



by the aisle's shelves and products. As she walked through this narrow corridor, her forehead suddenly struck the corner of a metal shelf. At the moment she struck the shelf corner, plaintiff's eyes were focused on the ladder. The impact caused plaintiff significant, and likely permanent, brain injury.

Although plaintiff did not see the shelf before striking it, she noted the arrangement of the shelving and submitted pictures of similar shelving taken after the incident. The pictures, which plaintiff asserts are accurate depictions of the in-store conditions on the day of her injury and which are included with this Order as Attachments A and B, show metal shelves approximately 1.0 to 1.5 inches thick and arranged at various distances apart depending, naturally, on the size of the products being displayed. On the shelf that injured plaintiff, the products did not extend to the edge, such that plaintiff has called the shelf "protruding." Opp. Br. at 1. Additionally, the shelves were connected to the back of the shelving unit with no side walls. From the side, therefore, a set of three shelves might resemble a capital letter "E," with each shelf extending evenly into the aisle. Plaintiff has submitted a diagram indicating that the shelving near the ladder was comprised of four shelves, including the floor-level shelf, spaced about twelve to eighteen inches apart.

Plaintiff alleges that the combination of placing a ladder in the middle of the aisle and allowing the shelf to protrude into the aisle constituted an unreasonably dangerous condition. Plaintiff sues Sears for negligence and seeks three million dollars in compensatory damages. Defendant denies the claims, contending that the ladder and shelving presented no unreasonably dangerous condition, and in any event, that plaintiff was contributorily negligent by failing to exercise reasonable care in walking around the ladder. Defendant thus moves for summary judgment.

## II.

The summary judgment standard is too well-settled to require elaboration here. In essence, summary judgment is appropriate under Rule 56, Fed. R. Civ. P., only where, on the basis of undisputed material facts, the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Importantly, to defeat summary judgment the non-moving party may not rest upon a “mere scintilla” of evidence, but must set forth specific facts showing a genuine issue for trial. *Id.* at 324; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Thus, the party with the burden of proof on an issue cannot prevail at summary judgment on that issue unless that party adduces evidence that would be sufficient, if believed, to carry the burden of proof on that issue at trial. *See Celotex*, 477 U.S. at 322.

## III.

Under Virginia law,<sup>1</sup> it is well settled that a store owner owes its invitee customers a “duty to exercise ordinary care” by maintaining the premises “in a reasonably safe condition.” *Colonial Stores v. Pulley*, 203 Va. 535, 537 (1962). Yet, a store owner owes no duty to warn invitees of an unsafe condition “that is open and obvious to a person exercising ordinary care.” *Fobbs v. Webb Building, Inc.*, 232 Va. 227, 229 (1986). When asserting the affirmative defense of contributory negligence, defendant ordinarily has the burden to show that plaintiff failed to act as a reasonable person would have acted for his or her own safety under the circumstances. *Fultz v. Delhaize Am., Inc.*, 278 Va. 84, 89 (2009). But, where plaintiff’s injury arises from an open and obvious condition, the plaintiff is contributorily negligent as a matter of law. *Scott v. Lynchburg*, 241 Va. 64, 66 (1991). Under such circumstances, plaintiff has the burden of

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<sup>1</sup> As this is a diversity action, the appropriate substantive law is that of the forum state, in this case, Virginia. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496, (1941); *Colgan Air, Inc. v. Raytheon Aircraft Co.*, 507 F.3d 270, 275 (4th Cir. 2007).

defeating contributory negligence by showing “conditions outside herself which prevented her seeing the dangerous condition or which would excuse her failure to observe it.” *Id.* at 90.

The undisputed facts of this case entitle defendant to summary judgment on the sole claim of negligence. Plaintiff contends that the combination of the ladder and the protruding shelf created a hazard by requiring her to negotiate both obstacles at once, leading to her injury.<sup>2</sup> The flaw in plaintiff’s argument is that both the ladder and the shelf are open and obvious conditions, and the mere fact of their combination does not render the hazard, if any, latent. Although plaintiff calls the shelf “protruding,” the shelf that she struck with her forehead did not extend into the aisle any further than the other shelves on the aisle. Had it been otherwise—that is, were one shelf protruding further than the others—then it might be conceivable that a reasonable person notice the shelving as a whole but fail to realize that one shelf extends farther into the aisle. Under those circumstances, the unexpectedly long shelf might not be deemed open and obvious. This was not the case here; here, the shelves in issue were of equal length and roughly equal spacing, and it would have required only a glance at any of the shelves to realize the nature of the hazard and easily avoid it. As such, the dangers, if any, were open and obvious to any person exercising ordinary care, and defendant owed no duty to protect plaintiff from the dangers.<sup>3</sup>

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<sup>2</sup> Plaintiff does not contend that the Sears was negligent in failing to pad the shelves’ corners or edges.

<sup>3</sup> The finding that a hazard is “open and obvious to a person exercising ordinary care” defeats a negligence claim such as this one in two ways. First, when a defect is open and obvious, the store owner owes no duty to protect an invitee from the hazard because the exercise of care by the invitee will avoid any injury. *See Fobbs*, 232 Va. at 229. Second, a plaintiff injured in an encounter with an open and obvious hazard has, as a matter of law, failed to exercise reasonable care and is thus contributorily negligent. *See Scott*, 241 Va. at 66. In other words, once a hazard is determined to be open and obvious, the plaintiff’s claim fails as a matter of law regardless of whether one considers the evidence from the defendant’s perspective, as a limitation on the defendant’s duty to invitees, or from the plaintiff’s perspective, as an application of the

Plaintiff also suggests that the shelf was almost invisible when viewed on edge, and since the shelf she struck was at eye level, the hazard was not open or obvious. But plaintiff's pictures of the shelf belie this characterization. The shelves are at least an inch thick and made of opaque, light tan or gray metal. They are typical of the shelves seen in any retail store, from grocery stores to hardware stores, and even viewed from eye-level, they are certainly not "invisible" as plaintiff suggests. Accordingly, because the condition was open and obvious, defendant owed no duty to protect plaintiff from the shelf that injured her. *Id.*

Alternatively, defendant is entitled to summary judgment based on the contributory negligence defense. Upon seeing the ladder, plaintiff should have recognized that she would need to move through the space between the ladder and the aisle-side, a space that would naturally be narrower than the aisle itself. Any reasonable person walking around the ladder would be careful moving through this narrower passageway to avoid striking the shelves. Additionally, plaintiff struck her head on the top shelf but did not strike any other shelf with her body, indicating that she contorted herself so as to extend her head, face-forward, into the shelf while simultaneously keeping the rest of her body away from the shelves—all while fixing her eyes on the ladder. No person exercising reasonable care would strike the shelf in this manner. As the Supreme Court of Virginia has stated, "more is needed than a simple allegation of a distraction to create a jury issue" as to contributory negligence; rather, plaintiff must establish

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plaintiff's duty to exercise reasonable care. Typically, when Virginia courts have found open and obvious defects, they have elected to frame the decision in terms of contributory negligence. *See, e.g., Rocky Mt. Shopping Ctr. Assocs. v. Steagall*, 235 Va. 636, 637 (1988) (where plaintiff tripped over a recessed water meter cover two to three inches deep and eight to ten inches across in a store owner's parking lot, the hazard was open and obvious, and thus plaintiff was contributorily negligent). Either path provides the same outcome, and indeed, the outcome here is expressed both as a failure of proof as to defendant's duty and a finding of contributory negligence as a matter of law.

decide the case on contributory negligence grounds rather than the finding no duty to warn.


that her “excuse for inattention was reasonable, *i.e.*, that the distraction was unexpected and substantial.” *West v. Portsmouth*, 217 Va. 734, 737 (1977). To the extent the ladder can even fairly be called a distraction, it was certainly an expected distraction from the point of view of the plaintiff, who voluntarily<sup>4</sup> undertook the task of walking around the ladder. Accordingly, any reasonable jury would be compelled to find, on the basis of this record, that plaintiff’s contributory negligence was a proximate cause of her injuries and deny plaintiff’s claim. *See Rocky Mt.*, 235 Va. at 637 (where plaintiff tripped over a recessed water meter cover two to three inches deep and eight to ten inches across in a store owner’s parking lot, the hazard was open and obvious, and thus plaintiff was contributorily negligent); *see also* n.3 *supra*.

Plaintiff’s injuries are undeniably regrettable, and her injuries have required significant medical attention. But Virginia law is clear that negligence cannot be presumed from the mere happening of an accident. *Duffer v. Newman*, 217 Va. 415, 418 (1976). Because the ladder and shelving together constituted an open and obvious condition, and because the exercise of reasonable care by plaintiff would have avoided her injuries, defendant Sears is entitled to summary judgment.

Accordingly, and for good cause,

It is hereby **ORDERED** that summary judgment is **GRANTED** in favor of defendant and against plaintiff. The Clerk is directed to send a copy of this Order to all counsel of record, and to place this matter among the ended causes.

Alexandria, Virginia  
November 24, 2010

  
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**T. S. Ellis, III**  
**United States District Judge**

<sup>4</sup> The aisle with the ladder was one of several aisles available to plaintiff to reach the exit.

Attachment A



**Attachment B**

