

**By Michael Goldberg**

To the average person, the mention of a slip and fall case conjures up visions of a malingerer pouring a Coke on the floor and then lying next to it pretending to be in pain. For some reason, people associate slip and fall cases with the "classic insurance scam." It could be that most people cannot believe that claimants are so unwary of their surroundings that they cannot see what is in plain view in front of them. Perhaps these cynics have difficulty accepting that claimants could slip on such a wide variety of items as a grape,<sup>1</sup> a partially thawed frozen vegetable,<sup>2</sup> a french fry,<sup>3</sup> and liquid detergent<sup>4</sup> (although, ironically, there has never been a reported decision in Georgia of a slip and fall on a banana.)

Whatever the reason for the skepticism, these claimants do not have the respect and sympathy that other personal injury plaintiffs enjoy. Given this pervasive attitude towards slip and fall plaintiffs, the recent decision of *Robinson v. Kroger CO.*,<sup>6</sup> in which the Georgia Supreme Court finally decided to pick up the slip and fall plaintiff and treat him with the same dignity as any other plaintiff, is all the more unusual.

### **The Law Prior to *Robinson v. Kroger Co.***

Prior to *Robinson*, slip and fall law was dominated by the burdensome test delineated in the 1980 decision of *Alterman Foods, Inc. v. Ligon*.<sup>6</sup> Under the precedent of *Alterman Foods*, in order to state a cause of action, a slip and fall plaintiff had to show (1) that the defendant had actual or constructive knowledge of the foreign substance and (2) that the plaintiff was without knowledge of the substance or, for some reason attributable to the defendant, was prevented from discovering it? The end result of this test was that a slip and fall plaintiff, unlike any other plaintiff, essentially had to prove his own lack of comparative negligence in order to reach a jury.<sup>8</sup>



Defendant business owners frequently used the *Alterman Foods* test to obtain summary judgment by demonstrating that the plaintiff could have seen and avoided the hazardous condition but failed to do so.<sup>9</sup> Counsel for the defendant business owner would typically ask the plaintiff at his deposition if he could have seen the substance if he had looked down prior to his fall. An unwary plaintiff would usually respond, as one would expect, that he could have seen the grape, water or other foreign substance if he had closely examined the floor before his fall since nothing actually obstructed his view of the floor. Although it was almost always the situation that the plaintiff, in hindsight, could have seen the hazardous substance, the business owner was still entitled to summary judgment because the plaintiff could have seen the substance and avoided the hazard if he had paid more attention to where he was walking.<sup>10</sup> In this manner, the slip and fall plaintiff was kept from presenting his case to a jury, and most cases were adjudicated on a motion for summary judgment

### The Effect of *Robinson u. Kroger Co.*

As this trend continued for several years, slip and fall cases became so difficult to prosecute that attorneys would turn them away because of the risky proposition of maneuvering through the difficult test of *Alterman Foods*. Then, in 1997, Henrietta Robinson came before the Georgia Supreme Court, and the court had a change of heart. Mrs. Robinson had been shopping in a grocery store when she injured her knee as a result of slipping on a substance on the floor. She admitted that she did not look at the site where she placed her foot prior to her fall and that she could have seen the hazardous condition if she had examined the floor. After the trial court granted summary judgment to the store and the Court of Appeals affirmed, ruling that the proximate cause of her fall was her failure to exercise ordinary care for her own safety, Mrs. Robinson sought certiorari claiming that a jury should decide if she had been at fault in failing to see and avoid the hazard.<sup>11</sup>

The Georgia Supreme Court agreed with Mrs. Robinson and confirmed *Alterman Foods* test unfairly forced the slip and fall plaintiff to prove his own lack of negligence.<sup>12</sup> According to the court, recent appellate decisions had placed in the limelight an invitee's duty to exercise reasonable care for personal safety and, in so doing, relegated to the shadows the duty owed by an owner/occupier to an invitee.<sup>13</sup>

While the *Robinson* court acknowledged that an owner/occupier was not an insurer of an invitee's safety, the court also recognized that an invitee who responds to an invitation and enters the premises does so pursuant to an implied assurance that the premises have been made ready and safe for the invitee's reception, and the entering invitee is entitled to expect that the owner/occupier has exercised and will continue to exercise reasonable care to make the premises safe.<sup>14</sup>

In balancing these competing duties, the court held that the established standard is whether, taking into account all the circumstances existing at the time and place of the fall, the invitee exercised the prudence an ordinarily careful person would use in a like situation.<sup>15</sup> Given this standard, a plaintiff's admission that he did not look at the site on which he placed his foot prior to his fall does not establish as a matter of law that he failed to exercise ordinary care.<sup>16</sup> Furthermore, a defendant is not entitled to summary judgment simply because a plaintiff testifies that he could have seen the hazard had he visually examined the floor before taking the step that led to his accident<sup>17</sup>

Under the precedent of *Robinson*, a slip and fall plaintiff must now prove (1) that the defendant had actual or constructive knowledge of the hazard; and (2) that the plaintiff lacked knowledge of the hazard despite the exercise of ordinary care due to actions or conditions within the control of the owner/occupier. However, the plaintiff's evidentiary proof concerning the second prong is not shouldered until the defendant establishes negligence on the part of the plaintiff, *i.e.*, that the plaintiff intentionally and unreasonably exposed himself to a hazard which he knew or, in the exercise of ordinary care, should have known existed.<sup>18</sup> The court cautioned that "routine" issues of premises liability, including the negligence of the defendant and the plaintiff, and the plaintiff's lack of ordinary care for personal safety, generally are not susceptible to summary adjudication, and that summary judgment should only be granted when the evidence is "plain, palpable, and undisputed."<sup>19</sup>

## Post-Robinson Decisions Concerning

### Constructive Knowledge

Armed with this new decision, slip and fall claimants fought off summary judgment motions with the mere incantation of the words *Robinson v. Kroger*. The Court of Appeals dutifully followed the Supreme Court's mandate and repeatedly held that summary judgment could not be based on the plaintiff's failure to see the condition that caused his fall.<sup>20</sup> Although the situation appeared grim for business owners, they would not be discouraged. Since the plaintiff's conduct no longer provided a basis for summary judgment, defendants searched for an alternate method of escaping liability and eventually focused on the defendant's lack of knowledge of the hazardous condition. Presumably even under *Robinson*, the plaintiff had to demonstrate that the defendant had actual or constructive knowledge of the foreign substance that caused plaintiff's fall.<sup>21</sup> Since few defendants admitted that they knew of the hazardous condition, this issue usually focused on the plaintiff's ability to prove constructive knowledge.<sup>22</sup>

A plaintiff could show the defendant's constructive knowledge by presenting (1) evidence that employees were in the immediate vicinity and easily could have noticed and removed the hazard, or (2) evidence that the substance had been on the floor for such a long time that (a) it would have been discovered had the proprietor exercised reasonable care in inspecting the premises, and (b) upon being discovered, it would have been cleaned up had the proprietor exercised reasonable care in its method of cleaning the premises.<sup>23</sup> In regard to employees in the vicinity of the foreign substance, the plaintiff had to show that the substance was visible and capable of being discerned by the employee.<sup>24</sup> In regard to liability for failure to inspect the premises properly, the central issue was the plaintiff's proof of the actual amount of time the substance had been on the floor.<sup>25</sup>

Although the *Robinson* court was explicit in the treatment of the issue of plaintiff's exercise of ordinary care for his own safety, the court's decision was silent in regard to the requirement that the plaintiff must demonstrate that the defendant had actual or constructive knowledge of the foreign substance that caused plaintiff's fall. Left with no guidelines from the Supreme Court, the Court of Appeals held in the decision of *Sharfuddin v. Drug Emporium, Inc.* that the first prong of the old *Alterman Foods* test regarding the defendant's knowledge of the hazard was not altered by the *Robinson* decision.<sup>26</sup>

In *Sharfuddin*, the plaintiff slipped and fell in water on the floor of defendant's store. The plaintiff admitted that there were no employees of the defendant in the vicinity and further admitted that she did not know how long the water had been present on the floor. Despite the fact that the defendant offered no evidence of its inspection procedures, the court affirmed the grant of summary judgment to the defendant on the ground that the plaintiff had failed to point to specific evidence giving rise to a triable issue on the question of the defendant's knowledge of the water.<sup>27</sup> According to the court, the plaintiff had to prove the amount of time the water had been present on the floor or else there would be no evidence by which a jury could determine that a reasonable inspection would have revealed the foreign substance.<sup>28</sup>

The *Sharfuddin* decision created a new point of attack for defendants, and this basis for summary judgment was as onerous on the slip and fall plaintiff as the *Alterman Foods* test. Under the precedent of *Sharfuddin*, the plaintiff, who had not seen the substance prior to his fall, was required to produce evidence as to the amount of time it had been on the floor. In order to prove this element, the plaintiff was forced to rely on the testimony of the defendant's employees since the plaintiff could not rely on his own knowledge. However, the employees rarely saw the substance before the accident and usually could not be of any assistance. The plaintiff was left with no evidence to support his claim and again faced an inevitable dismissal on a motion for summary judgment. *Robinson* had given the slip and fall plaintiff a new chance to reach a jury, only to have that opportunity crushed by *Sharfuddin*.

Realizing that it had created a pitfall similar to the *Alterman Foods* test, the Court of Appeals refined the doctrine of *Sharfuddin* in the decision of *Straughter v. J. H. Harvey CO.*<sup>29</sup> In *Straughter*, the plaintiff slipped

and fell on a green, leafy object in the produce section of defendant's grocery. The plaintiff admitted that there were no employees in the vicinity of her fall and that she did not know how long the object had been on the floor. The defendant offered no evidence as to the reasonableness of its inspection procedure except for the affidavit of the manager who stated that the store had a policy of sweeping the floor every two to three hours.

The defendant moved for summary judgment since the plaintiff could not testify as to the amount of time the object was on the floor. The court refused to grant summary judgment to the defendant stating that the plaintiff need not show how long a substance had been on the floor unless the defendant had established that reasonable inspection procedures were in place and were followed at the time of the incident.<sup>3D</sup> The court reasoned that the defendant had the evidence of inspection procedures in its power and the failure to produce such evidence created a negative presumption in favor of the plaintiff.<sup>31</sup>

Since *Straughter*, the court has held that reasonable inspection procedures can be established by a manager's affidavit testifying that the defendant had a policy of inspecting its store every thirty minutes and that the area was inspected thirty minutes prior to plaintiff's fall, and such evidence shifts the burden to the plaintiff to show that the substance was on the floor for a length of time sufficient for knowledge to be imputed to the defendant.<sup>32</sup> On the other hand, testimony that the floor is usually swept every hour is not sufficient to require the plaintiff to prove the amount of time the foreign substance had been present on the floor.<sup>33</sup>

## Conclusion

In *Robinson v. Kroger Co.*, the Supreme Court of Georgia picked up the slip and fall plaintiff, dusted him off, and elevated him to the same status as any other personal injury plaintiff. Slip and fall cases are no longer subject to summary adjudication on the issue of the plaintiff's exercise of ordinary care for his own safety. Furthermore, a claimant does not have to prove the amount of time the substance was on the floor unless the defendant business owner demonstrates that a reasonable inspection procedure was in place and followed on the day of the accident. With greater access to a jury, the slip and fall plaintiff's best days are yet to come.

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1. *Queen v. Kroger Co.*, 191 Ga. App. 249, 381 S.E.2d 413 (1989).
2. *Mazur v. Food Giant, Inc.*, 183 Ga. App. 453, 359 S.E.2d 178 (1987).
3. *Kitchens v. Restaurant Management Servs., Inc.*, 192 Ga. App. 313, 385 S.E.2d 11 (1989).
4. *Clemons v. Piggly Wiggly, Inc.*, 193 Ga. App. 309, 387 S.E.2d 600 (1989).
5. *Robinson v. Kroger Co.*, 268 Ga. 735, 493 S.E.2d 403 (1997).
6. *Alterman Foods, Inc. v. Ligon*, 246 Ga. 620, 272 S.E.2d 327 (1980).
7. *Id.* at 623, 272 S.E.2d at 330.
8. *Robinson*, 268 Ga. at 743, 493 S.E.2d at 410.
9. *Foodmax v. Terry*, 210 Ga. App. 511, 436 S.E.2d 725 (1993); *Bruno's, Inc. v. Pendley*, 215 Ga. App. 108, 449 S.E.2d 637 (1994); *Vermont Amer. Corp. v. Day*, 217 Ga. App. 65, 436 S.E.2d 618 (1995).
10. *Alterman Foods*, 246 Ga. at 623, 272 S.E.2d at 330.

11. *Robinson*, 268 Ga. at 735, 493 S.E.2d at 405.

12. *Id.* at 743, 493 S.E.2d at 410.

13. *Id.* at 740, 493 S.E.2d at 408.

14. *Id.* at 740-41, 493 S.E.2d at 409.

15. *Id.* at 748, 493 S.E.2d at 414.

16. *Id.*

17. *Id.*

18. *Id.* at 748-49, 493 S.E.2d at 414.

19. *Id.* at 748, 493 S.E.2d at 414.

20. *Kroger Co. v. Brooks*, 231 Ga. App. 650,

500 S.E.2d 391 (1998); *Watson v. Kroger Co.*, 231 Ga. App. 741, 500 S.E.2d 631 (1998); *Smith v. Toys 'R' Us, Inc.*, 233 Ga. App. 188, 504 S.E.2d 31 (1998).

21. *Robinson*, 268 Ga. at 748-49, 493 S.E.2d at 414.

22. *Newman v. Ruby Tuesday, Inc.*, 184 Ga. App. 827, 363 S.E.2d 26 (1987).

23. *Hardee's Food Sys., Inc. v. Green*, 232 Ga. App. 864, 502 S.E.2d 738 (1998).

24. "Constructive knowledge can only be inferred where there is evidence that an employee was in the immediate vicinity

of the dangerous condition *and* could have easily discovered and removed the hazard. The fact that Rodriguez admitted that the alleged dangerous substance was not visible precludes finding that the City's employee could have easily noticed and corrected it" *Id.* at 867, 502 S.E.2d at 741; *see also Haskins v. Piggly Wiggly S., Inc.*, 230 Ga. App. 350, 496 S.E.2d 471 (1998).

25. *Sharfuddin v. Drug Emporium, Inc.*, 230 Ga. App. 679, 498 S.E.2d 748 (1998).

26. "Although our Supreme Court in *Robinson v. Kroger Co.* modified the burden on the parties on the second prong of the elements of a foreign substance slip and fall case, the Supreme Court did not revise the contents of the first element nor modify the burden of proof on this element" *Id.* at 685, 498 S.E.2d at 753.

27. *Id.* at 684, 498 S.E.2d at 752.

28. *Id.*

29. *Straughter v. J. H. Harvey Co. Inc.*, 232 Ga. App. 29, 500 S.E.2d 353 (1998), *cert denied* (Ga. Sept 11, 1998).

30. *Id.* at 30, 500 S.E.2d at 355.

31. *Id.* at 31, 500 S.E.2d at 355.

32. *Hopkins v. Kmart Corp.*, 232 Ga. App. 515, 502 S.E.2d 476 (1998).

33. *Ingles Mkts., Inc. v. Martin*, 236 Ga. App. 810, 513 S.E.2d 536 (1999).