

# Record No. 5462

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In the  
Supreme Court of Appeals of Virginia  
at Richmond

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THE GREAT ATLANTIC & PACIFIC  
TEA COMPANY, INCORPORATED

v.

EVA BERRY

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FROM THE LAW AND EQUITY COURT OF THE CITY OF RICHMOND

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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 this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 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. 5462**

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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 Tuesday the 16th day of January, 1962.

THE GREAT ATLANTIC & PACIFIC TEA COMPANY,  
INCORPORATED, Plaintiff in Error,

*against*

EVA BERRY, Defendant in Error.

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From the Law and Equity Court of the City of Richmond

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Upon the petition of The Great Atlantic & Pacific Tea Company, Inc., a writ of error and *supersedeas* is awarded it to a judgment rendered by the Law and Equity Court of the City of Richmond on the 10th day of August, 1961, in a certain motion for judgment then therein depending wherein Eva Berry was plaintiff and the petitioner was defendant.

And it appearing from the certificate of the clerk of the said court that a *supersedeas* bond in the penalty of eight thousand dollars, conditioned according to law, has heretofore been given in accordance with the provisions of sections 8-465 and 8-477 of the Code, an additional bond conditioned according to law is required in the penalty of one thousand dollars.

## RECORD

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June 29, 1961.

John S. Battle, Jr., Esq.  
Attorney at Law  
Mutual Building  
Richmond 19, Virginia

Lavenstein & Lavenstein, Esqs.  
Attorneys at Law  
139 Monroe Street  
Petersburg, Virginia

*Re: Berry v. The Great A. & P. Tea Co. A-3837*

Gentlemen:

This matter is up for consideration upon defendant's motion to set aside the verdict rendered in favor of the plaintiff on May 12, 1961, for injuries alleged to have been received by plaintiff as the result of slipping upon a piece of celery while on defendant's premises as an invitee.

*Evidence.* The evidence, upon the crucial issues, viewed in the light most favorable to plaintiff is as follows: Plaintiff testified that the fall occurred in front of the sugar counter which was some 50 feet or more distant from the produce counter. She alleges that the fall occurred as the result of her foot slipping upon a piece of celery under the shelf shown in plaintiff's exhibit number 2, yet was close enough to the walking area to have been stepped upon by plaintiff facing the shelf as shown in the same exhibit. Her testimony (or that of her husband) is that after the fall the piece of celery was in plain view, had slipped some inches when plaintiff's weight had been put on it and that under the same counter and in the exact same location as the celery when slipped upon, there were several cigarette butts and other trash. Plaintiff's husband further testified that when the celery was shown to defendant's manager immediately following the accident that he

kicked it back under the shelf. This was denied by defendant's manager.

*Applicable rules of law.* Principles governing liability in cases involving structural or alleged structural defects are not here controlling nor are we concerned with the doctrine of *Res Ipsa Loquitur*. See *White v. Sears, Roebuck & Company*, 242 F. (2) 821.

page 22 } We are here concerned with an accident alleged to have been caused by the presence of a foreign substance upon defendant's floor and the universally recognized rule in such cases seems to be that to hold the defendant proprietor liable the evidence must be such as to justify a finding that the dangerous condition actually existed and further, either (a) that the presence of such substance was actually caused by defendant or his employees or that defendant had actual knowledge thereof, or (b) if such cannot be shown then the facts proven must be such as to impute constructive knowledge of the presence of the substance to the defendant. Absent evidence of actual or implied knowledge the courts have usually refused to submit the issue of liability to a jury. *White Case, supra*, and evidence as to the length of time the substance has been on the floor appears to have been considered a vital link in this chain of proof. *Livingston v. Atlantic Coast Line Rwy.* 28 F. (2nd) 563. See also exhaustive note on this point in Annotation found in 61 A. L. R. (2nd) page 28 through page 38.

In the case at bar there is ample evidence of the presence of the substance, the sole question being whether there is sufficient evidence of actual or constructive notice to take the case to the jury.

Plaintiff contends that the fact that the locus of the fall was far removed from the produce counter where a customer would have been expected to drop or knock the substance to the floor, together with the presence of cigarette butts and trash of a kind that would result from faulty sweeping, is sufficient to support a proper inference that the defendant's employees had been guilty of "sweeping-under-the-rug" practices and that the evidence that the manager, Vaiden, had done the same thing when the substance was called to his attention strengthened this inference. Plaintiff further contends that in any event the presence of the celery in company with cigarette butts and other refuse justified the inference that the condition was not a fresh one but had existed at least for a sufficient length of time to have been discovered by Vaden or other employees during the morning cleanup which it was testified had been had.

All counsel admit that the case—from a factual standpoint—is one of first impression in Virginia. *City of Norfolk v. Anthony*, 117 Va. 777, here relied upon by plaintiff, is of but little help as there the plaintiff relied upon both structural defect and foreign substance, and had evidence of both. Moreover, as to the issue of the foreign substance, the witness, Jordan, who had occupied a stall in the market for a long while stated that the refuse was there, that it had been there all morning and that the market had not been properly swept out since his occupancy of his stall. Nor is *Livingston v. A. C. L.*, 28 F. (2nd) 563 relied upon by defendant of much aid for there the positive evidence of not only the defendant's porter but of the *plaintiff himself* was that the banana peel was not seen by them upon the floor when passing the point a few minutes just prior to the accident.

page 23 } *Conclusion.* After hearing the argument of counsel and reviewing the authorities cited I have concluded that the case was properly submitted to the jury and the defendant's motion to set aside the verdict is, accordingly, overruled.

Counsel are requested to prepare an order to this effect preserving defendant's exceptions and containing such suspension provisions as defendant may desire.

Yours very truly,

ALEX H. SANDS, JR., Judge.

AHSjr:jh

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This day came again the plaintiff and defendant, by their respective attorneys, and the Court having maturely considered the motion heretofore submitted to set aside the jury's verdict, is now of opinion for reasons set out in the Court's memorandum to counsel dated June 29th 1961 which is hereby made a part of the record, that the motion should be overruled; wherefore, it is considered by the Court that the motion to set aside the jury's verdict be and the same is hereby overruled, and that the plaintiff, Eva Berry, recover of the defendant, The Great Atlantic & Pacific Tea Company, Inc., the sum of \$7,500.00, in accordance with the jury's verdict, with interest thereon from the 12th day of May, 1961, the date said verdict was rendered, as well as her costs in this behalf ex-

pended. To which action of the Court the defendant, by counsel, objected and noted its exception.

The defendant, by counsel, having indicated its intention to present a petition for writ of error to the Supreme Court of Appeals of Virginia, upon motion of defendant it is ordered that execution of said judgment be suspended for a period of four months from this date, and thereafter until such petition is acted on by the Supreme Court of Appeals, if such petition is actually filed within the specified time, provided the defendant shall within ten days from this date enter into a suspending bond in the penalty of \$8,000.00 with good security to be approved by the Clerk of this Court, conditioned according to law.

Enter Aug. 10, 1961.

A. H. S., JR.

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# ASSIGNMENTS OF ERROR.

The following are the errors assigned.

The Law and Equity Court of the City of Richmond erred:

1. In not striking out the evidence introduced by the plaintiff.
2. In not setting aside the verdict as contrary to the law and the evidence, without evidence to support it, and plainly wrong, and not entering final judgment for the defendant or granting a new trial, and in entering judgment for plaintiff.

THE GREAT ATLANTIC &  
PACIFIC TEA COMPANY, INC.,  
By Counsel.

BATTLE, NEAL, HARRIS, MINOR  
& WILLIAMS

815 Mutual Building  
Richmond, Virginia

By JOHN S. BATTLE, JR.  
Counsel for the defendant.

*Charles B. Vaiden.*

Received and filed Oct. 5, 1961.

Teste:

LUTHER LIBBY, JR., Clerk  
By EDW. G. KIDD, D. C.

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CHARLES B. VAIDEN,  
being first duly sworn, was called as an adverse witness by  
the plaintiff, and testified as follows:

# DIRECT EXAMINATION.

By Mr. Victor Lavenstein:

Q. Will you please state your name, residence and occupation?

A. Charles B. Vaiden, 4 Granger Street, Ettrick, Virginia, Manager of the A & P, South Sycamore, Petersburg, Virginia.

Q. On May 4, 1959 what was your occupation?

A. I was Manager of the A & P Tea Company store at 115 West Washington Street, Petersburg, Virginia.

Q. On that date, Mr. Vaiden, did you see the plaintiff, Mrs. Berry, and her husband in your store?

A. Yes, sir, I did.

Q. Where was Mrs. Berry when you first saw her?

A. Mrs. Berry was standing near a Tyler meat  
page 23 } case in a cross aisle to the store, near the meat  
department, when I first saw her.

Q. Who called your attention, if anyone, to Mrs. Berry?

A. Mr. Berry came to me and told me that Mrs. Berry had  
fell in the flour aisle and I went around to see about it, sir.

Q. But at that time you say that neither—or didn't Mr. or  
Mrs. Berry walk down there with you?

A. No, sir.

Q. Then they did not show you where she fell?

A. No, sir.

Q. How long is this—you call it the flour aisle?

A. That is where the flour, sugar and so forth are.

Q. Approximately how long is that flour aisle?



*Charles B. Vaiden.*

A. The length of aisle, sir.

Q. You said "aisle." I am simply asking you the length of the aisle you refer to.

A. I'd say approximately thirty feet, sir.

Q. And all you were told is that she fell in the flour aisle?

A. Yes, sir.

page 24 } Q. I hand you a photograph and ask you if you  
can identify that photograph?

A. Yes, sir.

Q. Am I correct, sir, in saying that photograph does not represent the entire length of that aisle you are referring to?

A. Yes, sir, you are right.

Mr. Lavenstein: We would like to offer that photograph in evidence, Your Honor.

Mr. Battle: No objection.

(The said photograph was marked and filed as Plaintiff's Exhibit No. 1.)

By Mr. Lavenstein:

Q. Now, you say that aisle is about thirty feet long. Do I presume that the counter itself is the same length?

A. Well, sir, I don't know exactly how long it is. I'd say about thirty feet.

Q. Now, Mr. Vaiden, looking at that picture that has been offered in evidence, is that the same counter, as far as you know, that was in the store in that same location on May 4, 1959?

A. Yes, sir, I'd say it is.

Q. There has been no change in the counter or  
page 25 } the location?

A. No, sir.

Q. Now, you say you went down the aisle. Where did you go on the aisle?

A. I was approximately two aisles over, sir. I came across the crosswalk and came down this aisle and went all the way to the front of the store. This picture is from the back, looking to the front of the store, sir.

Q. Mr. Vaiden, as the Manager of that store you open the store in the morning and close it?

A. Yes, sir.

Q. What were your opening hours as of May 4, 1959?

A. 8:30 a.m., sir.



*Charles B. Vaiden.*

Q. Do you know at approximately what time you saw Mrs. Berry on that day?

A. Sir, I do not recall the time.

Q. Mr. Vaiden, you do not clean the aisles yourself, do you? That is not part of your duty, is it?

A. No, sir.

Q. Do you have the person here today that cleans the aisles or did the cleaning at that time?

A. No, sir.

Q. What are your general duties in that store?

A. My general duties?

page 26 } Q. Yes, sir, as Manager.

A. To see that everything is operating properly, to see that the place is well stocked, to see that everything is clean and neat for the convenience of customers.

Q. Do you at any time—are you required to go out of the store during business hours?

A. At times, sir.

Q. On that particular day can you state—that is, May 4, 1959—whether or not any of your duties had called you out of the store for any purpose whatsoever?

A. I don't recall, sir.

Q. Do I assume you don't know whether it did or didn't?

A. Yes, sir.

Q. Are there any special rules whereby the floors are cleaned at specific times during the course of a day?

A. They are cleaned every night, sir, before leaving, and they are also cleaned whenever I think it is necessary or whenever I see anything that might be a hazard.

Q. Well, on that particular day can you recall back, and do you recall, other than cleaning the store the night before, whether it was cleaned at any other time during that day?

Can you remember?

page 27 } A. Yes, sir.

Q. What is your recollection?

A. The floor was swept that morning earlier, sir; at just what time I do not recall, but that was one of the duties of the boy on Mondays when he came in, was to sweep the floor, sir.

Q. You mean that you directed—or the boy who is supposed to clean—you directed him to sweep the floors, or is he supposed to do that automatically?

A. That is automatic, sir.

Q. Do you know of your own knowledge that that boy did sweep every aisle that morning as per the understanding?

*Eva B. Berry.*

A. The store was swept, sir, that morning.

Q. My question, sir, was do you know of your own knowledge that it was swept, every aisle was swept that morning?

A. I do not know whether every aisle was swept, sir, but I had been around the store and looked around. That is one thing I do every morning, is to look around.

Q. Now, Mr. Vaiden, being Manager of that store, it is considered a rather large store in the trade, or what is the description of it?

A. It would be a medium store in the trade, sir.  
page 28 }

Q. Do you remember the day of the week this happened on?

A. It was on Monday, yes, sir.

Q. Do you recall whether there was—whether this was called a busy day with a lot of customers in that day, or would you know?

A. Monday, sir, as a rule is never busy.

Q. Now, are you in a position to state at this time how many times you personally walked down this flour aisle, as you described it, that day, before the accident?

A. No, sir, I cannot.

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EVA B. BERRY,  
the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Victor Lavenstein:

Q. Mrs. Berry, will you please state your name and residence?

A. Eva B. Berry, Chesterfield County.

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\* \* \* \* \*

*Eva B. Berry.*

Q. Now, Mrs. Berry, did you go in the A & P store on Sycamore Street on May 4, 1959?

A. Yes, sir.

Q. Will you please state to the Court and the jury what occurred?

A. Well, my husband and I went in the back door of the store to make a few purchases that day and I had picked up a can of corned beef and I believe he had a loaf of rye bread and some cottage cheese. Well, I went up the aisle where the sugar was to get a package of confectioners' sugar. The sugar was on the right-hand side of the aisle. I walked close to the aisle and—close to the shelf. I beg your pardon, and when I reached to get the sugar, when I turned—it all happened so quickly—I slipped and fell and when I fell, page 43 } evidently I fell on my knee and then I fell backwards; so while I was on the floor I was trying to see what I might have fallen on and it was this piece—this black object. It was about an inch and a half long. My foot evidently had pulled it out because there was a skid mark where I stepped on it, made it skid. I had a severe pain up my spinal column and had a severe headache and became sick to my stomach. My husband helped me up and by that time Mr. Vaiden was at the end of the other counter and he came up the aisle and asked me what had happened. My husband said "She stepped on a piece of celery there and fell." He walked over to it and kicked it with his foot back up underneath the counter and said, "Oh, that is not celery, that is gum." I said, "No, it is not gum, it would have stuck to my shoe." So we came on out of the store. When I got to the back door I started vomiting because of the severe headache and pain, then when I got to the car I vomited again. My husband tried to get me to go to the hospital then but I went on; instead, I went on home. I said, "No, if I lie down I will be all right."

Q. All right, now, Mrs. Berry—

Mr. Lavenstein: Do you have the exhibit up there?

The Court: Yes, sir.

page 44 } By Mr. Lavenstein:

Q. Would you look at that picture that has been offered in evidence as Exhibit 1, and state whether or not you can identify what that picture represents?

A. Yes, sir, this is the aisle where the sugar counter is in the A & P store on West Washington Street.

*Eva B. Berry.*

Q. Have you any idea how long that counter is from one end to the other? Would you know?

A. No, I would say it is about twenty or thirty feet.

Q. All right, in relation to the—I understood you to say you came in from the back of the store?

A. That is right.

Q. Is there a back entrance as well as a front entrance?

A. Yes, sir.

Q. In relation to your place of employment was it more convenient to take one or the other of these entrances?

A. It was more convenient to take the back door.

Q. Now, this sugar, you say you were looking for sugar?

A. Yes, sir.

Q. Whereabouts was the sugar located on this page 45 } counter?

A. Well, it was on the right-hand side of the counter, oh, about three-fourths of the way up towards the front.

Q. Now, when you say counter, do you recall or does that picture—by the way, as far as you know, is that the same counter, shelving, that was in there at the time of this accident?

A. Yes, sir.

Q. In relation to the shelves, on what shelf was this sugar located?

A. It was on the top shelf on the right-hand side.

Q. I hand you a picture and ask you to look at it and see if you can identify that picture. Can you identify that picture?

A. Yes, sir.

Q. Where is that picture taken?

A. That is by the sugar counter in the A & P store on West Washington Street in Petersburg.

Q. Is that the same aisle represented in the other picture?

A. That is right.

Q. Now, in relation to how you are standing, can you state how you were standing at the time this accident occurred, in reference to this picture?

A. Well, this is the way I was standing. (Indicating.)

Q. You are satisfied that is the way you stood?

A. Yes, sir.

Mr. Lavenstein: We would like to offer that picture in evidence.

*Eva B. Berry.*

The Court: You have seen this, Mr. Battle?

Mr. Battle: Yes, sir.

(The said photograph was marked and filed as Plaintiff's Exhibit No. 2)

A Juror: Your Honor, will the jury get a chance to look at those pictures later on?

The Court: Yes, sir.

Mr. Lavenstein: May they look at them now? It might be helpful.

The Court: Yes, sir.

(The photographs were shown to the jury.)

By Mr. Lavenstein:

Q. Mrs. Berry, I hand you another picture and ask you to look at it and see if you can identify what is represented in that picture.

A. Yes, sir, this is the sugar counter at the A & P store on Washington Street.

page 47 } Q. Can you state whether or not that is the spot at which you were standing when you reached for the sugar?

A. Yes, sir.

Mr. Lavenstein: We offer that in evidence, Your Honor.

(The said photograph was marked and filed as Plaintiff's Exhibit No. 3.)

Mr. Lavenstein: We also would like to offer this—

The Court: Do you desire this to be passed around?

Mr. Lavenstein: Yes, sir, I think it would be a good idea. We also would like to offer this in evidence and the jury can look at this at the same time.

By Mr. Lavenstein:

Q. Mrs. Berry, will you look at that picture and state whether you recognize that area?

A. Yes, this is as you come in the back door of the store, this is the back aisle.

Q. And from that back aisle how do you reach the area in which you fell?

A. Well, it's the second counter over.

*Eva B. Berry.*

Q. Are there any objects there that would indicate it—that you could designate it by better?

A. Yes, sir, the dextro—the shortening display.

Mr. Lavenstein: We offer that in evidence, Your Honor.  
(The said photograph was marked and filed as Plaintiff's Exhibit No. 4.)

By Mr. Lavenstein:

Q. Now, Mrs. Berry, in relation to the exhibit marked #3 it appears from this picture, does it not, that under the last shelf there is an open space to the floor; is that correct?

A. That is right.

Q. Can you state the open spaces, as indicated in this Exhibit No. 3, were in existence at the time of the accident?

A. Yes, sir.

Q. In relation to this photograph #3, and the open spaces indicated under the last counter, were either one of your feet under what would be this space under the shelf?

A. Yes, sir, my right foot was.

Q. Then, I show you Exhibit No. 2 and ask you if this is the manner in which your right foot was under that shelf at the time of the accident?

A. That is right, yes, sir.

page 49 } Q. Now, Mrs. Berry, you said that your right foot, as you proceeded to turn—you had better explain it yourself again, if you please.

A. Well, when I reached to get—you know, the last shelf, the shelves protrude outward, the last shelf comes out further—when I reached to get the sugar I was close to the counter, my foot was underneath the counter, oh, I'd say about three or four inches, and when I got the sugar and went to turn, when I put my weight on my right foot to turn, that is when my foot slipped and the next thing I knew I was on the floor.

Q. Now, when you were on that floor there, I think you have already said that you saw an object on which your foot had slipped, is that correct?

A. Yes.

Q. What was that object, and can you describe it?

A. Well, it was black, it was a piece of celery. It had the small strings on the end, and when I stepped on it, it mashed and it made a skid mark on the floor.

Q. In relation to the area under this shelf, did it indicate how far under that shelf this piece of celery was when you stepped on it?

*Eva B. Berry.*

A. Well, where my foot was, I would imagine it was about three or four inches underneath there.

page 50 } Q. After the accident did the piece of celery remain under the shelf or did it come out?

A. Well, it came out about five or six inches, out in the aisle, evidently.

Q. Did you measure it?

A. No, I didn't measure it, I wouldn't know exactly. Evidently, my foot dragged it out.

Q. Now, at that time, after the accident, did you notice whether there was any other debris of any kind or description in the area?

A. Yes, underneath the counter there was some crumpled pieces of paper and cigarette butts.

Q. When you say "under," you mean under the shelf that you had stepped under; is that the one?

A. Yes, sir.

Q. Do you recall whether or not there was any other item of debris underneath any of the other area there?

A. Well, there was some empty boxes and pieces of paper.

Q. Where?

A. Underneath the next shelf.

Q. Mrs. Berry, you have already testified that you became sick as you started out, but how long would you say you were in the A & P from the time you fell until you got out?

A. Oh, I would say about five or ten minutes, at the most.

Q Then did you go back to work?

A. Yes, I went back to work that night, I did try to go back.

Q. Where did you go after you left the A & P?

A. I went home.

Q. And then were you in any discomfort of any kind?

A. Oh, yes, I became ill when I got back to the car; I vomitted.

Q. Were you in any pain of any kind?

A. Oh, yes, I had this sharp pain running up and down my back and I had a severe headache.

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*Eva B. Berry.*

CROSS EXAMINATION.

By Mr. Battle:

\* \* \* \* \*

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Q. Mrs. Berry, I am going to show you this picture which is marked Plaintiff's Exhibit No. 2, which seems to show you standing at the store when the picture was taken.

A. That is right.

Q. I think the jury recalls this picture. When was this picture taken?

A. It was taken last Monday, this past Monday.

Q. Does that accurately depict or portray the position you were in just prior to this fall?

A. Yes, that was the position I was standing.

Q. Now, when you had this picture taken it was your effort to react exactly what you were doing at the time of your fall, wasn't it?

page 66 } A. That is right.

Q. And you were reaching for a piece—box of sugar, approximately a head high, on that shelf?

A. Yes.

Q. And I think you testified that your right foot was three or four inches under the open spot there?

A. Yes.

Q. And off the aisle? Now, you got the sugar down, didn't you, before you made an effort to move, I suppose?

A. Yes, sir.

Q. Were you wearing this type of shoe at the time?

A. I had on these same shoes.

Q. Had on the shoes you have on?

A. Yes, sir.

Q. And I think you said that you had squshed this thing that you called celery under your foot?

A. Yes.

Q. Is it your testimony that you squshed it when your foot was up under the shelf in this fashion?

A. Well, I don't know, it all happened so suddenly when I hit the floor. The thing I remember is slipping and then

*Eva B. Berry.*

when I fell I was looking to see what might have  
page 67 } caused the fall. I don't remember being conscious  
of stepping on anything.

Q. You didn't feel it under your foot?

A. No.

Q. You didn't feel yourself squishing it?

A. No.

Q. Now, as I understood your testimony, you were standing in this position and as soon as you put your weight on your right foot, before moving at all, you commenced your fall, is that correct?

A. That is right.

Q. All right, now, let's assume that this table in front of me is the extended part of these counters and I will stick my right foot under here four inches; do you agree that is about where it is?

A. Yes, sir.

Q. And I will put my left foot up against it like you seem to be. Was it roughly in this position I am in that you were in when you commenced your fall?

A. Yes, sir, as far as—

Q. Roughly?

A. As near as I remember.

Q. I think your testimony was that you swung your weight to your right foot?

page 68 } A. Yes, to turn around.

Q. How were you going to turn, which way?

A. I was going to turn to go back to the end of the store. I was going to turn right.

Q. Were you going to go to your right?

A. Yes.

Q. You were going to turn clockwise to go to your right?

A. Yes.

Q. And you put your weight on your right foot?

A. That's right.

Q. And you didn't move that right foot before you fell? It was the weight, as I understand it, that caused you to start your fall?

A. Well, when I reached to get the sugar and I went to turn, the next thing I knew I was on the floor.

Q. But my question is, was it the weight that you put on that right foot that started your fall? I think that was your testimony, I just wanted to make sure.

A. Yes.

*Eva B. Berry.*

Q. You put your weight on your right foot and you were going to turn to go this way? (Indicating)

A. Yes.

Q. And you didn't move your right foot before page 69 } you commenced your fall or your turn?

A. No, not that I remember.

Q. Well, now, how were you going to turn without moving your right foot if you were going to move this way? How could I turn this way to go there, if I am standing here? (Indicating) Wouldn't I have to step back to turn this way?

A. Well, the only thing I remember is that when I reached to get the sugar and—well, I did move my right foot just a fraction and then when I turned I slipped. The next thing I knew I was on the floor, but my foot slipped.

Q. You say you moved your right foot a fraction?

A. Yes.

Q. How far is a fraction? An inch?

A. Well, I wouldn't know.

Q. Was it that movement of a fraction, now, that started your fall or the weight on your foot?

A. Something that was underneath my foot that evidently caused the slip.

Q. Well, you seem to remember very distinctly which way you were going to turn, that your foot was about three inches under the counter when you were reaching for the sugar and you put your weight on your right foot. That is all your testimony, isn't it?

page 70 } A. Yes.

Q. And then you fell?

A. Yes.

Q. Now, you say you moved it back a fraction?

A. Evidently I must have moved it back to get back from the counter.

Q. You must have moved it back quite a ways to get back from the counter?

A. No, it wasn't that far underneath the counter, it was only about three or four inches underneath the counter.

Q. Well, if your foot is three or four inches underneath the counter and you are going to turn to your right; if I am like this (indicating), you have got to come back clear to some extent to go that way, haven't you?

A. No, I just wheeled around.

Q. And the next thing you knew you were on the floor?

A. Yes.

*Eva B. Berry.*

Q. Do you know which way you fell, forward or backward or sideways?

A. I think I must have slipped forward and then fell backward because I fell on my knee and then fell back, as near as I remember.

Q. Did you touch the counter when you fell page 71 } forward?

A. Yes.

Q. Did you hit anything on it?

A. No.

Q. What did you touch the counter with?

A. I think I touched it with my hand.

Q. And you fell forward towards the counter?

A. And then fell backward on my knee. Anyway, my foot jerked from whatever I stepped on and I fell—well, it happened so quickly I don't remember exactly, but anyway, when I fell, I fell on my knee and then fell backward.

Q. Are you able to demonstrate that in any way? It is hard for me to follow.

A. No, I couldn't.

Q. You couldn't do it?

A. No.

Q. You hit your knee? One knee or both knees?

A. Just one.

Q. Did you have a bruise on the other knee?

A. I don't remember. I was only conscious of one knee because the knee was torn out of my hose and it was skinned.

Q. Did you fall hard on your back when you fell?

A. Yes.

Q. But on your knee first and then hard on your page 72 } back?

A. And then on my back.

Q. And then what was the very next thing you did?

A. Well, my husband came up the aisle and helped me up.

Q. Helped you up?

A. Yes.

Q. And then he went after Mr. Vaiden, didn't he?

A. No.

Q. Who went after Mr. Vaiden?

A. No one went after Mr. Vaiden.

Q. You are sure your husband didn't leave you?

A. I am positive.

*Eva B. Berry.*

Q. Where did you walk to when he helped you up?

A. When he helped me up? As the picture indicated, we were approximately four or five feet from where it happened and he helped me up and then Mr. Vaiden came around the aisle because when a person my size falls—I lost the sugar and a can of corned beef and the purchases I had in my hand and it made a commotion, noise. He came around the corner and wanted to know what was the trouble.

Q. Were you up or down when Mr. Vaiden came up?

A. Beg pardon?

Q. Were you on your feet?

page 73 } A. Yes, my husband had helped me on my feet.

Q. You are sure you weren't standing around by the meat counter when Mr. Vaiden came up?

A. No, sir.

Q. Did you point out this piece of celery to Mr. Vaiden?

A. Yes, I did.

Q. Are you sure?

A. I am positive.

Q. Did you point it out to your husband?

A. Well, my husband saw it.

Q. You said, I think, that it had been dragged some distance by your foot?

A. Evidently my foot pulled it from underneath the counter or from where I slipped.

Q. You could trace it by the track it made?

A. There was a wet mark left by the celery.

Q. Where it just came out?

A. Yes.

Q. I hate to take so long on this but I just can't understand how you fell, Mrs. Berry. Now, let me ask you one more time, did your feet go out from under you, behind you, or sideways or in front of you when you started to fall?

A. Well, as near as I remember, my foot slipped  
page 74 } forward and then that is when I fell.

Q. That is your right foot?

A. Yes, and then I fell forward and then I fell backward and somehow my knee was crumpled up beneath me.

Q. At that stage you were far enough away from the counter not to hit it with your body as you fell forward?

A. No, I hit my body as I fell forward, the edge of the counter.

*Arthur Gene Berry.*

Q. But you didn't hit it with your knees?

A. No, I fell on my knee.

Q. When you fell on your knee, you fell again on your seat, on your back?

A. Yes.

\* \* \* \* \*

page 78 }       ARTHUR GENE BERRY,  
              being first duly sworn in behalf of the plaintiff,  
testified as follows:

## DIRECT EXAMINATION.

By Mr. Victor Lavenstein:

Q. Please state your name, occupation and residence.

A. Arthur Gene Berry, I am a carpenter and I live Route 5, Box 456-A, Petersburg, Virginia, Chesterfield County.

Q. Are you the husband of Mrs. Eva Berry, the plaintiff in this case?

A. Yes, sir.

Q. Mr. Berry, were you with your wife on the 4th of May, 1959 when she was in the A & P store on Washington Street in Petersburg?

A. Yes, I was.

Q. Approximately what time of day was it?

A. 12:15, something close to that.

Q. Will you please state your recollection of what occurred when you were in that store with your wife on that day?

A. Well, we had went into the store to buy a few groceries and she picked up a can of corned beef and said, "Let me get some confectioners' sugar." She went down the aisle on the right-hand side. I was behind her, and she  
page 79 } reached for the confectioners' sugar and the next thing I knew she had fallen onto the floor.

Q. Did you actually see her fall on the floor?

A. Yes, sir.

Q. Mr. Berry, what did you do after that?

A. I went to her, and tried to pick her up. I managed to pick her up.

Q. While you were picking her up were you able to ascertain or did you notice any objects on the floor near where she had fallen or where she had fallen?

A. Yes, sir, I seen a piece of celery that she had stepped on where she had skidded on, to fall.

*Arthur Gene Berry.*

Q. Could you describe that piece of celery?

A. Yes, sir, I would say it was about an inch and a half long, it was dirty and black from being on the floor.

Q. You say "skidded on", were there any so-called skid marks in the area there?

A. Yes, sir, there was; there was a place I'd say, oh, from the point where she stepped on it out into the aisle, I guess maybe six or nine inches.

Q. Did you measure it?

A. No, sir, I didn't.

Q. You said from where she stepped on it. I hand you here Exhibit No. 2 that has been in evidence and page 80 } ask you, in relation to the bottom of the shelf, approximately how far under that—on the floor under that last shelf—did this skid mark begin?

A. Oh, I would say approximately about three inches, something close to that, from the point of where she stepped on it underneath the counter there.

Q. And it extended, then, out into the aisle itself about how far, the entire distance—about how far out into the aisle would you say?

A. Oh, between six and nine inches.

Q. After you picked your wife up did any representative of the A & P come around or did you call it to their attention or did you see anybody?

A. No, sir, the representative of the A & P come around the aisle where we were and asked what happened.

Q. Who was that representative?

A. Mr. Vaiden sitting right over there.

Q. Will you please state what he said to you and what either you or your wife said to him?

A. He asked me what had happened. I said, "My wife slipped on this piece of celery," and he says, "Oh, that is not a piece of celery, that is a piece of gum."

Q. What did he do?

A. He kicked it underneath the counter again.

page 81 } Q. Did it go under the counter?

A. Yes, sir.

Q. Did you notice at that time, or before, whether there was any debris under that bottom area there under these shelves?

A. Yes, sir, after I had stood there and looked a minute, I could see there was other debris under there.

Q. Of what nature?



*Arthur Gene Berry.*

A. Oh, pieces of paper and cigarette butt or two, small trash-like.

Q. Did you notice whether it was in any of the other areas under that counter?

A. No, sir, I didn't look at any other part of the counter. The particular place where she slipped, I did.

Q. In relation—do you know where at that time the vegetable counter was located in that store?

A. Yes, sir, the same place it is right now; as you go in the front door it is on the far right wall.

Q. Approximately what distance would that be from the beginning of the aisle in which your wife was injured?

A. A good fifty feet.

Mr. Lavenstein: Your witness.

page 82 } CROSS EXAMINATION.

By Mr. Battle:

Q. Mr. Berry, you have said that you could trace this piece of celery a distance of six or nine feet by the track it made?

A. Six or nine inches.

Q. I beg your pardon, I meant to say inches—by the track it made. Now, did you see it on the floor at the occasion of your wife's fall?

A. I seen it after she fell.

Q. And how far was it from the edge of that counter as shown in that picture?

A. Oh, I'd say, well, from the point of where she stepped on it underneath the counter, I'd say it was three inches underneath the counter; between six and nine inches out—

Q. You traced it as if it were dragged out toward the aisle?

A. That's right.

Q. Straight out?

A. No, sir, it wasn't straight, it was on an angle where she turned.

Q. Well, now, would you describe—you are looking at the picture there taken last week?

page 83 } A. Yes, sir.

Q. Is that about the way she was standing before her fall?

A. Yes, sir.

Q. Now, describe to us how she fell or what her motions were.

*Arthur Gene Berry.*

A. Well, she walked down the aisle next to the right-hand side, and reached for the sugar, got down to the sugar and reached for the sugar.

Q. Just about as shown there?

A. Yes, sir, and when she—the thing happened so quick it's kind of hard to describe. When she managed to get ahold of herself and she turned, she slipped on a piece of celery.

Q. Did you see her slip on a piece of celery?

A. No, sir, I seen her fall, I wasn't watching her feet; I seen her fall.

Q. Which way did she turn?

A. She reached to the right and turned back.

Q. She reached to the right and turned back to her left?

A. And turned back to the left and when she turned back to the left, she fell.

Q. So she reached with her right hand, to the  
page 84 } right, for the sugar and turned to the left like  
she was going to the front of the store, and fell?

A. Yes, sir.

Q. If she had been going to the back of the store she would have turned to the right?

A. Yes, sir.

Q. And that's the way she fell?

A. Yes, sir.

\* \* \* \* \*

page 106 }

\* \* \* \* \*

Mr. Jacob Lavenstein: The plaintiff rests.

Mr. Battle: May I be permitted to make a motion now?

The Court: Yes, sir. Will you take the jury out?

(Note: The following occurred out of the presence of the jury.)

Mr. Battle: If Your Honor please, I should like to move at this time that the Court strike the evidence of the plaintiff and in support of that motion I would like in the beginning to cite the two authorities that I rely upon so that I won't constantly do it.

*Charles B. Vaiden.*

\* \* \* \* \*

page 107 }

\* \* \* \* \*

The Court:

\* \* \* \* \*

page 109 }

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For that reason I will have to overrule the motion. Now, I must say this, that to the Court's way of thinking, the way the plaintiff described this accident taking place and how she fell is extremely improbable, to my way of thinking, but I don't think it impossible enough for the Court  
 page 110 } to say that her testimony is just completely unbelievable on that point and I don't think I would be justified in striking on that ground, either.

\* \* \* \* \*

page 111 }

\* \* \* \* \*

Mr. Battle: May I save the point?

\* \* \* \* \*

page 118 }

\* \* \* \* \*

CHARLES B. VAIDEN,  
 being first duly sworn in behalf of the defendant, testified as follows:

#### DIRECT EXAMINATION.

By Mr. Battle:

Q. Mr. Vaiden, you were on the stand this morning and

*Charles B. Vaiden.*

reviewed some of these. I want to ask you a few additional questions. As I understand it, you were the Manager of the store on this occasion?

A. Yes, sir.

Q. Now, when did you first learn of Mrs. Berry having any difficulty in your store?

A. When Mr. Berry came around to the aisle that I was in and told me that his wife had slipped and fell.

Q. What aisle were you in?

page 119 } A. I was in the—the aisles are numbered 1, 2, 3 and 4; I was between No. 1 and 2 aisle, which is two aisles over from the flour and sugar aisle, sir.

Q. Did Mr. Berry tell you where his wife had slipped?

A. He told me that his wife had slipped and fell over in the flour aisle.

Q. And that was two aisles away?

A. Yes, sir.

Q. And he came to you to tell you that?

A. Yes, sir.

Q. And is that the first notice you had of it?

A. Yes, sir.

Q. Now, what did you then do?

A. I stopped immediately what I was doing and walked across the back walk of the store, the back aisle of the store, and went around to the aisle that Mr. Berry had told me that she had slipped and fell.

Q. Is that the shortest distance?

A. Yes, sir.

Q. And what did you find?

A. I did not see Mrs. Berry in the aisle at the time so I walked all the way down the aisle—

Q. Was Mr. Berry going with you at this time?

page 120 } A. No, sir, I don't know where Mr. Berry went.

Q. All right, sir.

A. I walked down the aisle, going towards the front of the store looking for Mrs. Berry and also looking for anything that might have been on the floor or anything that was a hazard.

Q. Where did you finally locate her?

A. I came back up the other aisle to the back of the store and Mrs. Berry was standing near this end Tyler case, the meat case.

Q. Near the meat case?

A. Yes, sir.

*Charles B. Vaiden.*

Q. Let me show you these pictures and see if you can point that out. Does the meat case show on this photograph?

A. Yes, sir, it does.

Q. Would you stand up and show it to the jury, please?

A. This case right here. (Indicating.)

Q. Is this the back aisle you have been referring to that you used to go down her aisle?

A. Yes, sir.

Q. Where on this picture is the general area of the aisle, the flour and sugar aisle?

page 121 } A. That would be down this aisle here, sir. (Indicating.)

Q. Beside the meat case?

A. In-between these two meat cases.

Q. There are two meat cases and that aisle would be in-between them?

A. Yes, sir.

Q. And she was standing by this one? (Indicating)

A. Yes, sir.

Q. What, if anything, did she say to you when you got there?

A. When I walked up Mrs. Berry was standing there at the case and I asked her what had happened. She told me she had slipped and fell and I noticed—I don't recall which leg or which knee—she had a cut, a briuse and there was a little blood around the knee area.

Q. She showed that to you?

A. Yes, sir.

Q. Did she say what she had thought she had slipped on?

A. I do not recall her mentioning anything what she had slipped on.

Q. Did she point anything up to you she had slipped on?

A. No, sir.

page 122 } Q. Are you sure of that?

A. Yes, sir.

Q. Did she take you to the location where she said she had fallen?

A. No, sir.

Q. What did she do after you saw her at that spot by the meat counter?

A. I looked at the knee and asked her if she thought she was all right and she said she thought so and then she turned—if I remember correctly, her husband came back about that time and they went towards the back.

Q. Towards the back?

*Charles B. Vaiden.*

A. To the back exit.

Q. Could they leave by the back exit?

A. Yes, sir.

Q. And did they leave?

A. I don't recall right off, no, sir.

Q. In any event, they left you?

A. Yes, sir.

Q. Did you make an inspection of the floors at that time?

A. Yes, sir.

Q. Did you find anywhere, or see anywhere a  
page 123 } piece of celery approximately an inch and a half  
long?

A. I did not see any celery, no, sir.

Q. Did you look carefully?

A. Yes, sir.

Q. Now, you said this morning, when Mr. Lavenstein was examining you, that you didn't do the sweeping. What was the sweeping routine there, so far as evenings and mornings are concerned?

A. The store is swept every night at closing, sir, and then it is swept—I keep tab on the floors, and it is swept whenever I think it needs sweeping. The produce aisle and checking area are swept often. Any time the checkers are not busy or anything, we will clean up and sweep around those areas.

Q. Do they sweep stuff under the counter or up in dust pans?

A. Most of the time they use a piece of cardboard and put it in a cardboard box and take it to the trash room.

Q. You made some reference to the boy sweeping on this particular morning, the fact that you didn't do it, but do you know for a fact that he did it?

A. The store had been swept that morning, yes, sir.

Q. Are you sure of that?

page 124 } A. Yes, sir.

Q. Had this aisle where Mrs. Berry claims to have fallen, had that been swept?

A. I cannot say definitely that particular aisle had been swept.

Q. You can't say definitely, do you have any thought on it?

Mr. Victor Lavenstein: May it please the Court, we object to that question.

The Court: I think he would have to testify—he can state, if he knows, Mr. Battle. I don't believe he can guess.

*Charles B. Vaiden.*

By Mr. Battle:

Q. Let me put it this way. You are sure that the store had been swept?

A. Yes, sir.

Q. Well, now, why are you not sure about this aisle?

A. I didn't actually see the boy sweep the aisle, but I walked around the store afterwards because I always check behind him.

Q. What was the condition of this aisle?

A. The condition, sir?

Q. Yes, as far as cleanliness is concerned.

page 125 } A. It was clean, sir.

Q. And you are positive that neither Mr. or Mrs. Berry mentioned a piece of celery to you or showed a piece of celery to you?

A. Nothing was shown to me, sir.

Q. Did you kick a piece of celery under the counter?

A. No, sir.

Q. Did you see a wet mark that could have been left from a piece of celery?

A. I did not, sir.

Q. Did you look close enough to see it if it had been there?

A. Yes, sir.

Mr. Battle: Will you answer Mr. Lavenstein.

### CROSS EXAMINATION.

By Mr. Victor Lavenstein:

Q. Mr. Vaiden, did I understand you to say that Mr. Berry is the one who told you his wife had slipped?

A. Yes, sir.

Q. He didn't tell you what she slipped on or how she slipped?

A. I do not recall, sir. The only thing I remember, he came around and told me his wife had slipped and fell  
page 126 } over in the flour aisle.

Q. Didn't you think the matter serious enough to have inquired from Mr. Berry what caused her to slip or how she did slip?

A. Sir, before I could turn around Mr. Berry had left.

Q. Had left for where?

A. I don't know where, sir.

Q. But you saw them later, didn't you, at the store there? You talked to Mrs. Berry? Did you ask Mrs. Berry?



*Charles B. Vaiden.*

A. No, sir.

Q. Don't you think you should have asked her?

A. Yes, sir.

Q. Apparently, Mr. Vaiden, since you did not know what caused the lady to slip, why did you go down this aisle looking for something?

A. I was looking for Mrs. Berry and also looking for anything which might have caused her fall, sir, that is part of my job.

Q. Then you suspected there was something in the aisle that might have caused it?

A. No, sir, I didn't expect anything, it is possible there could have been something.

page 127 } Q. As I understand it, you were at the front or back part of the store?

A. Near the back.

Q. And then you went back to this back aisle that you have identified on the picture, in order to find Mrs. Berry?

A. Yes, sir.

Q. And you found her at what point, now?

A. I went clean up the aisle, sir, towards the front of the store. I did not see Mrs. Berry. I came back down the aisle, the opposite aisle near the coffee counter, and I came back and she was standing at this Tyler case at the cross-walk, sir.

Q. Mr. Vaiden, as you walked up towards—from where you were, you walked in the opposite direction from where the vegetable counter is?

A. Yes, sir.

Q. Right, and then you walked towards what you called the flour aisle earlier—you called it the flour aisle?

A. Flour and sugar.

Q. You walked towards that aisle, didn't you, in that direction?

page 128 } A. I walked towards that aisle when Mr. Berry told me his wife had slipped in that aisle.

Q. All right, now, and you also testified that that morning there were very few customers in there?

A. Yes, sir.

Q. And yet as you walked down towards—in that direction—towards the flour aisle, you say to the Jury you never saw Mrs. Berry?

A. I did not see Mrs. Berry when I went towards the flour aisle.

*Charles B. Vaiden.*

Q. When did you see her? After you walked down the flour aisle and back, is that when you saw her?

A. I went down the flour aisle, sir, and came back on the outside aisle, facing the coffee counter, and started back across the back and that is when I saw Mrs. Berry.

Q. You said that these boys use cardboard. Is that what they use to clean out the store with?

A. Around the checking stands, sir.

Q. Now, you mean only the checking stands used cardboard?

A. Yes, sir.

Q. Other than that they use these mops—not mops, a brush affair?

A. Brush-broom.

page 129 } Q. A brush thing is what they use, isn't it?

A. Yes, sir.

Q. How do they get the things that are under the shelf there?

A. They also carry a straight broom when it is necessary, sir, to clean the under-floors out.

Q. You mean that is what they are supposed to carry?

A. Yes, sir.

By A Juror:

Q. May I ask a question? You said when you went back—did you ever go to the spot where the accident happened?

A. I went down the aisle, sir.

Q. I mean when you went over and talked to Mrs. Berry, she was not at the spot where the accident happened?

A. No, sir.

Q. Did you take her to the spot where the accident happened so you could see whether there was anything on the floor?

A. No, sir.

A Juror: Thank you.

page 130 } REDIRECT EXAMINATION.

By Mr. Battle:

Q. You understand, from her description of where it happened, from these pictures, don't you, Mr. Vaiden—you have

*Charles B. Vaiden.*

been sitting here and heard her describe being at the sugar counter?

A. Yes, sir.

Q. You know where the sugar counter was?

A. Yes, sir.

Q. Did she point out to you that that was the general area where she fell?

A. No, sir.

Q. Did you inspect the floor in that general area?

A. I did, sir.

Q. And there was nothing there?

A. I saw nothing, sir.

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page 131 }

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The Court: I assume you make the same motion at the conclusion of all the testimony that you made at the end of the plaintiff's testimony, to strike, and that is overruled. That would carry with it the exception to all instructions that they offer on the ground that there is into evidence.

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page 136 }

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(Note: Subsequently the jury returned with the following verdict: "We, the jury, on the issue joined find for the plaintiff and assess the damages at \$7,500.00"

Mr. Harris: May it please the Court, I move that the verdict of the jury be set aside for the reason it is contrary to the law and the evidence and that the Court enter up summary judgment for the Defendant for the reasons stated earlier when the motion to strike the evidence was made, or in the alternative that the Defendant be granted a new trial and we would like to have time to argue this orally before the Court.

(Whereupon, May 29, 1961, 2:15 o'clock p.m. was the time set for the argument on the motion.)

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A Copy—Teste:

H. G. TURNER, Clerk.

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