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202 VA 913

# Record No. 5262

## In the
## Supreme Court of Appeals of Virginia
## at Richmond

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## JEANNE MURPHY

v.

## J. L. SAUNDERS, INCORPORATED

---

FROM THE COURT OF LAW AND CHANCERY OF THE CITY OF NORFOLK

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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

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## Record No. 5262

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VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 23rd day of November, 1960.

JEANNE MURPHY, Plaintiff-in-error,

*against*

J. L. SAUNDERS, INCORPORATED, Defendant-in-error.

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From the Court of Law and Chancery of the City of Norfolk

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Upon the petition of Jeanne Murphy a writ of error is awarded her to a judgment rendered by the Court of Law and Chancery of the City of Norfolk on the 8th day of July, 1960, in a certain motion for judgment then therein depending wherein the said petitioner was plaintiff and J. L. Saunders, Incorporated, was defendant; upon the petitioner, or some one for her, entering into bond with sufficient security before the clerk of the said Court of Law and Chancery in the penalty of three hundred dollars, with condition as the law directs.

# RECORD

* * * * *

## MOTION FOR JUDGMENT.

NOW COMES the plaintiff and moves the Court of Law and Chancery of the City of Norfolk, Virginia, for an award of judgment against the defendant, in the amount of Twenty-Five Thousand ($25,000.00) Dollars, for damages, for this, to-wit:

1. That on the 13th day of October, 1958, plaintiff was properly in the store of the defendant, located at 1551 Bayview Boulevard in the City of Norfolk, Virginia, in order to make certain purchases.
2. That as a result of the negligence of the defendant, certain cans of juice fell on the plaintiff.
3. That as a proximate result of the aforesaid negligence of the defendant, the plaintiff has suffered severe and permanent injuries all over her body and was otherwise maimed, bruised and caused to suffer bodily pain, and will continue to suffer bodily pain; the plaintiff was forced to expend monies in endeavoring to be cured, and will continue to need and use services and care of physicians in the future, lost time from her work and will continue to lose time from her work.

WHEREFORE, plaintiff demands judgment against the said defendant in the sum of Twenty-Five Thousand ($25,000.00) Dollars for damages.

JEANNE MURPHY

By MORRIS H. FINE
Of Counsel

* * * * *

Filed in the Clerk's Office the 10th day of August 1959.

A Copy—Test:

W. L. PRIEUR, JR., Clerk

L. M. CALVERT, D.C.

* * * * *

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## ANSWER AND GROUNDS OF DEFENSE.

Now comes the Defendant, J. L. Saunders, Incorporated, A Virginia Corporation, and states it will rely upon the following for its Answer and Grounds of Defense to Plaintiff's Motion For Judgment:

1. The allegations of Paragraph 1 of the Motion For Judgment are denied.
2. The allegations of Paragraph 2 of the Motion For Judgment are denied.
3. The Defendant has no knowledge of the allegations contained in Paragraph 3 of the Motion For Judgment and can neither affirm nor deny therefore and calls for strict proof thereof.
4. The Defendant states the Plaintiff was guilty of such negligence as proximately caused or contributed to her alleged injuries.
5. The Defendant denies the Plaintiff is entitled to recover of it the sum of Twenty Five Thousand and No/100 Dollars ($25,000.00) or any other sum.
6. The Defendant hereby reserves the right to amend its pleadings and rely upon any defense which may hereafter become available to it whether before, during or after trial hereof.

J. L. SAUNDERS,
INCORPORATED

By ROBERT G. WINTERS
Of Counsel

Filed 8-28-59.

W. R. McCORY, D.C.

* * * * *

page 4 }

* * * * *

## ORDER.

This day came the Defendant, J. L. Saunders, Incorporated, a Virginia Corporation, by Counsel, and the Plaintiff, Jeanne Murphy, by Counsel and argument was had on the Motion of the Defendant for a Bill of Particulars from the Plaintiff as to the Defendant's act or acts of negligence; and for cause shown.

It is ADJUDGED, ORDERED and DECREED that the Plaintiff shall file a Bill of Particulars of the Defendant's Acts of Negligence within Twenty One (21) days herefrom.

To the Clerk of the Court of Law and Chancery of the City of Norfolk, enter this order in Vacation 9-1-59.

J. HUME TAYLOR, Judge

* * * * *

page 5 }

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BILL OF PARTICULARS.

NOW COMES the plaintiff, by her counsel, and for her bill of particulars, says:

1. That the defendant was guilty of the following acts of negligence:

(a) The negligent stacking on top of one another of small circumference juice cans not in line with one another.
(b) The negligent stacking of small circumference juice cans in tall stacks.
(c) The negligent stacking of small circumference juice cans on unstable shelving.
(d) The negligent stacking of cans out of the reach of the plaintiff.
(e) The negligent failure to provide a ladder so that the plaintiff could safely reach the cans in question which were placed out of her reach.
(f) Other acts of negligence as may appear during the course of the trial of this case.

JEANNE MURPHY

By MORRIS H. FINE
Of Counsel

* * * * *

Filed 9-4-59.

H. L. STOVALL, D.C.

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* * * * *

In the Court of Law and Chancery of the City of Norfolk on the 8th day of July, 1960.

* * * * *

This day came the parties, the plaintiff in person and by counsel, and came as well the defendant, by counsel, and thereupon came a jury, to-wit; Leon H. Barnes, Dennie B. Gillespie, Morris J. Legum, James C. Luck, Owen J. McColl, Maurice L. Mednick and Percival B. Perry, who, upon being duly sworn the truth to speak upon the issue joined and at the conclusion of plaintiff's evidence relating to liability, defendant, by counsel, moved the Court to strike the evidence of the plaintiff as to liability and enter up summary judgment for the said defendant, which motion, by agreement of counsel, was fully heard and maturely considered by the Court was sustained and summary judgment entered in favor of the said defendant. Thereupon the jury was discharged from the further consideration of this case.

Whereupon it is considered by the Court that the plaintiff take nothing for her motion for judgment and that the said defendant go hence and recover of the said plaintiff its costs about its defense herein expended.

To all of which action of the Court the plaintiff, by counsel, duly excepted.

* * * * *

page 8 }

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

Now comes the plaintiff, Jeanne Murphy, pursuant to the provision of Rule 5:1, Section 4 of the Rules of Court, and states that she hereby notes an appeal from the final judgment of the Court of Law and Chancery of the City of Norfolk, Virginia, entered on the 8th day of July 1960, rendered in the above styled cause in favor of the defendant against the plaintiff, and that the said plaintiff to that end, will prepare and present her petition for a writ of error and

the record in this cause to a Justice of the Supreme Court of Appeals of Virginia.

For her assignments of error, the said plaintiff says that the Trial Court erred as follows:

1. The Court erred in striking the evidence of the plaintiff and entering summary judgment for the defendant.
2. The Court erred in entering the final judgment order of July 8, 1960.

JEANNE MURPHY

By JERROLD G. WEINBERG
Of Counsel

* * * * *

Court of Law and Chancery, Filed 9-6-60.

By L. M. CALVERT, D.C.

* * * * *

page 3 } Norfolk, Virginia, July 8, 1960.

The reporter was sworn; a jury was empaneled and sworn; the witnesses were sworn, and excluded on motion of counsel for the defendant; opening statements were made by counsel; and the following evidence was introduced:

JEANNE MURPHY,
the plaintiff, having been first duly sworn, testified as follows:

DIRECT EXAMINATION.

Examined by Mr. Fine:

Q. Mrs. Murphy, state your full name to his Honor and the members of the jury.

A. Jeanne Murphy.

Q. You are going to have to speak up so everyone can hear you.

A. Jeanne Murphy.

Q. Where do you live, Mrs. Murphy?

A. I live at 1030 Hillside Avenue, Norfolk.

Q. What is your occupation, Mrs. Murphy?

A. I am a nurse.

*Jeanne Murphy.*

Q. Are you a registered nurse or a practical nurse?

A. I am registered in the State of Virginia, but I am an undergraduate.

page 4 } Q. Is that what we term "a practical nurse"?

A. We don't term it that. We consider ourselves a little better trained. But, that will be all right for the present.

Q. What is your age, Mrs. Murphy?

A. Fifty-four.

Q. Directing your attention to October of 1958, Mrs. Murphy, did you have occasion in October to go into a store, Be-Lo Market, managed by Mr. Saunders here?

A. Yes.

Q. Where is that store located?

A. On Bayview Boulevard.

Q. Is that in the City of Norfolk?

A. Yes.

Q. Tell his Honor and the members of the jury exactly what occurred in there, in your own words.

A. Well, I went in to do a little purchasing, and picked up a couple of things. Then I went around to the juice counter. I wanted to get a can of lemon juice. When I got around to the aisle where the juices were—those cans—they were much higher than my head.

Q. How tall are you?

A. Five feet, one.

Q. Then what happened?

A. Well, I saw that I could not reach it exactly that way, so with my left hand I braced myself on the shelf,

page 5 } and as I reached for the can of lemon juice, before this hand got in contact with the juice I felt this thud on this hand (left). I immediately pulled it away. I noticed that these cans of V-8 had fallen, which were at least three feet away from the lemon juice, which my hand had never touched. I pulled my hand away and noticed the finger begin to swell right away. It turned red and then purplish. It began to swell right away.

Q. Did you see these cans stacked?

A. Yes. They were stacked four and five tall, one on top of the other.

Q. Did you see them before you reached for the lemon juice can?

A. I never had occasion to notice. I was just going to get a can of lemon juice. But, I never noticed how they were stacked then. But, after this fell on my hand, then I noticed these cans had fallen. They fell to the right. They didn't fall that way;

they fell this way, where my hand was. No lemon juice cans had fallen. Nothing had fallen on that side at all. It was just about two and a half feet away from the lemon juice that they had fallen on my hand. So, I saw one of the Messrs. Saunders at the produce counter.

Q. Was it this gentleman here?

A. No; it was his brother. I stopped and I showed page 6 } him. I said, "I have just hurt my hand." He said, "What happened?" I said, "A can of juice fell on it.

So I walked around. As I came to the checkout girl I told her. Of course I did not stop to pick up anything, my hand was hurting me so bad. So, I told the lady at the counter, the checkout girl, what had happened, and I showed her my finger. She said, "What happened?" I said, "A can of juice fell on it." She said "You had better see a doctor." So I went out got in my car and went home right away.

Q. What treatment did you take at that time?

A. Well right away I told my daughter, as I went in, to fix me a bowl of ice, crushed ice. She said, "What happened?" I said—

Q. Don't say what you said.

By the Court:

Q. You told her that you had been hurt, and you showed her your finger?

A. Yes. She fixed a little bowl of ice, and I stuck my finger in this ice and kept it in there quite awhile. It began to throb then terribly. It was going all up into my hand. So, I kept it in there for sometime. Then I would take it out. Then I would put it back in. In a couple of days after giving it the ice treatment—and then I took an icecap to bed with me at page 7 } night and rested my hand on the pillow, on the icecap. But, I could not sleep for the first couple of nights. I had to take some medicine to sleep. The redness left my finger, but the swelling was still there. I thought it would gradually go away. Being a nurse I thought I could take care of it, myself, which I intended to do, but it never got any better.

So, I went over and showed it to Dr. Reed. At that time a deposit had formed here on this first joint.

* * * * *

page 12 }

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*Jeanne Murphy.*

CROSS EXAMINATION.

By Mr. Winters:

Q. Mrs. Murphy, when specifically did this accident or incident occur?

page 13 } A. It occurred in October, around I think the first week; around the 10th, sometime like that, of October 1958.

* * * * *

page 18 }

* * * * *

Q. What was your conversation with Mrs. Flowers? Do you recall specifically?

A. It wasn't much of a conversation, because there was someone else there that she was checking out. I just passed right on by. I said, "I have hurt my finger," and I was holding my hand. She said, "What happened?" I told her what happened. I showed her my finger. That was all that was said to her. She said, "You should see a doctor," and I went right out.

Q. What did you tell her had happened?

A. I told her that a can of juice had fallen on my finger.

Q. Did you say that you had struck a can and it fell on your finger?

page 19 } A. I could not have told her that, because I did not strike the can. The can fell of its own accord. My left hand was nowhere near the can. My right hand was nowhere near the can. I just braced myself on that top shelf with this hand (left) to reach for the can of lemon juice. But, my right hand had never come in contact with the lemon juice before that can fell, which was at least two and a half feet away from the lemon juice.

Q. Mrs. Murphy, when you placed your left hand on the top shelf, where was your left hand in relation to the can which you allege fell on your finger?

A. My fingers were on the edge of the shelf like this (illustrating), and I reached for this, which was about two and a half feet away from it, when I felt this on my finger and I pulled it away. This is when I looked up and saw that these V-8 cans had fallen, which the other cans in between had not fallen. It was just those V-8 cans that had fallen. I saw how they were stacked. They were stacked four and five on top

of each other. But, the lemon juice cans had never fallen. They were still intact.

Q. When you placed your left hand, where was your left hand specifically in relation to these cans which you allege fell?

A. Right directly in front of the V-8 cans.

Q. Were these V-8 cans stacked on the top shelf?

page 20 } A. Yes, they were stacked on the top shelf.

Q. The store was well-lighted, was it not?

A. Oh, yes.

Q. As you walked down you observed them, did you not?

Q. What do you mean "observed"?

Q. You observed the stacked cans of goods as you walked down, looking for the lemon juice?

A. No, I did not observe them, because there was no reason for me to. I did not know there was going to be any accident. When they fell, that was when I looked up and saw that they were stacked four and five tall.

Q. How many rows were left standing, Mrs. Murphy?

A. Of what—all the cans?

Q. Of the V-8 cans?

A. I did not count how many were left standing. Next to the V-8 cans was some other kind of juice. There were four or five different juices up there. I don't know how many cans were left standing. I saw those that had fallen down on my finger. There were two or three of the cans of V-8.

Q. Two or three cans fell?

A. Yes, of the V-8. But, I did not see any other kinds of cans that had fallen at all. They were still standing.

page 21 } Q. When you looked at these V-8 cans and saw those still remaining, how high were they?

A. Some of them were stacked in threes and some of them in fours.

Q. Did you stand on the display gondola—the shelving there?

A. No, I did not have to do that. I stood on the floor.

Q. You say that two or three cans fell?

A. Yes.

Q. You did not hear them fall; you just felt one can fall?

A. I did not hear them. I just felt this on my finger. That was when I looked up and pulled my hand away. I did not hear anything fall. I know that they were not there when I put my hand up. Those cans were not laying down on the shelf like that when I reached up there to brace myself. There were no cans on the shelf other than those that were stacked.

*Jeanne Murphy.*

Q. Do you recall whether or not you actually touched or pushed these cans, or stacks of cans, which fell?

A. No, sir, I did not touch them, because they were a distance away from the edge of the shelf.

Q. Did you pick up these cans that fell?

page 22 } A. No. I did not touch them any more. My hand hurt me so bad that I did not bother about anything. I did not even pick up the groceries that I had purchased in my basket. I just went right out then.

Q. The cans that you were buying were cans of lemon juice. Is that right?

A. It was going to be a can of lemon juice, but I did not ever get it.

Q. Did you have any trouble in reaching the cans of lemon juice?

A. What do you mean, did I have any trouble reaching it?

Q. Could you reach for them?

A. I could not reach for it. They were stacked up. I had to put my hand on the shelf to reach up. I wasn't going to take one in between.

Q. How high were they stacked?

A. In fours.

Q. They were stacked in fours?

A. Fours and fives.

Q. In the position that you were, didn't you think that you were liable to slip and fall or push the display cases, or something?

A. No. My feet were right on the ground. The shelves had merchandise on them. I did not think I was going to push anything.

page 23 } Q. Actually isn't it true that when you observed it you did not believe you were going to have any difficulty in getting that can of juice down—the one that you were looking for you did not anticipate any trouble in getting it down?

A. No, sir, I didn't.

Q. So that what your attorney said in his opening argument about having difficulty, that wasn't in accordance with your view of this matter, was it?

A. What I guess he meant by that, I had difficulty in reaching it. That was the reason I had to brace myself. That was the only difficulty I had. I couldn't just stand there and reach up and get the top lemon juice. I could not do that.

Q. You did not ask anyone to help you get that can of juice down?

*Gwen Murphy Brahm.*

A. I had never asked anyone to help me at any time. I have gotten juices down before.

Mr. Winters: I have no further questions.

RE-DIRECT EXAMINATION.

By Mr. Fine:
Q. Mrs. Murphy, tell me this: What type of V-8 can was that?
A. Those little six-ounce cans. They were all of page 24 } the same size up on that shelf.
Q. Is this the type of can you ware talking about?
A. Yes.

Mr. Fine: I would like to introduce that in evidence.
The Court: Exhibit P-1.

Mr. Fine: I have no further questions of this witness.
Mr. Winters: Nothing further, Your Honor.

* * * * *

page 27 } GWEN MURPHY BRAHM,
called as a witness, on behalf of the plaintiff, having been first duly sworn, testified as follows:

DIRECT EXAMINATION.

Examined by Mr. Fine:
Q. Will you state your full name, please, ma'am?
A. Gwen Murphy Brahm.
Q. What is your address, Mrs. Brahm?
A. 1030 Hillside Avenue, Ocean View.
Q. Is that in the City of Norfolk?
A. Yes, sir.
Q. What is your occupation?
A. Right now I am unemployed.
Q. What is your relationship to Mrs. Murphy here?
A. She is my mother.
Q. Do you recollect this accident when she came home with an injured finger in October of 1958?
A. Yes, sir, I do.
Q. State what you saw when she came home.
A. Well, I was home. I heard her coming up the steps, and I went to the door and said—

*Gwen Murphy Brahm.*

Q. Don't say what was said. Just tell us what you saw?

A. Yes, sir. Her hand was swollen. I don't call her "Mother;" I call her "Jeanne." I said, "What happened?" She said—

page 28 } Q. You can't say what she said. Just say what you saw.

A. Her finger was swollen. When she came in the house I went and got some ice, and she put her hand in this bowl of ice. Then I asked her was there anything else that I could do. She said, "Will you get me a couple of aspirin, or whatever we have here?" Of course at that time I did happen to have a few aspirin.

So then she went and lay down. I put a pillow under her arm so that she could rest her hand. She rested for awhile. Of course later on I fixed something for her to eat, and I did different things around the house that had to be done which she could not do at that time, and she has not been able to do but very little, other than to dress herself.

Q. Have you noticed anything unusual about that finger since that time?

A. Yes, sir.

Q. State what it is.

A. It is just out of shape. It is not like her other fingers.

Q. Did she have that out-of-shape condition prior to this incident in 1958?

Mr. Winters: Your Honor, I object to the leading question.

page 29 } The Court: It is leading, but I don't see any harm.

By the Court:

Q. Answer the question. Did she or not?

A. No, sir, I did not see her finger shaped like that before.

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page 30 }

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Mr. Fine: May we have a short recess?

(The following proceeding was had in the absence of the jury:)

Mr. Fine: Judge, we have agreed to go ahead and argue the question of liability.

Mr. Winters: Your Honor, counsel for the plaintiff and I have agreed that you hear a motion to strike the plaintiff's evidence in order that we might save him a possible attendance fee of the physician in the event Your Honor should sustain my motion. He is perfertly agreeable to that.

The Court: I understand then, Mr. Fine, that you wish the Court to rule on the motion; that for the purpose of this motion you rest on the question of negligence?

Mr. Fine: Yes, Your Honor.

The Court: If the court should overrule the motion, then the only evidence you would have would be the medical testimony as to the injuries?

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page 32 }

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The Court: In other words, it is agreeable for the court to rule upon the motion upon the theory that you have rested except as to the question of medical testimony?

Mr. Fine: Yes, sir, except for the medical.

The Court: I will hear from you.

Mr. Winters: Your Honor, I believe the evidence in this matter is as follows: that Mrs. Murphy entered and she placed her left hand on apparently the top shelf directly in front of the V-8 cans, and that for some unexplainable reason she testified that this one can, or several cans, fell and struck her.

Now, there is a showing that she proceeded along this aisle by the gondola, which I believe was on her left where these cans were stacked. It would appear on the basis of what she has alleged and testified to here that her theory page 33 } of the case is that these cans were improperly stacked, in that they were stacked too high. If that be the case, it was an open and obvious condition which she saw or should have seen as she proceeded along. She had no reason not to see.

The Court: Mr. Fine, what is your theory upon which liability could be predicated?

Mr. Fine: Your Honor, my theory is (1) that these cans were stacked too high. We have evidence that these cans were stacked too high, out of the reach of the plaintiff. It is not the

plaintiff's duty to discover possible peril. That has been the law in Virginia so far as invitees are concerned for many, many years. She has no duty to discover this peril. She does not have to look for it. She was using reasonable care. These cans were stacked too high. If a slight vibration would cause these cans to fall down, then it is foreseeable and is a situation for which I believe the store is liable to an invitee. This is not a situation where we have a box left out in the aisle and a person comes along and stumbles over it.

(Thereupon, an off-the-record discussion was held, after which the following occurred:)

page 34 } The Court: Mr. Fine, this is not a case where she was walking out in the aisle and these things toppled over. She has not shown that there was any negligence on the part of the operator, as far as I can see. It is a regrettable thing. All accidents are regrettable. I cannot see how I can allow the jury to speculate.

Mr. Fine: It is forseeable that a can would come down off that shelf and hit her. If they were not stacked properly, if they were stacked four high, the slightest vibration would cause a can to come down. Your Honor knows—maybe Your Honor does not know—I know from my own experience that you can go in a store and see these cans stacked high, and that a slight vibration will cause them to come down. You don't have to touch those cans.

The Court: If you see them, you ought not to put your finger where they might fall on it.

The Court: Are you through, Mr. Fine?

Mr. Fine: I would like to say one thing further, Judge. She was invited into this store, not only as an invitee, but she was invited to take these juice cans. I think she had a right to assume that it was safe for her to take the juice cans off of this other stack. These cans were stacked four high. They could certainly come down easily on a shelf like that.

page 35 } The Court: There is too much speculation for the court to allow it to stand. I sustain the motion to strike and enter summary judgment.

Mr. Fine: Your Honor, I would like to except.

The Court: Note his exception.

A Copy—Teste:

H. G. TURNER, Clerk.

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