# LIABILITY FOR SLIP AND FALL CLAIMS IN THE POST ROBINSON V. KROGER COMPANY ERA (BEST DEFENSE PRACTICES FOR PROPERTY OWNERS AND INSURERS)

**By Craig R. White**

**SKEDSVOLD & WHITE, LLC.**
**1050 Crown Pointe Parkway**
**Suite 710**
**Atlanta, Georgia 30338**
**(770) 392-8610**
**FAX: (770) 392-8620**
**EMAIL: cwhite@skedsvoldandwhite.com**

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One of the more common causes of action brought against restaurant, store and property owners/occupiers involve customers slipping and falling on foreign substances or other conditions on their premises. Typically, these cases tend to be very fact intensive. Issues of whether the Plaintiff slipped/tripped on a static condition or foreign substance; whether the premises owner/occupier was aware of any alleged foreign substance on its premises and whether the Plaintiff was aware of any such alleged condition or foreign substance each need to be addressed by the trial court. Although a jury is necessary to resolve factual disputes, summary adjudication is appropriate where the premises owner/occupier is unaware of the condition that caused the Plaintiff's fall and/or where the clear and palpable evidence indicates that the Plaintiff had equal or greater knowledge of the presence of the alleged condition or foreign substance. Because of the factual complexity of many slip/trip and fall cases, proper training of employees, proper documentation and execution of inspection/cleaning procedures and accurate accident reporting by a property owner/occupier and its insurer can greatly assist counsel in successfully defending against a premises liability case.

**GROUNDS FOR PREMISES OWNER/OCCUPIER LIABILITY**

Slip and falls (like all other premises liability cases) are governed by the Supreme Court's holding in Alterman Foods, Inc. v. Ligon, 246 Ga. 620, 272 S.E.2d 327 (1980). In that decision, the Georgia Supreme Court set forth two prerequisites that must be satisfied before a Plaintiff can recover on a premise liability/slip and fall theory of recovery. These requirements are (1) that the premises owner/occupier violated its duty to exercise ordinary reasonable care for the safety of its invitees by knowingly allowing a dangerous condition to exist on its premises, and (2) that the

Plaintiff/Customer was without equal or greater knowledge of the alleged dangerous condition on the property owner/occupier's premises or for some reason attributable to it was prevented from discovering same. Alterman Foods, Inc. v. Ligon, 246 Ga. 620, 272 S.E.2d 327 (1980). Should the Plaintiff fail to satisfy both of these requirements, he/she cannot recover.

The first prong of the Alterman Foods test is satisfied if the Plaintiff can establish that the premises owner/occupier had actual or constructive knowledge of the presence of a dangerous condition on its premises. Actual knowledge is established if the Defendant premises owner/ occupier admits or otherwise reveals that it had knowledge of the presence of a dangerous condition on its premises before the Plaintiff fell. Since a premises owner/occupier rarely admits that it had knowledge that a dangerous substance was on its premises, the Plaintiff will often have to prove that the premises owner/occupier had constructive knowledge of the alleged hazard in question. Constructive knowledge can be established by one of two methods. The Plaintiff must prove that a premises owner/occupier or one of its employees was in the vicinity of the alleged dangerous condition prior to the Plaintiff's fall and could have seen and removed it. See Blake v. Kroger Co., 224 Ga. App. 140, 480 S.E.2d 199 (1996). See also Sharfuddin v. Drug Emporium, Inc., 230 Ga. App. 679, 498 S.E.2d 748 (1998). In the alternative, the Plaintiff must prove that the premises owner/occupier allowed the dangerous condition (which allegedly caused the Plaintiff to slip and fall) to remain on its floor for such an unreasonable length of time that notice is legally imputed to it. Queen v. Kroger Co., 191 Ga. App. 249, 381 S.E.2d 413 (1989). See also Piggly Wiggly Southern, Inc. v. Brown, 219 Ga. App. 614, 468 S.E.2d 387 (1995). If the Plaintiff is unable to establish either actual or constructive knowledge on his/her part regarding the dangerous condition at issue, he/she cannot recover. It is on the issue of constructive knowledge that a premises

owner/occupier, its employees, and its insurer can best assist their defense counsel in defending a slip and fall claim. Winn-Dixie Stores, Inc. v. Hardy, 138 Ga. App. 342, 344, 226 S.E.2d 142 (1976).

In several decisions, Georgia appellate courts have held that if a premises owner/occupier proves that it maintained a policy (preferably written) of properly inspecting and removing potentially hazardous conditions on its premises, that said policy was actually carried out by the premises owner/occupier or its employees; and that in fact these inspections in question were carried out in reasonable time intervals before the Plaintiff's fall, said premises owner/occupier will not be deemed to have constructive knowledge of an alleged hazard on its floor. See J.H. Harvey Co. v. Johnson, 211 Ga. App. 809, 440 S.E.2d 548 (1994); Mallory v. Piggly Wiggly Southern, Inc., 200 Ga. App. 428, 408 S.E.2d 443 (1991). Should the Plaintiff be unable to prove that the Defendant premises owner/occupier had constructive knowledge of the alleged hazard on its premises, it would be entitled to summary judgment in its favor.

Although the issue of what constitutes a reasonable period of time between each inspection is often a jury question, the Georgia appellate courts have established a "bright line" standard for determining what is considered reasonable timely inspections by a premises owner/occupier. To date, Georgia appellate courts have held that inspecting premises every fifteen (15) minutes is reasonable. Mazur v. Food Giant, Inc., 183 Ga. App. 453, 454, 359 S.E.2d 178 (1987). If the Defendant premises owner/occupier can establish that it inspected its premises within fifteen minutes prior to the Plaintiff's fall and did not have actual knowledge of the presence of the condition that caused Plaintiff's fall, it will not be deemed to have constructive knowledge of it. In such circumstances, the premises owner/occupier should prevail on a motion for summary judgment.

See Winn Dixie Atlanta, Inc. v. Bianco, 204 Ga. App. 292, 418 S.E.2d 819 (1992); FoodMax of Georgia, Inc. v. Terry, 210 Ga. App. 511, 436 S.E.2d 725 (1993).

## EVENING UP THE PLAYING FIELD - THE EFFECT OF ROBINSON V. KROGER, CO.

In 1997, the Supreme Court issued a watershed opinion in Robinson v. Kroger Co., 268 Ga. 735, 493 S.E.2d 403 (1997). The Supreme Court's holding in Robinson drastically changed the manner in which premises liability cases are litigated. It essentially eliminated entry of summary judgment in slip and fall cases based on Plaintiff's failure to establish the second prong of the Alterman Foods, Inc. v. Ligon test. *Supra*. Before the Court issued its opinion in Robinson v. Kroger Co., summary judgement was frequently granted in cases where a Plaintiff admitted that he could have seen a hazard had he looked for it. Essentially, the Court would enter summary judgment based on the Plaintiff's failure to satisfy the second prong of the Alterman Foods, Inc. test.

Under the Georgia Supreme Court's holding in Alterman Foods, Inc. v. Ligon, a premises owner/occupier could also prevail on a motion for summary judgment by showing that the Plaintiff invitee had at least equal knowledge of the hazard/foreign substance on its premises. In subsequent decisions, Georgia's appellate courts further defined what constitutes equal knowledge of a hazard/foreign substance by a plaintiff invitee. Under these decisions, the Plaintiff was deemed to have equal knowledge of a hazard where he actually sees the hazard and voluntarily encounters it. Under these circumstances, the Plaintiff is deemed to have assumed a known risk and summary judgment is entered against him. In addition, the Courts held that a Plaintiff is deemed to have equal knowledge of a potential hazard if he/she could have been aware of it through the exercise of ordinary, reasonable care. The Plaintiff must use all of their senses to locate and avoid hazards in his path. This theory is analogous to the "constructive knowledge" theory applied to premises

owners/occupiers described above.

Prior to the Robinson decision, defense counsel would elicit an admission from the Plaintiff that she could have seen and avoided the foreign substance in question had she been looking for it. If defense counsel could elicit such an admission from the Plaintiff, then she was deemed, as a matter of law, to have equal knowledge of the hazard in question as did the premises owner/occupier. It was tantamount to Plaintiff admitting that she was contributorily negligent in not using her senses in a reasonable manner to discover alleged hazards around her. In such cases, the Courts frequently found that the Plaintiff failed to satisfy the second prong of the Alterman Foods test and entered summary judgment against her. It was this method of attacking Plaintiff's case, and the ensuing frequent dismissal of slip and fall case, that the Georgia Supreme Court intended to address in Robinson v. Kroger Company.

In that case, Ms. Robinson fell on a liquid located in one of the store's aisles. Ms. Robinson did not see the substance in question because her view of the floor was partially obstructed by a nearby display. Nevertheless, the trial court granted summary judgment to Kroger because Ms. Robinson admitted that she did not look around the display in question to see if it was safe to place her foot on the other side. Had she done so, she would have seen the foreign substance and avoided stepping on it. The trial court's granting of Defendant's motion for summary judgment was appealed to the Court of Appeals which affirmed it. That court held that an invitee must not only look at the floor in front of her must also move to a position where she can see around obstacles before placing her feet in a potentially hazardous location.

The Supreme Court in Robinson found that the burden placed on Plaintiffs in slip-and-fall cases was much too onerous. The Court held that a Defendant is no longer entitled to summary

judgment based on whether the Plaintiff/Customer failed to exercise ordinary care for her own safety by not looking where she is going. The Court found that it was untenable to expect an invitee to pay close attention to every step made in a premises owner/occupier's premises where the expectation remains that it is maintaining a safe environment for its customers. The Court concluded by stating that the issue of whether the plaintiff exercises ordinary care for her own safety is not susceptible to summary adjudication and must be determined by a jury.

Similarly, the Court further held that whether an invitee's attention was diverted by a distraction created by the premises owner/occupier is an issue to be determined by a jury as well. Under Robinson, the issue is now whether the distraction in question is of such a nature that the Defendant might have anticipated that it would divert an invitee's attention, such as the conduct of a store employee, the premises construction or configuration, or a merchandise display, and whether the "diversion" was of such a nature that its presence would not have been anticipated by an invitee Plaintiff. This interpretation of the distraction doctrine by the Georgia Supreme Court eliminates the possibility of summary judgment on this issue. Essentially, if the Plaintiff alleges that she was distracted by some item on the premises owner/occupier's premises, a jury must determine whether this alleged distraction is enough to excuse the Plaintiff's failure to exercise ordinary care by not looking where she was going.

In practical effect, the Supreme Court revised the burden of proof of both parties with regards to summary judgment in a slip-and-fall action. Following Alterman Foods, Inc. v. Ligon, a Defendant premises owner/occupier did not have to provide any affirmative evidence which negated the plaintiff's theory of recovery. The Defendant could simply argue there was a deficiency in the Plaintiff's evidence which did not satisfy both prongs of the Alterman Foods test. In other

words, Plaintiff not only had to prove that the Defendant had knowledge of a hazardous condition, but also that the Plaintiff did not have such knowledge. In Robinson, the Supreme Court held that the Defendant premises owner/occupier has the initial burden of producing evidence which shows the Plaintiff's negligence in order to negate the second prong of the Alterman Foods test. In other words, the burden of proof is not on the Plaintiff to produce evidence showing that he or she was not negligent. Instead, the Defendant must present evidence raising the issue that the Plaintiff may have been contributorily negligent before the Plaintiff would have to provide any sort of rebuttal. However, that only applies to defenses based on the second prong of the Alterman Foods, Inc. test.

The effect of these changes in the law is that defenses based on the Plaintiff's failure to exercise ordinary care are not subject to summary adjudication. They must be tried before a jury. However, the Supreme Court's holding in Robinson v. Kroger Company does not affect summary judgment based on Plaintiff's failure to establish the first prong of the Alterman Foods, Inc. test. A Defendant premises owner/occupier is still entitled to summary judgment if the Plaintiff cannot establish that it had actual or constructive knowledge of the alleged hazard in question before the Plaintiff fell. This is especially true where the Plaintiff is unable to state what caused her to fall. See Sharfuddin v. Drug Emporium, Inc., 230 Ga. App. 679, 498 S.E.2d 748, (1998). In any event the burden of proof remains on the Plaintiff to establish that the premises owner/occupier had actual or constructive knowledge of an alleged hazard before he/she can recover. Lau's Corp. v. Haskins, 261 Ga. 491, 405 S.E.2d 474 (1991).

In Sharfuddin v. Drug Emporium, Inc., the Court concluded that Robinson v. Kroger does not apply to Motions for Summary Judgement based on the first prong of the Alterman Foods, Inc. v. Ligon test. Sharfuddin v. Drug Emporium, Inc., 230 Ga. App. 679, 498 S.E.2d 748, (1998). See

also Alterman Foods, Inc. v. Ligon, 246 Ga. 620, 272 S.E.2d 327 (1991) and Robinson v. Kroger Company, 268 Ga. 735, 493 S.E.2d 403 (1997). Although Robinson mandates that summary judgment based on whether an invitee saw or should have seen the hazard is inappropriate, summary judgment can be entered if the Plaintiff cannot present any evidence indicating that the Defendant premises owner/occupier had actual or constructive knowledge of the defect which caused the Plaintiff's fall.

In Sharfuddin, Plaintiff brought suit against Drug Emporium alleging that she slipped on water sprinkled on the floor and fell. Although Ms. Sharfuddin alleged in her complaint that Drug Emporium had constructive knowledge that the water was present on its floor, she could not present any evidence supporting her contentions. In her deposition, Ms. Sharfuddin conceded not only that Drug Emporium did not have actual knowledge of water on its floor but also that no Drug Emporium employee either saw the fall, was cleaning in the area, or was in a position to see and remove the water in question. In conceding these facts, the Defendant failed to provide any evidence that Drug Emporium had notice that water was on its floor. As such, she failed to satisfy the first prong of the Alterman Foods, Inc. v. Ligon test.

In its opinion, the Court of Appeals adopted the Supreme Court's holding in Lau's Corp. v. Haskins and confirmed that a premises owner/occupier does not have to prove it did not have constructive knowledge of the hazard allegedly on its floor to be entitled to summary judgment. Lau's Corp. v. Haskins, 261 Ga. 491, 405 S.E.2d 474 (1991). To do otherwise would be an impermissible shifting of the burden of proof to the Defendant which it would not have to carry at trial. The burden remains with the Plaintiff to establish Defendant had knowledge of a hazard on its premises and not for the Defendant to disprove it. Therefore, Defendant premises owner/

occupiers no longer have to prove they had a reasonable inspection program in operation at the time of the Plaintiff's fall in order to prevail on summary judgment. They only have to point to an absence of evidence on any essential element of Plaintiff's case.

The Sharfuddin decision is important because it reaffirms that premises owners/occupiers are entitled to summary judgment if the Plaintiff cannot prove they had knowledge of an alleged hazard on their premises. Since, lack of knowledge of an alleged hazard by premises owners/ occupiers' knowledge is virtually the only way that summary judgment will be entered in premises liability cases, it is especially important that stores are inspected every fifteen minutes or less to locate and remove potential hazards. In addition, Sharfuddin is important because reiterates the Supreme Court's holding in Lau's Corp v. Haskins that the burden of proof on summary judgment motions remain on the Plaintiff. Defendant premises owners/occupiers are not required to prove that they had proper inspection procedures in place, it remains the Plaintiff's burden to disprove it.

Although the Court's holding in Robinson v. Kroger Co. has been readily felt in slip and fall cases involving foreign substances, it is still not clear what impact it may have on falls involving static conditions. "Static Conditions" are defined by the Georgia Court of Appeals as follows:

> [A] static defect [is] one which in and of itself is not dangerous. Certainly where there is common knowledge of a break in pavement, the defect standing alone is not dangerous or likely to cause injury until such time as one drives into it or falls into it.

See Emory University, Inc. v. Duncan, 182 Ga. App. 326, 327, 355 S.E.2d 446, 448 (1987)(original brackets). Typically, static condition cases involve falls where the Plaintiff tripped over a step or similar structural component of building or ramp. In static condition cases, defense counsel now commonly rely on the "Open and Obvious" and "Prior Encounter" doctrines as a basis for seeking summary judgment. The "Open and Obvious" doctrine states that the premises owner/occupier is

not required to warn others of open and obvious conditions on its premises. As held by the Court of Appeals in Crenshaw v. Hogan:

> It is common knowledge that small cracks, holes, and uneven spots often develop in pavement; and it has been held that where there is nothing to obstruct or interfere with one's ability to see such a "static" defect, the owner or occupier of the premises is justified in assuming that a visitor will see it and realize the risk involved.

See Crenshaw v. Hogan, 203 Ga. App. 104, 416 S.E.2d 147 (1992). Clearly, this doctrine is based on whether and to what extent that the Plaintiff should have seen and avoided the "static condition" in question. One concern is that since the "Open and Obvious" doctrine is based, at least in part, on Plaintiff's own lack of diligence, Georgia appellate courts will hold (based on the Supreme Court's holding in Robinson v. Kroger, Co.), that summary judgment cannot be granted on that ground. Instead, the validity of an "Open and Obvious" defense may be left for a jury to decide. Future opinions will determine what impact Robinson v. Kroger Co. may have on this doctrine.

Another defense to falls involving a static condition is the "Prior Encounter" Doctrine. This defense is applicable where a Plaintiff trips and falls over a static condition after previously encountering it. This is similar to an assumption of risk defense in that the Plaintiff is penalized for having again encountered a static condition after previously encountering it. The Plaintiff is essentially presumed to have had knowledge of the static condition before he/she tripped over it. See Lea v. American Home Equities, Inc., 210 Ga. App. 214, 435 S.E.2d 734 (1993). See Trans-Vaughn Development Corp. v. Cumming, 273 Ga. App. 505, 508, 615 S.E.2d 579, 582 (2005). Unlike the Open and Obvious Doctrine, the Prior Encounter Doctrine relies on the fact that the Plaintiff had actual knowledge of a condition by previously encountering or traversing over it. In other words, a Plaintiff is deemed to have knowledge of a staircase if he or she has previously climbed it. Since the Plaintiff had actual knowledge of the static condition in question, he cannot

show that the premises owner/occupier had greater knowledge of it. Remember, if both parties are aware of an alleged hazardous condition, Plaintiff is barred from recovery.

## SUGGESTED PROCEDURES FOR LIMITING EXPOSURE

In order for a premises owner/occupier to best protect itself against slip-and-fall claims and to best assist defense counsel in preparing a motion for summary judgment, the following procedures are recommended. Initially, the premises owner/occupier should promulgate a policy of inspecting its premises every fifteen (15) minutes to locate and remove hazards which may have accumulated there. In addition, the premises owner/occupier should prepare and maintain a schedule for its employees to follow to inspect its premises. As each employee inspects the defendant's premises at his/her appointed time, this information should be properly recorded in anticipation of future litigation and to document that the inspection was carried out as required by the policy. Information regarding the date and time of inspection, area of the premises inspected, the employee performing the inspection, and the number and nature of any hazards found and removed should be duly noted. By doing so, a premises owner/occupier can greatly assist defense counsel in establishing that appropriate procedures were in place for inspecting its premises; that it's employees inspected the store premises according to its own policies; and that the last inspection was performed within fifteen (15) minutes before the plaintiff's alleged fall. If the premises owner/occupier is able to establish that it has satisfied these elements, then the plaintiff will be unable to show constructive notice on the part of the premises owner/occupier. In such circumstances, the Plaintiff will be unable to prove the first element of the Alterman Foods, Inc. test and cannot recover. I.E. The premises owner/occupier did not have greater knowledge of the alleged hazardous condition than did the Plaintiff.

It should be noted, that the foregoing procedures are really only applicable in cases where the Plaintiff alleges that he/she slipped on a hazard which was not created by a premises owner/occupier's employee. In cases where an invitee slips and falls on a floor that was mopped or waxed by the employee, the most effective method of defeating the Plaintiff's case is to establish that he/she had or should have had equal of greater knowledge of the hazard in question as did the premises owner/occupier. In other words, the Defendant premises owner/occupier must establish that the Plaintiff had actual, equal knowledge of the hazard in questions or should have known of it through the exercise of ordinary care. This represents a defense based on the second prong of the Alterman Foods, Inc. v. Ligon test. If the premises owner/occupier can establish that the Plaintiff had equal or greater knowledge of the same hazard in question, Plaintiff cannot recover. See Moore v. Kroger Company, 221 Ga. App. 520, 471 S.E.2d 916 (1996). However, in light of the Court's holding in Robinson v. Kroger Company (see above), whether the Plaintiff knew or should have known of the presence of a foreign substance on the premises is often not subject to summary adjudication.

In cases where an alleged hazard was created or known by the premises owner/occupier, it is best to establish that the Plaintiff knew or should have known that said hazard was present. Such knowledge can be established by showing that the premises owner/occupier's employees warned the customers about the hazard in question through signs or similar items. Remember, in order for the Plaintiff to recover in a premises liability case. it must not only establish that the owner/occupier had knowledge of the presence of an alleged hazard on its premises but also that the Plaintiff did not have equal or greater knowledge of said condition.

A premises owner/occupier and its employees can assist their attorneys in this respect by

placing large wet floor signs or other indicators indicating that a potential hazard (such as a freshly mopped or waxed floor) is present nearby. See Palermo v. Winn-Dixie Atlanta, Inc., 221 Ga. App. 532, 472 S.E.2d 85 (1996). These signs need to be of such size that it would be highly unlikely for a customer not to see the signs if he/she looked for them. Another alternative is to set up barriers around the condition in question so as to prevent access to it. In addition, the premises owner/occupier can avoid many premises liability by mopping and waxing floors after or before business hours.

In addition to substantive procedures designed to inspect its premises and to provide potential plaintiffs with notice of a dangerous condition, other procedures are helpful in assisting counsel in defending against premises liability claims. Immediately after a customer is allegedly injured on its premises, the owner/occupier's employees need to prepare an accident report. This report needs to be prepared as close to the time of the accident as possible so as to procure and preserve the most extensive and accurate information possible. Such an accident report should reflect the names, addresses, and telephone numbers of any witnesses to the accident; the name of the allegedly injured customer; indicate the areas of the customer's body which were allegedly injured in the accident; the substance or hazard which allegedly injured the Plaintiff; and whether any employees were in the vicinity of the accident when it occurred. This information is very helpful to defense attorneys investigating the claim and interviewing witnesses. One thing that is especially critical to defending slip-and-fall cases is information regarding the texture and color of the substance which caused the customer to fall; the size of the area covered by the substance in question; and whether there were any signs warning the to the customer of the hazard (i.e. wet floor signs). It is also important to note whether the substance in question was opaque, translucent, or

transparent. See Hornbuckle Wholesale Florist of Macon v. Castellaw, 223 Ga. App. 198, 477 S.E.2d 348 (1997); Dill's Food City, Inc. v. Johnson, 219 Ga. App. 654, 466 S.E.2d 250 (1995).

In addition, premises owners/occupiers should photograph the accident scene before the hazard that allegedly caused the customer's injury is removed. These photographs allow defense attorneys to evaluate whether the hazard in question could have been easily seen by the customer before he/she encountered it. Such photographs are invaluable in illustrating for a jury how the accident occurred and describing the condition that allegedly caused Plaintiff to fall. They can often then make their own determination as to whether the alleged condition in question should have been detected by the Plaintiff before he/she fell. The photographs can also serve as a basis for filing a motion for summary judgment and are invaluable in illustrating for the jury .

Finally, it is very important to have every witness who observed or has information regarding the accident to prepare a narrative of their version of the events surrounding it. This information is very helpful to defending attorneys in selecting witnesses for trial and preparing affidavits which may be used to support a motion for summary judgment.

Although, the Supreme Court's holding in Robinson v. Kroger Company dramatically changed premises liability law in Georgia, premises owners/occupiers can limit their exposure to such claims though the use of proper inspection procedures, documentation of inspections and appropriate post-accident documentation and investigation. Use of the above-enumerated procedures should enable a premises owner/occupier to reduce or minimize its defense costs and hopefully avoid trial through judicious application of Motions for Summary Judgment.