.

It is also reasonable to infer that if there had been an attendant in the produce section at that time and if the grapes had fallen down the attendant would have picked them up since that is his duty. Mr. Schaffer told you he was very careful that all the employees knew about that. There was no attendant in the produce section for this period of

time. Somehow or other the grapes fell down, they did not get picked up, Mrs. Gall slipped and we are here today.

This, I say, is the second way that the A&P can be held liable in this case.

They owed a duty to Mrs. Gall on a busy Friday afternoon to keep somebody in that produce section to keep the floor clean. This was not the first accident that occurred, this was the fourth that had been reported. They may say that's only one a year, but you know when you are in a position of the injured person that's enough. They knew about it, they were aware of the danger of debris on the floor.

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page 169 }

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CLOSING ARGUMENT OF MR. DUFF.

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page 182 }

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In Instruction "D," the Court tells you, the Court instructs the jury that Mrs. Gall was under a duty to exercise reasonable care for her own safety while in the defendant's store. This duty required her to see and to avoid any dangerous condition which would have been seen by a reasonably prudent person under similar circumstances.

If you find from the evidence that Mrs. Gall was guilty of any negligence which contributed to her injuries, you must find in favor of the defendant. You are not permitted to balance the negligence of the plaintiff and the defendant, if any, and find against the party guilty of greater negligence. Under the law of this Commonwealth any negligence on the part of plaintiff which contributed to her injuries will bar a recovery. That's what is meant by contributory negligence.

Now a word about this. This lady worked in a supermarket. She is not just a customer coming into a store. She worked for three years in a supermarket. I submit to you, gentlemen, that she is charged with knowledge that debris at times, through absolutely no fault of the proprietor of the store, does fall on the floor. She knew that as she

walked into the store; she knew that as she walked over to this bin of grapes which she described as nicely
page 183 } stacked and she wanted to look at those grapes and at one point in her testimony she was in that store for five full minutes before she slipped.

Under the Court's instruction she is under a duty to see what a reasonable person would have seen. She didn't see the grapes and still she points the finger at Mr. Schaffer and said, I didn't see them, but you should have seen them. I think it is fair to say if you find any negligence on her part, to any degree whatever, it hasn't got to be this type of thing on the scale, just the slightest degree of negligence on her part which proximately did contribute to her injuries will bar her recovery.

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page 187 }

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REBUTTAL ARGUMENT OF MRS. MILLER.

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page 190 }

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If they had had those people in the department they should have had them here, they should have let them testify that Mrs. Gall didn't say any such thing, that she was there and knew full well what she was doing and so on. The fact of the matter was there hasn't been a thing to dispute Mrs. Gall's word that was exactly how it happened and we say that these people's negligence was in leaving that produce department unattended.

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page 191 }

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Now they have said to you that she was contributorily

negligent because she wasn't looking down at the
page 192 } floor. You don't do that when you are in a store.

You go to the store to find something either on the shelves or you find it on the counters. You are looking at the displays, you are looking at things, sales and so forth, you are not supposed to go down with a magnifying glass. Certainly if there was a big puddle I suggest that something would have been wrong if Mrs. Gall walked into something of that sort. She didn't. She had a perfect right to believe she could walk through that department and would be safe.

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A Copy—Teste:

H. G. TURNER, Clerk.

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