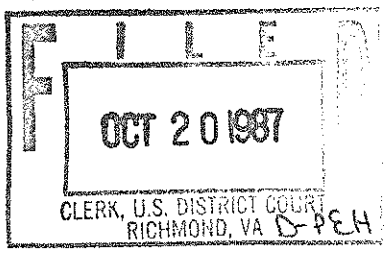
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

SUSAN C. SARVER-WADE, Plaintiff, v. CROWN CENTRAL PETROLEUM CORPORATION, and CROWN CENTRAL LEASING CORPORATION, Defendants.	)	Civil Action No. 87-0391



BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

The defendants, Crown Central Petroleum Corporation and Crown Central Leasing Corporation, by counsel, state the following for its brief in support of motion for summary judgment:

FACTS

On May 2, 1985, the plaintiff was driving her husband to work and travelling Forest Hill Avenue. She took a left turn into the Crown Station and proceeded to pull up to the pumps on the eastern end of the station, facing Forest Hill Avenue (Mrs. Sarver-Wade's deposition pages 58-59. Mr. Wade's deposition page 183). Mrs. Sarver-Wade stated that she does not recall seeing any other cars at the station when she pulled in, and stated that she really was not paying attention to that. (Sarver-Wade deposition page 71, lines 9

- 16.) Mrs. Sarver-Wade stepped out of the car and placed her left foot on the ground. It slipped and she fell. (Sarver-Wade deposition page 61, lines 11 - 15). Mrs. Sarver-Wade stated that she did not ever look at the ground before she steped out of the car. (Sarver-Wade deposition page 72, lines 16 - 25). Mrs. Sarver-Wade further stated that she once worked in a Citgo Gas Station and was aware of what went on around a gas station. (Sarver-Wade deposition page 73, lines 1 - 6).

Mrs. Sarver-Wade believed her foot slipped on a substance which was puddled on the service station apron. (Sarver-Wade deposition page 75, lines 8 - 13). She described the size of this puddle as bigger than one foot by one foot. (Sarver-Wade deposition page 74, lines 22 - 23). She is unsure what this spill was, but it seemed to be gasoline. (Sarver-Wade deposition page 73, line 20). Mr. Wade, Susan Sarver-Wade's husband, who was a passenger in the car also stated that there was a puddle on the service station apron. (Wade deposition page 187 - 188, lines 3 - 25 and line 1). He described the size of the puddle as two foot by three foot square. (Wade deposition page 188, line 2 - 5). He described it to be a clear liquid. (Wade deposition page 188, lines 9 -12). Further, Mr. Wade put his finger in the substance and felt that it had a slick consistency. (Wade deposition page 89, lines 2 - 8).

Neither Mrs. Sarver-Wade nor her husband stated how long the puddle had been there.

Jerry Lee Blanks, Manager of the Crown Station was also present at the Crown Station on the same day and at the time the plaintiff allegedly fell. (Blanks deposition page 14). In fact, Mr. Blanks was working in the area when Ms. Sarver-Wade allegedly fell, and has a specific recollection of Mrs. Sarver-Wade on that date. (Blanks deposition page 34, lines 17 - 23). Even though Mr. Blanks was on the premises at the time of the accident and in the area where the plaintiff allegedly fell, he did not actually become aware of the fall until he was informed by a handicapped customer that Ms. Sarver-Wade had fallen. (Blanks deposition page 18, lines 1 - 10).

Before the car driven by the plaintiff pulled up to the station, Mr. Blanks saw another customer in the same spot. (Blanks deposition page 35, lines 8 - 18). This vehicle used the same pump as she did, was on the same side of island as she was, and was pointed in the same direction as her car. (Wade deposition page 35, lines 13 - 20). Mr. Wade recalls that this customer had to pull the pump hose across the back of his car, because his filler pipe was on the other side of the car. (Blanks deposition page 36, lines 2 - 5). This customer got gas and Mr. Wade did not notice if his spilling any gas. (Wade deposition page 40, lines 7 - 11). This customer then left the station. Only 30 seconds to a minute passed before the car driven by Mrs.

Sarver-Wade pulled into the station in the same spot. (Blanks deposition page 37, lines 10-19). Mr. Blanks stated he knows this:

> "Because when I first went out to take care of the handicapped customer, this gentlemen was out there. And in the course of pumping his gas when I first started when he pulled up, that is when I noticed his gas tank was on the wrong side because he had to stretch the hose. I went ahead and took care of the handicapped customer. When I went in the first time to get the mans change this customer had left, when I came back Mrs. Sarver-Wade pulled up, and that is when the handicapped customer told me she had slipped, so it had not been much more than a minute." (Blanks deposition pages 37 and 38, lines 21 - 25 and lines 1 - 6).

Mr. Blanks is sure that this customer must have been responsible for the gas spill, since he looked at the area where this customer pulled up just prior to the customer pulling up, and saw no gas spilled in the area. (Wade deposition page 55, lines 10 - 20, emphasis added).

Mr. Wade also testified as to the safety measures employed at the Crown Station. He stated that the concrete at the station was painted with an epoxy contained an abrasive, which would make it easier for people to walk. (Page 45, lines 10 - 18). Mr. Wade described how a gasoline spill or any other fluid would be cleaned up at the station. First cones were placed around the area to prevent traffic for using that service lane. (Blanks deposition page 45, lines 22 - 24). Then a "degreaser" would be placed

upon the spill in order to break it down. (Blanks deposition page 46, lines 9 - 14). The degreaser is then brushed in with a deck brush and the surface is washed off with a hose. (Blanks deposition page 47, lines 5 - 13). This procedure was followed in this case, once the plaintiff left the station. (Blanks deposition pages 45 - 47).

After Mrs. Sarver-Wade had driven her car off, Mr. Blanks did have an opportunity to observe some fluid on the service station apron. (Blanks deposition pages 41 and 42, lines 23 - 25 and lines 1 - 7). At that time, Mr. Blanks found what he described as a "gas spill". (Blanks deposition page 42, lines 5 - 7). Mr. Blanks described the size of the spill as approximately 14 to 18 inches in diameter and circular in shape. (Blanks deposition page 42, lines 10 - 21). When Mr. Blanks found this spill, it was no longer puddled. (Blanks deposition page 42, lines 22 - 25).

ISSUE

Summary judgment should be entered in favor of the defendants due to the lack of any evidence that the defendants or their employees had any notice, either actual or constructive, that any foreign substance was on the surface of the service station apron, which could have been dangerous to the plaintiff.

ARGUMENT

Under Federal Rule of Civil Procedure 56(c) the party moving for summary judgment bears the initial burden of

showing both the absence of genuine issue of material fact and the he is entitled to judgment as a matter of law. Adickes v. S. H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). While conflicts in the evidence are resolved in the non-moving party's favor in reviewing the evidence, the Court may also consider uncontroverted and unimpeached evidence unfavorable to that party. Ross v. Communications Satellite Corp., 759 F.2d 355, 364 (4th Cir. 1985) (summary judgment); Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 243 n. 14 (4th Cir. 1982) (J.N.O.V.).

To survive a motion for summary judgment the non-moving party must then come forward with "specific facts showing that there is a genuine issue for trial." Federal Rule of Civil Procedure 56(e). In order for an issue of fact to be genuine, the non-moving party such as Susan C. Sarver-Wade in this case, "must do more than simply show that there was some metaphysical doubt as to the material facts." Matsushita Electric Industrial Co. v. Zenith Radio, 475 U.S. ___, ___, 106 S.Ct. 1348, ___, 80 L.Ed.2d 538, 552 (1986).

The mere existence of a scintilla of evidence in support of the plaintiff's position, as well as evidence that is merely colorable or is not significantly probative is insufficient to withstand summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. ___, ___, 106 S.Ct. ___, ___,

91 L.Ed.2d 202, 212-217 (1986). The plaintiff need only present evidence from which the jury could reasonably return a verdict in his favor. Id., as long as the plaintiffs have had an opportunity to conduct discovery, such as has been the case here. This burden of putting forth affirmative evidence to defeat a motion for summary judgment remains upon the plaintiff even if the evidence is likely to be within the possession of the defendants and even if it is the defendants' state of mind that is at issue. Id. Although the moving party has the initial burden, it is not required under Rule 56(c) to support its motion for summary judgment with affidavits or other similar materials negating the plaintiff's various claims. Celotex Corp. v. Catrett, 477 U.S. ___, 106 S.Ct. ___, 91 L.Ed.2d 265 (1986).

In this diversity case, the extent of the duty and degree of care that the defendant service station owes to an invitee or business visitor such as the plaintiff is determined under Virginia law. Erie Railroad Company v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938); Gauldin v. Virginia Winn-Dixie, Inc., 370 F.2d 167 (4th Cir. 1966).

It is well-established in Virginia that the proprietor of a business is not the insurer of the safety of his customers and that before recovery can be had for personal injuries received by a customer from a slip and fall allegedly caused by a foreign substance on the business

premises it must be shown by the plaintiff that the business owner or proprietor had either actual knowledge or constructive notice of the foreign substance. Memco Stores Inc. v. Gauldin v. Yeatman, 232 Va. 50, 348 S.E.2d 228, 230 (1986), Great Atlantic & Pacific Tea Company v. Berry, 203 Va. 913, 128 S.E.2d 311 (1962); Colonial Stores, Inc. v. Pulley, 203 Va. 535, 125 S.E.2d 188 (1962); Great Atlantic & Pacific Tea Company v. Rosenberger, 203 Va. 378, 124 S.E.2d 26 (1962); Safeway Stores, Inc. v. Tolson, 203 Va. 13, 121 S.E.2d 751 (1961). When the facts are such that there is but one conclusion that could be reached by reasonable men, namely that the business had no actual knowledge or constructive notice of the presence of the foreign substance on the premises, then the issue of defendant's negligence becomes a matter of law which can be resolved by the Court on a motion for summary judgment. See e.g., Colonial Stores, Inc. v. Pulley, supra; Great Atlantic & Pacific Tea Company v. Rosenberger, supra; Browning v. Sear, Roebuck & Company, 173 Ga.App. 898, 328 S.E.2d 580 (1985).

Turning to the instant case, there is absolutely no evidence from which it can be determined that the defendants' business or its employees had actual knowledge or, in the exercise of reasonable care, should have known of the presence of a pool of gasoline or any other fluid on the service station apron. There is no evidence from the plaintiff which would indicate how long the gasoline had

been pooled on the service station apron, or, when, or by whom the gasoline had been placed there.

The only evidence on these points is uncontradicted, and comes from the defendants' service station manager, Jerry Lee Blanks. Mr. Blanks states that he saw a customer filling up his gas tank about a minute before the plaintiff arrived. This customer was filling his tank on the service station apron at the point where the plaintiff later fell. Mr. Blanks did not see any gas spill when he observed the customer filling his tank; nor was there any spill in the area prior to that customer pulling into the station. The first time Mr. Blanks became aware of any spillage of gas on the service station apron, was when he was informed by the plaintiff that she had slipped on something.

Mr. Blanks is positive that no more than a minute had passed from the time he saw the customer filling his tank and the time when the plaintiff fell, because during this time period all he had time to do was take money from the handicapped customer and go inside and make change for him. By the time Mr. Blanks had returned the plaintiff had fallen.

Further testimony by Mr. Blanks indicated that all the attendants at Crown were told to keep an eye out for gasoline spillage. When any spillage was noted, the attendants were instructed to place pylons on the ground to prevent any one from entering in the area. They would then

put a degreaser on the spill and brush it. That solution was then washed away by the use of the hose.

The plaintiff has presented no evidence which would indicate that the defendants' business or its employees had any notice of gasoline spilled on the service station apron. Again the only testimony in that regard is uncontradicted. The gasoline spill could not have been there for any longer than a minute.

Furthermore no one could have possibly observed and cleaned it up in such a short time. The defendants are not required to remove a foreign substance in less time than is ordinarily required for such a task. The Great Atlantic & Pacific Tea Company v. Rosenberger, 203 Va. at 380. 124 S.E.2d at ___. (Mr. Blanks testified that, as soon as he is aware of a gas spill, pylons were placed in the area and the spill was properly cleaned up in the manner previously described.)

Even if the testimony of Mr. Blanks is disregarded by the Court, as biased in some way, the plaintiff is still unable to prove her case. Neither she or her husband can say how the spill got on the apron, or more imporantly, how long it had been there. It is just as logical to conclude that the spill had only been there for a few seconds, as it is to conclude that it had been there for hours. For one to draw a conclusion as to these facts, one would have to speculate or guess. This court can not allow the jury to

rely on "speculation and conjecture" to render a verdict. Such a verdict can not stand. Gouldin v. Winn Dixie, 370 F.2d at 169.

Thus, it is clear, as a matter of law, that there is a total absence of any evidence which would show actual knowledge or constructive notice by the defendants or their employees of the presence of gasoline or any other fluid on the service station apron. In fact, the facts indicate that there was no notice. Since there are no facts remaining in dispute, summary judgment is appropriate in this case.

CONCLUSION

For the above stated reasons, the defendants Crown Central Petroleum Corporation and the Crown Central Leasing Corporation respectfully request that this Court grant its Motion for Summary Judgment.

CROWN CENTRAL PETROLEUM CORPORATION
and
CROWN CENTRAL LEASING CORPORATION

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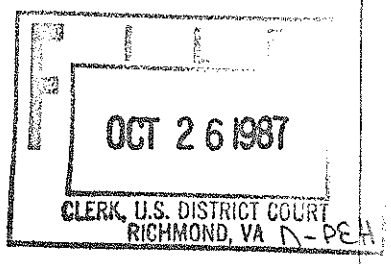

SUSAN C. SARVER-WADE, Plaintiff,	)	
v.	)	CA-87-0391
CROWN CENTRAL PETROLEUM CORPORATION, and CROWN CENTRAL LEASING CORPORATION, Defendants.	)	PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGEMENT

COMES NOW your plaintiff, by counsel, and submits the following argument and authority in opposition to the Motion For Summary Judgement, lately filed on behalf of defendants:

Statement of Facts

Defendants' recitation of the facts omits some very important points which preclude a grant of summary judgement against Susan C. Sarver-Wade. Plaintiff states the following facts which are to be considered in the light most favorable to her as the non-moving party.

On the morning of May 2, 1985, plaintiff left her home at approximately 7:00 a.m., to drive her husband to work. (Mrs. Sarver-Wade's deposition, page 56, lines 16-18). While travelling on Forest Hill Avenue, she turned into the Crown Station to purchase gas at its self-service pumps facing Forest Hill Avenue. (Sarver-Wade deposition, pages 58-59).

As Mrs. Sarver-Wade stepped out of her car, and before any gas was pumped into her car, she extended her left foot. When it reached the pavement, her foot slipped and her left leg went underneath the car. Simultaneously, her right leg became caught under the steering wheel and her right foot was caught under the brake pedal. (Sarver-Wade deposition, pages 61-62). Because she slipped the moment her left foot exited the automobile, Mrs. Sarver-Wade never had a chance to stand before she fell, striking her arm, head and leg on the concrete and door of her car. (Sarver-Wade depsoition, pages 62-63).

After she fell, Mrs. Sarver-Wade smelled the strong odor of gasoline coming from a clear puddle that had spread out from under her car to the side where she slipped. (Sarver-Wade deposition, pages 73-74). Her husband, who was a passenger in the car, also observed the puddle. Mr. Wade put his finger in it and noted that it was slick. (Wade deposition, pages 188-189).

Mr. Wade also noted that there were no other cars at the station that morning on the side where he and his wife were parked. In addition, there were no other cars obstructing the view between the cashier's office and his car. (Wade deposition, page 91, lines 16-24).

When Mrs. Sarver-Wade yelled for help after her fall, her husband came to her assistance, whereupon Mrs. Sarver-Wade entered the station to report her fall. There was a man

standing in the doorway, dressed in a Crown uniform. He opened the door for Mrs. Sarver-Wade, (Sarver-Wade deposition, page 70, line 12), who then approached another man, who was a cashier, to pay for her gas and to inquire as to the whereabouts of the manager. She was told by the cashier that the manager was in his office in the back, counting the morning receipts. (Sarver-Wade deposition, pages 67, lines 5-9).

Mrs. Sarver-Wade had to walk around back to find the manager's office. She knocked on the door and stepped inside after he answered. She told him what had happened; the manager told her to see a doctor, and to mail an accident card, which he provided, to the insurance company. (Sarver-Wade deposition, pages 68, lines 17-23).

Mr. Jerry Lee Blanks, is and was, at the time of Mrs. Sarver-Wade's accident, manager of the Crown Station at which the accident occurred. In his deposition, he claimed to be waiting on a handicapped customer at the time of the accident, but did not become aware of plaintiff's fall until the handicapped customer (who allegedly witnessed the fall) informed him. (Blanks deposition, page 18, lines 1-10). Mr. Blanks did not see Mrs. Sarver-Wade pull onto the station. (Blanks deposition, page 18, lines 1-7). But he did claim to see another car in the same location before she arrived. (Blanks deposition, page 35, lines

8-18). Mr. Blanks remembered this car, because the driver pulled up on the wrong side of the pump and had to stretch the hose across his car to reach the filler pipe. (Blanks deposition, page 36, line 1-5). Mr. Blanks did not see this customer leave the cashier's office, nor did he see him drive away. (Blanks deposition, page 37, lines 1-6).

In fact, all he could remember about this customer is the fact that he had to stretch the gas hose around the width of the car to pump his gas. Mr. Blanks did not see this customer spill any gas. (Blanks deposition, page 40, lines 7-11).

Even after Mr. Blanks was made aware of the fall, Mrs. Sarver-Wade had to seek him out in his back office in order to report her accident. (Sarver-Wade deposition, page 68, lines 17-23). Nor did Mr. Blanks inspect the area of the gas spill until after Mrs. Sarver-Wade had left the premises. At that time, he found a gas spill and proceeded to clean it up. (Blanks deposition, pages 41-42, lines 13-25 and line 8).

When Mrs. Sarver-Wade stopped to allow oncoming traffic to clear before making her left turn into the Crown Service Station, she looked over at the pump island nearest her, and saw no other cars on the side of the building nearest her. She saw no automobile at the pump island where she had her fall, nor did she see any automobile parked next

to the station itself, on the side nearest her, where an additional gas pump was located. As she pulled into the station, she saw a man wearing a red and blue Crown Petroleum Corporation shirt standing in the doorway on the side of the station nearest her. He continued to stand there as she pulled in adjacent to the pump island she had selected. After her fall, he was still standing in the doorway, looking directly at her as she approached and entered the station. In fact, this employee held the door open for her. The station manager was not, contrary to his testimony at depositions, out on the apron immediately before and after Mrs. Sarver-Wade's arrival, nor was he inside the front of the station, ringing up a sale of gasoline to a handicapped customer and making change for him. Instead, he was locked in a back office, counting the morning cash receipts when Mrs. Sarver-Wade sought him out immediately after her fall. (Mrs. Susan C. Sarver-Wade affidavit, Exhibit "A").

Argument And Authorities

I.

This Honorable Court should deny defendant Crown's motion for summary judgement for two reasons:

First, defendant has failed to carry its burden under Rule 56(c) of the Federal Rules of Civil Procedure which requires that defendant demonstrate the absence of a genuine issue of material fact.

Secondly, even if this Court were to find that defendant has carried its burden as the moving party, plaintiff has met its own burden under Rule 56(c) of the Federal Rules of Civil Procedure by showing through the present response and accompanying affidavits that there is a genuine issue of material fact that should be decided by a jury.

II.

Rule 56(c) of the Federal Rules of Civil Procedure, requires that the moving party, defendant Crown in the instant case, show the absence of any genuine issue of fact. Celotex Corp. v. Catrett, 106 S. Ct. 2548 (1986). This burden can be fulfilled by the moving party only by indentifying those "portions of the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, which demonstrate the absence of a geniune issue." Celotex at 2553. [See 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure §2727, p. 121 (2d ed. 1983)]. This burden on the moving party is one of production and persuasion. The initial burden of production shifts to the non-moving party only if defendant demonstrates affirmatively the absence of a geniune issue. The ultimate burden of persuading this Court, however, remains on the defendant moving party. 10A Wright, Miller & Kane, §2727.

In the instant case, defendant has not met its initial burden of production under Rule 56(c) because it has made

inaccurate, conclusory assertions that plaintiff has absolutely no evidence. Such a burden of production, which relies on conclusory assertions is "no burden at all and would simply permit summary judgement procedure to be converted into a tool for harassment". Celotex, at 2555 (White, J. concurring) and at 2557 (Brennamn, J., Burger, C. J., Blackmun, J. dissenting).

Defendant relies on Adickes v. S. H. Kress & Co., 398 U. S. 144 (1970) to support its understanding of its Rule 56(c) burden. Adickes, a 1970 case which was heavily relied on by the Celotex Court, as well as its companion case, Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505 (1986), states the rule that summary judgement should not be granted unless it is clear that a trial is unnecessary and any doubt as to the existence of a genuine issue for trial should be resolved against the moving party. Adickes at 158-159; Anderson at 2514.

"The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson at 2513 citing Adickes at 158-159. In analogysing the Anderson Court's reasoning, to the factual dispute in the instant case concerning the issue of notice, the appropriate summary judgement question is whether the evidence in the record could support a reasonable jury's finding either that the plaintiff has shown constructive or actual notice or has not. Anderson at 2514. The plaintiff, through

deposition testimony and accompanying affidavits, has submitted that there was no car immediately before her when she and her husband arrived at Crown's pump. (Wade deposition, page 91, lines 16-24) (Sarver Affidavit, Exhibit "A"). In addition, defendant's employee, Mr. Blanks has stated in deposition testimony that he did not see the plaintiff when she initially arrived at the pump, but he did see the car of the customer before her arrival. (Blanks deposition, page 18, lines 1-7, page 35, lines 8-18.) If in fact, actual notice is an issue here, then plaintiff submits that she has created an issue of material fact which requires a jury to decide whether defendant had notice of the gas spill. Further, Mr. Blanks' observation of the previous customer's hazardous mode of pumping gas put him on increased notice that a spill was likely to occur. (Blanks deposition, page 36, lines 1-5). In paraphrasing the Adickes Court, this sequence of events creates a substantial enough possibility of negligence to allow plaintiff to proceed to trial. Adickes at 157.

In deciding this motion, the Court must view the facts and the inferences properly drawn therefrom, in the light most favorable to the nonmoving party, Anderson at 2513-14; Adickes at 158-59. Even where there is no dispute as to the basic facts, summary judgement is inappropriate if the parties disagree on the inferences which may be reasonably drawn from the undisputed facts. Morrison v. Nissan Motor

Co., 601 F 2d 139 at 141 (4th Cir. 1979). In the present case, a reasonable jury could infer either that defendant was on notice or was not. Of course, as will be seen below, actual notice is not even an essential element of plaintiff's case. The evidence must be weighed by a jury, and that jury must be allowed to draw reasonable inferences from the facts.

In conclusion, even if this Court determines that defendant has met its burdens of production and persuasion under Rule 56(c), plaintiff submits, through her accompanying affidavit (to be considered in conjunction with her pleadings allegations, interrogatories and deposition testimony) that she has met her own burden under Rule 56(e) of showing that there is indeed a genuine issue of material fact which requires that a jury be allowed to weigh the evidence of defendant's negligence.

III.

The issue of the existence of negligence in the instant case is governed by Virginia law. Erie Railroad Company v. Tompkins, 304 U. S. 64 (1938).

It is well established in Virginia that a proprietor of a business is not an insurer of his customer's safety, nevertheless, he has a duty to exercise ordinary care to keep the premises in a reasonably safe condition for the customer's visit, and to remove foreign objects or substances from floors or surfaces in a reasonable time, which he

may or may not have placed there, or which he knew or should have known that other persons had placed there, and to warn the customer of any unsafe condition, if it was unknown to her, but was known or should have been known to the business. Memco Stores, Inc. v. Yeatman, 232 Va. 50 (1986).

Plaintiff asserts that defendant, when its manager observed a customer who arrived before plaintiff pumping his gas in a hazardous manner, was put on sufficient notice to trigger a duty to look for an existing, potentially unsafe condition. Moreover, she also asserts that she is not required to prove that the Crown Station had actual notice of the hazardous gas spill on its premises in time to remove it. It is sufficient to prove constructive notice. Memco at 55. If an ordinarily prudent person, given the facts Crown should have known in this case, could have forseen the risk of danger resulting from the circumstances, Crown had a duty to exercise reasonable care to avoid "the genesis of the danger". Memco at 55.

Applying this rule to the facts, a jury could find that Crown, a merchandiser of gasoline, should have known that allowing customers to pump their own gas at a self-service pump, and in the instant case, allowing a particular customer to pump his own gas in a manner which increased the risk of spillage, created a risk of harm to customers visiting

the premises. The jury could then decide that Crown, having deliberately selected a mode of merchandising that clearly increased the risk of spills in order to save money, then failed to recognize the obvious danger to its customers. Or, the jury could decide, on the basis of the evidence that Crown recognized the danger, but failed to vigilantly watch for spills, and promptly clean them up. In either event, the defendants would be negligent, and legally responsible. Memco, at p. 55.

The Supreme Court in Memco, Supra, recognized the method of merchandising theory (the method or scheme by which a merchant dispenses its wares) as a basis of recovery. Under this theory, courts hold "the defendant liable in the absence of actual notice because it can be reasonably foreseen that objects will drop to the floor due to such method of dispensing the merchant's wares". Id.

The Fourt Circuit Court of Appeals, in reversing summary judgement for the defendant in a slip and fall case, stated "we do not find that the Supreme Court of Virginia has foreclosed an action where the culpability for the mishap lies in the method of dispensing the merchant's wares". Thomason v. Great Atlantic and Pacific Tea Co., 413 F 2d 51 (4th Cir. 1969). The method referred to is one in which the store allows customers to serve themselves weighing and bagging their own merchandise. In the instant case,

defendant allowed customers to serve themselves by pumping their own gas. "In the method-theory the storeowner is definitely informed of the threat of peril, for he instituted or adopted the manner of offering or delivering the merchandise". Id at 52. "If it is reasonably forseeable that a dangerous condition is created by, or may arise from, the means used to exhibit commodities for sale, and a patron is harmed as a consequence, we think Virginia law demands reimbursement of the victim." Id. at 52.

In merchandising its gasoline, Crown allows its customers to pump their own gasoline as many other gasoline companies do in order to reduce operations overhead. This method of self-service is an integral part of the means Crown chooses to merchandise its gasoline. Actual notice is not required where the presence of a dangerous substance on the floor is caused by defendant's method of merchandising.

Plaintiff in the present case admits she cannot show exactly when the gasoline spill which caused her injuries occurred. Neither can defendants. Crown's manager, Mr. Blanks, did not see the customer at the pump before plaintiff's arrival spill any gas. (Blanks deposition, pg. 40, lines 7-11). But as the Fourth Circuit stated in Thomason:

> Justice and justification for this gravamen of suit are seen in the saving of the sufferer from the illogical exaction that he specify when, if otherwise fairly chargeable

> to the vendor, the particular lettuce leaf, or grape as here, or other blamable article, reached the place of the fall.
>
> On this postulate, circumstances disclosed in the motion papers framed a triable tort issue for judge or jury.

413 F 2d at 52.

And finally: "without intimating a judgement on the outcome, our opinion is that subject to all appropriate defenses, in taxing the company with dereliction in vending its grapes, appellant made a case for trial". Id at 53.

Defendant's reliance on Colonial Stores v. Pulley, 203 Va. 535 (1962) and Great Atlantic & Pacific Tea Company v. Berry, 203 Va. 913 (1962) and their companion cases is inapposite to the case at hand, because in those cases the evidence failed to establish that the defendants caused the hazardous substance to be on their premises. Because Crown's method of merchandising made the gasoline spill, possible, or even likely, actual notice of its existence is not required.

Conclusion

Even if this Court determines that defendant has met its burden under Rule 56(c), plaintiff has met her burden as the non-moving party under Rule 56(e) by showing that a material issue concerning notice does exist, and that it is a question for the jury whether the defendant was

negligent in allowing customers to pump their own gas, thereby creating the peril which was the proximate cause of plaintiff's injury.

In point of fact, there is a direct contradiction in the evidence between the testimony of plaintiff and her husband, and the only witness defendants have brought forth. He says he was waiting on a customer in the vicinity of plaintiff's accident just before and after she fell, thus suggesting a very brief period during which the spill she slipped in could have been discovered. (Blanks deposition, pp. 14-18) On the contrary, both plaintiff and her husband say no other car was in the vicinity during the time they were on the premises. (Affidavits "A" and "B"). Also plaintiff says the manager was some distance away from the accident scene, locked in a back office shortly after she fell. (Sarver-Wade deposition, pp. 77-79) She also says there was another Crown employee present before and during her fall, who was looking right at her when she pulled up to the gas pumps. He should have seen the gas spill which caused her fall, and either warned her, or cleaned it up. He did neither. (Sarver-Wade Affidavit, Exhibit "A"). Although Crown admits there were other employees on the premises when Mrs. Sarver-Wade's accident occurred, Crown has been unable to identify them. This seems strange, since Crown's manager took a report of her fall from plaintiff immediately after it happened. (Blanks deposition, pp. 23-25,41)

Under Virginia law, Crown was on notice constructively, because of the self-service method it chose to dispense its product. Even if Crown had insufficient opportunity to actually notice the spill, its failure to be more observant makes it liable. Of course, plaintiff does not concede for a moment that Crown lacked notice. An employee of defendant was right at the scene of the spill when she arrived, and saw her fall. Because of Crown's failure to record his identity, he cannot be located. Plaintiff's testimony, however, is that he must have seen the spill; that he certainly had ample opportunity to see it in time to prevent her accident. Thus, there is a genuine issue of fact. Therefore, summary judgement is inappropriate and should be precluded.

Accordingly, plaintiff, Susan C. Sarver-Wade, respectfully requests that this Court deny defendants' Motion For Summary Judgement.

Respectfully,

SUSAN C. SARVER-WADE

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