

**WINNING SUMMARY JUDGMENT IN  
GEORGIA SLIP AND FALL CASES**

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## INTRODUCTION

Last year marked the tenth anniversary of Robinson v. Kroger Co., 268 Ga. 735, 493 S.E.2d 403 (1997), in which the Georgia Supreme Court noted that the “pendulum” of slip and fall case law had swung decidedly too far in favor of defendants moving for summary judgment. The Court not only shifted the burden of proof in favor of plaintiffs, the Court stated that “routine” issues in slip and fall cases “are generally not susceptible of summary adjudication” and “summary judgment is granted only when the evidence is plain, palpable, and undisputed.” Id., 268 Ga. at 748. Despite these dire pronouncements, summary judgment remains alive and well.

The facts and holding of Robinson are simple enough. While shopping at the defendant’s grocery store, the plaintiff slipped on a “foreign substance,” fell to the floor, and injured her knee. The plaintiff admitted that, prior to her fall, she did not look at the precise spot on the floor before she stepped on the foreign substance. The Georgia Supreme Court reversed the grant of summary judgment in favor of the defendant.

We hold that an invitee’s failure to exercise ordinary care is not established as a matter of law by the invitee’s admission that he did not look at the site on which he placed his foot or that he could have seen the hazard had he visually examined the floor before taking the step which led to his downfall.

Id. at 748. The Court modified Alterman Foods v. Ligon, 246 Ga. 620, 272 S.E.2d 327 (1980), by reallocating the burden of proof in a motion for summary judgment. The Robinson Court held that a plaintiff has the burden to show evidence disproving the plaintiff’s own negligence “only after it has been established or assumed the defendant had actual or constructive knowledge of the hazard, and the defendant presents evidence that the plaintiff’s injuries were proximately caused by either the plaintiff’s voluntary negligence . . . or by the plaintiff’s casual negligence.” Robinson, 268 Ga. at 748.

Although the Court shifted the burden of proof as to plaintiff's own negligence, the plaintiff's prima facie case remains the same:

[W]e reaffirm that, in order to recover from injuries sustained in a slip and fall action, an invitee must 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 with 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 self to a hazard of which the plaintiff knew or, in the exercise of ordinary care, should have known.

Id. at 749.

Thus, Robinson merely shifted the focus from the plaintiff's exercise of ordinary care to both parties' knowledge of the hazard. Defendants can still successfully move for summary judgment by showing an absence of evidence of the defendant's knowledge of the hazard or evidence which shows the plaintiff had equal knowledge.

As with any summary judgment motion, the court in a slip and fall case will view the evidence in the light most favorable to the nonmovant and determine whether there is any genuine issue of material fact. See, e.g., Ford v. Bank of Am. Corp., 277 Ga. App. 708, 627 S.E.2d 376 (2006). The appellate courts conduct a de novo review of the law and the evidence when reviewing the grant or denial of a motion of summary judgment. Id.

This paper will review slip and fall decisions rendered by Georgia courts within the last two years. Part I of the paper will examine the preliminary issues of the plaintiff's status and the nature of the hazardous condition. Then, utilizing the courts' framework of the two-prong test for liability, part II will analyze cases focusing on the defendant's and plaintiff's knowledge of the hazard. Finally, part III will discuss cases dealing with the issue of the plaintiff's exercise of ordinary care.

**I. FIRST THINGS FIRST: WHAT IS PLAINTIFF'S STATUS, AND IS THERE A HAZARD?**

**A. Plaintiff's Status**

In the majority of slip and fall cases, the plaintiff is deemed an invitee. An invitee, for example, may be a business customer or employee. The duty owed to an invitee is found in the Code:

Where an owner or occupier of land, by express or implied invitation, induces or leads others to come upon his premises for any lawful purpose, he is liable in damages to such person for injuries caused by his failure to exercise ordinary care in keeping his the premises and approaches safe.

O.C.G.A. § 51-3-1.

The duty owed to a licensee, however, is potentially more favorable to the defendant. A licensee is “neither a customer, a servant, nor a trespasser,” has no contractual relationship with the owner, and is “permitted, expressly or impliedly, to go on the premises merely for his own interest, convenience, or gratification.” O.C.G.A. § 51-3-2 (a). “The owner of the premises is liable to a licensee only for wilful or wanton injury.” O.C.G.A. § 51-3-2 (b).

At least two recent decisions dealt with the property owner's duty to licensees. In Behforouz v. Vakil, 281 Ga. App. 603, 636 S.E.2d 674 (2006), the defendant's own daughter sued her for injuries after slipping on a rug in the defendant's home. The plaintiff was in the defendant's home to pick up her son who had been left there after school. The Court first determined whether the plaintiff was an invitee or a licensee. The Court concluded the plaintiff was “a mere social guest in her parents' home” because she was “picking up her son for her own convenience and gratification.” Behforouz, 281 Ga. App. at 604. Although the plaintiff had dropped off some medicine for her father prior to slipping on the rug, this “incidental service” did not change her status from licensee to invitee. Id., n.2. Thus, “absent any

evidence showing that [the defendant] acted wilfully or wantonly to injure [the plaintiff], the trial court properly granted summary judgment to [the defendant].” Id. The Court noted an important distinction in a landowner’s duty to a licensee: it is one of ordinary care when the licensee’s presence is known to the owner, except when the hazard is “a mere dangerous static condition,” and in such case the duty owed is, again, to refrain from wilfully or wantonly injuring the licensee. Id., n.1.

In Ellis v. Hadnott, 282 Ga. App. 584, 639 S.E.2d 559 (2006), the plaintiff was the defendant’s house guest. Walking through the dark house early one morning, the plaintiff turned on a light and immediately tripped over either a broom handle, tools on the floor, or the corner of a couch. The Court of Appeals explained that the “statutory liability for wilful or wanton injury to licensees means that the landowner or occupier of the premises owes a duty to a licensee only to avoid knowingly letting him run upon a hidden peril or wilfully causing him harm.” Ellis, 282 Ga. App. at 585 (punctuation and citations omitted). When the owner knows of the licensee’s presence, “it is usually wilful or wanton not to exercise ordinary care to prevent injuring a person who is actually known to be, or may reasonably be expected to be, within the range of a dangerous act being done or a hidden peril.” Id. (punctuation and citations omitted). The Court affirmed the grant of summary judgment in favor of the defendant. The Court held that the items the plaintiff tripped over were plainly visible and not “a dangerous act being done.” Having failed to show the injury was wilful or wanton, therefore, the plaintiff could not prove a breach of the duty owed to him as a licensee, and the defendant was entitled to summary judgment. Id. at 586.

## **B. Is There a Hazard?**

The defendant may defeat the plaintiff's claim in a motion for summary judgment without even reaching the issue of the defendant's superior knowledge of the hazardous condition. The hazard itself may be challenged first. "The threshold issue is whether there is any evidence of a condition that would subject an invitee to an unreasonable risk of injury." Gibson v. Symbion, Inc., 277 Ga. App. 721, 722, 627 S.E.2d 84 (2006). "Proof of an injury, without more, is not enough to establish a proprietor's liability. . . . Without first establishing that a dangerous condition existed, the plaintiff cannot establish that the defendant knew about the danger and therefore cannot recover." Ford v. Bank of Am. Corp., 277 Ga. App. 708, 709, 627 S.E.2d 376 (2006). Several recent cases address this issue.

### 1. Ramps, Bathtubs, and Chairs

In Gibson, supra, the plaintiff fell where the defendant's handicap ramp led from the sidewalk to the parking lot. She claimed that she could not see the slope and that her foot went out from under her. The trial court granted the defendant's motion for summary judgment, and the Court of Appeals affirmed. The Court held that the plaintiff had failed to produce any evidence on the threshold question of whether there existed a hazardous condition. "Here, the record is devoid of any evidence to show that the handicap ramp was improperly designed or constructed," and, therefore, "this is one of those cases where the evidence is plain, palpable, and undisputed, entitling [the defendant] to summary judgment." Gibson, 277 Ga. App. at 722.

In Billings v. Starwood Realty, 2006 U.S. Dist. LEXIS 65182 (N.D. Ga. Sept. 13, 2006), the U.S. District Court for the Northern District of Georgia considered the case of a plaintiff who injured herself after slipping in a hotel bathtub. Moving for summary judgment, the defendant hotel argued that there was no evidence that a hazardous condition existed in the

room in question and that, even if a hazard existed, the defendant lacked superior knowledge of it. The plaintiff argued that the defendant's failure to place a mat or other nonslip device in the tub created the hazardous condition. The Court rejected this argument because the plaintiff failed to produce any competent evidence of an industry standard requiring hotels to install nonslip strips or mats in hotel bathtubs. The Court agreed with the defendant that "all bathtubs are slippery to some degree." The plaintiff's opinion that the bathtub was "unreasonably slippery or dangerous" was unsupported by the evidence, and, therefore, the defendant was entitled to summary judgment. Id.

In Ford, supra, the plaintiff was a customer of the defendant bank and was injured when she backed up to a chair with wheels and fell when the chair went out from under her. Although the plaintiff could not state whether she knew the chair had wheels, she admitted she had sat in the chairs before and that nothing had obstructed her view of the chair wheels prior to the accident. The plaintiff also had no evidence that the chair was defective. The plaintiff argued "a chair with wheels on a slick, tile floor can certainly be a dangerous condition." The Court, however, rejected this argument: "[M]erely stating that a condition is dangerous does not constitute evidence that it is so." 277 Ga. App. at 709.

## 2. Natural Accumulations

The alleged hazardous condition is often a natural substance such as ice or leaves. Two recent cases explored the issue of such "natural accumulations" as hazardous conditions. The plaintiff prevailed in one, and the defendant in the other.

In Augusta Country Club, Inc. v. Blake, 280 Ga. App. 650, 634 S.E.2d 812 (2006), one issue was whether the defendant owner had a legal duty to remove magnolia seed pods which had fallen on a patio and walkway. Although this case went to verdict, the Court of Appeals

applied the principles of Robinson v. Kroger, *supra*, in affirming the denial of the defendant's motion for directed verdict. The plaintiff had noticed the seed pods as she walked across the patio, but as she descended two steps to the walkway, she did not see a seedpod lying at the base of the second step because it was obscured by the step's lip. The plaintiff's foot rolled over the seed pod, causing her to fall and seriously injure herself. The Court held that the defendant owed a duty to remove the magnolia seed pods from the walkway. "[T]he accumulation of a naturally occurring condition does not negate an owner's duty to exercise ordinary care in inspecting the premises in every circumstance. . . . Thus, the primary question here was whether in light of the circumstances, the [defendant] was negligent in failing to take remedial action to remove accumulated seed pods." Augusta County Club, 280 Ga. App. at 655–56 (punctuation and citations omitted). Because the defendant was aware of the seed pods and considered them a "huge maintenance problem," there was evidence supporting the jury's finding of negligence.

The defendant fared better in Leibel v. Sandy Springs Historic Community Found., Inc., 281 Ga. App. 390, 636 S.E.2d 27 (2006). In this case, the issue was whether fallen sweetgum balls constituted a hazard. The plaintiff attended a concert at the defendant's property. She parked her car on the side of the driveway beside a grassy hill which had sweetgum and other trees on it. Returning to her car, the plaintiff slipped on a sweetgum ball in the grass and injured herself when she fell to the ground. Affirming summary judgment in favor of the defendant, the Court of Appeals reviewed two lines of cases involving natural substances alleged to be hazards. In one line of cases, the courts have held that when the accumulation of water on rainy days, leaves in fall, or ice in winter "is naturally occurring and not attributable to any affirmative action on the proprietor's part, the proprietor has no affirmative duty to

discover and remove it in the absence of evidence that it had become an obvious hazard by means other than natural accumulation.” Leibel, 281 Ga. App. at 392 (punctuation and citations omitted). In the other line of cases, the courts have held that the accumulation of naturally occurring substances does not negate the property owner’s duty to exercise ordinary care in inspecting and in taking remedial action. Distinguishing Augusta County Club, *supra*, the Leibel Court held that the accumulation of sweetgum balls had not become a maintenance problem, and there was no evidence that the sweetgum balls had accumulated to the point that a reasonable inspection would have revealed a hazardous condition. The defendant, therefore, had no duty to remove sweetgum balls from the side of the road.

3. Plaintiff Must Identify the Hazard

No hazard exists until the plaintiff is able to identify the cause of the fall. If the plaintiff can only speculate, the defendant is entitled to summary judgment. Grinold v. Farist, 284 Ga. App. 120, 643 S.E.2d 253 (2007). In this case, the plaintiff was invited onto property adjacent to the defendant’s property to look at the defendant’s camper which was for sale. The plaintiff slipped and fell in the grass beside the driveway as he was leaving. He admitted in his deposition that he did not know what caused him to fall, “only that it was ‘something wet.’” Plaintiff also saw no substance on the ground either before or after his accident. The Court of Appeals affirmed the grant of summary judgment in favor of the defendant. Citing Christopher v. Donna’s Country Store, 236 Ga. App. 219, 511 S.E.2d 579 (1999), the Court held that the plaintiff’s speculation as to the cause of the slip and fall was insufficient to support his claim.

## **II. KNOWLEDGE IS POWER: THE KEY TO LIABILITY**

In cases where the hazard itself is established, the plaintiff must show that the defendant had superior knowledge of the hazard. The defendant may prevail on a motion for summary judgment by showing a lack of evidence as to its own knowledge of the hazard or by showing evidence of plaintiff's equal knowledge. In Norman v. Jones Lang LaSalle Americas, Inc., 277 Ga. App. 621, 627 S.E.2d 382 (2006), the Court of Appeals succinctly stated this rule:

Because a plaintiff cannot recover in a premises liability suit unless the defendant has superior knowledge of the hazard, the defendant is entitled to summary judgment if there is no evidence that it had superior knowledge or the undisputed evidence demonstrates that the plaintiff's knowledge of the hazard was equal to or greater than that of the defendant.

Norman, 277 Ga. App. at 624.

### **A. Defendant's Knowledge of the Hazard**

The plaintiff must show that the defendant had actual or constructive knowledge of the hazard and that the defendant's knowledge was superior to his own. In recent cases, the courts consistently applied the test for constructive knowledge. In Prescott v. Colonial Properties Trust, Inc., 283 Ga. App. 753, 642 S.E.2d 425 (2007), the Court of Appeals set out the complete test for constructive knowledge:

"Constructive knowledge can be established in one of two ways: (1) by evidence that employees were in the immediate vicinity and easily could have noticed and removed the hazard, or (2) by evidence that the substance had been on the floor for such a 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 its premises."

Prescott, 283 Ga. App. at 755 (quoting Hardee's Food Systems v. Green, 232 Ga. App. 864, 866, 502 S.E.2d 738 (1998)).

In Prescott, the plaintiff was injured after slipping on a wet substance in the common area of the defendant's mall. Reversing the grant of summary judgment in favor of the defendant, the Court of Appeals noted the rule that, until the defendant has established compliance with a reasonable inspection procedure, the plaintiff is not required to show the length of time the foreign substance was on the floor. Here, there was no evidence of either an inspection procedure or an inspection. Thus, the defendant was deemed to have constructive knowledge of the hazard and was not entitled to summary judgment.

In Augusta Country Club, Inc. v. Blake, 280 Ga. App. 650, 634 S.E.2d 812 (2006), the Court noted that a defendant has constructive knowledge of the hazard when it remains on the floor or ground long enough to be discovered and removed had the owner exercised reasonable care in conducting an inspection, and "constructive knowledge may be inferred when there is evidence that the owner lacked a reasonable inspection procedure." Augusta Country Club, 280 Ga. App. at 653. Constructive knowledge may also be inferred even when the owner has a reasonable inspection procedure in place but fails to follow the procedure. Id. In this case, in which the plaintiff fell after stepping on a magnolia seed on the defendant's walkway, the Court held that the defendant had constructive knowledge of the hazard because it was aware of the maintenance problem caused by the magnolia seeds. Although the defendant had an inspection procedure in place, there was evidence that the inspections were only occasionally performed. The Court also noted evidence that no inspection or remedial actions were taken on the day of the accident. Thus, "ample evidence supported a finding that the [defendant] had constructive knowledge of the hazard." Id. at 655.

In Valentin v. Six Flags Over Georgia, 286 Ga. App. 508, 649 S.E.2d 809 (2007), the plaintiff came off a water ride at the defendant's amusement park and fell when a rubber mat

slipped out from beneath her. The plaintiff contended the mat was unsecured and slick from mildew and that a reasonable inspection would have revealed the hazard. The defendant argued it had no actual or constructive knowledge of the hazard, and the trial court granted the defendant's motion for summary judgment. The Court of Appeals reversed. The Court found a question of fact as to the defendant's constructive knowledge. Although the defendant's operations manager testified about the inspection procedures in place, he was not the one who actually inspected on the day of the accident, so the defendant failed to show the procedures were actually followed. Thus, "an inference may be drawn that [the defendant] had at least constructive knowledge of the hazard but negligently failed to remove it." Valentin, 286 Ga. App. at 511. The Court also held that, even if the defendant presented evidence of an actual inspection, the mildew on the mat allowed the inference that the hazard had been permitted to remain for an unreasonable amount of time.

Even when the defendant can show it complied with a regular inspection procedure, the reasonableness of the inspection is often deemed a question of fact. For example, in Gibson v. Halpern Enterprises, 288 Ga. App. 790, 655 S.E.2d 624 (2007), the Court held that the "specific facts and circumstances of a case determine the reasonability of an inspection procedure." Gibson, 288 Ga. App. at 792. In this case, the plaintiff was injured when she slipped and fell on loose gravel in the defendant's parking lot. The defendant presented evidence that it hired a cleaning company to sweep the parking lot every day, and that the property manager conducted a weekly inspection. The defendant argued that the plaintiff had failed to show the defendant had actual or constructive knowledge of the hazard. Reversing the trial court's grant of summary judgment in favor of the defendant, the Court of Appeals stated that, although the defendant had no duty to conduct "an unduly burdensome inspection

procedure” and did not have to show it inspected on the day of the accident to avoid liability, the Court could not find the weekly inspection in this case was reasonable as a matter of law. Id. at 793.

The defendant’s knowledge of the hazard was just one of many issues addressed in Norman v. Jones Lang LaSalle Americas, Inc., 277 Ga. App. 621, 627 S.E.2d 382 (2006). In this case, the Court of Appeals also examined the effect of building code violations, the necessity rule, and the liability of out-of-possession landlords. The plaintiff was injured when, arriving early for work and walking into her dark office, she tripped over some boxes which had been placed on the floor overnight. She sued both the property owner and the management company. Noting the long-standing rule that a plaintiff has to show the defendant had superior knowledge of the hazard, the Court first affirmed the grant of summary judgment in favor of the property manager. The management company denied it had placed the boxes on the floor of the plaintiff’s office, and the plaintiff admitted she did know who had placed the boxes there. Plaintiff argued that the boxes contained ceiling lights and, therefore, the management company must have left them on the floor. The Court rejected this argument as mere speculation.

The Court next addressed the issue of whether the plaintiff’s knowledge of the inoperable ceiling lights was equal to or greater than that of the management company. The plaintiff argued that the inoperable ceiling lights —the darkness— partially caused her to trip over the boxes. Citing Hicks v. Walker, 262 Ga. App. 216, 585 S.E.2d 83 (2003), the plaintiff argued “the inoperable lights constituted a building code violation, and that such violation showed that [the management company] had superior knowledge of the hazard.” Norman, 277 Ga. App. at 626. The Court distinguished Hicks by pointing out that the inoperable ceiling

lights were not a hidden construction defect, and, even if they were, the plaintiff had at least equal knowledge of the defect. Norman, 277 Ga. App. at 627. The Court rejected the notion that “proof of any building code violation would automatically establish negligence per se under any circumstances.” Id. (emphasis in the original). Because the plaintiff had failed to specify the building code provisions allegedly violated by the defendant, and had failed to request the trial court to take judicial notice of the building code provisions, the trial court had no reason to determine the alleged code violations constituted negligence per se. Id. at 629. The Court further held that, even if the plaintiff had shown the violation of specific building codes, “[n]egligence per se does not equal liability per se, and [the plaintiff’s] equal knowledge of the hazard would still entitle [the defendant management company] to summary judgment.” Id.

The plaintiff further argued that, under the “necessity rule,” she was entitled to recover for her injuries “because she had no alternative but to walk into her completely dark office so that she could work.” Id. at 630. The Court noted that the necessity rule is an exception to the doctrine of assumption of the risk and prevents the application of that defense when plaintiffs are forced to encounter known hazards in going to and from their homes. The Court held this exception was limited to landlord/tenant situations involving a plaintiff’s home and does not apply to a business/customer relationship. Id. at 631.

Finally, the Court held that the defendant property owner was also entitled to summary judgment. The defendant owner argued that it was an out-of-possession landlord and, under O.C.G.A. § 44-7-14, its liability to third parties was limited “to damages which resulted from either faulty construction or from hazards created by its failure to repair the premises after receiving notice of a defect.” Id. at 632. The Court held, however, that whether the defendant

owner's duties were defined by O.C.G.A. § 44-7-14 or § 51-3-1, the plaintiff failed to show the owner had actual knowledge of either the inoperable lights or the boxes, and she failed to show the owner's potential constructive knowledge of these hazards was greater than her own. Id.

**B. Plaintiff's Knowledge of the Hazard**

In a number of recent cases, the defendant had actual or constructive knowledge of the hazard but the plaintiff was barred from recovery because of the plaintiff's equal knowledge. "The true basis of a proprietor's liability for personal injury to an invitee is the proprietor's superior knowledge of a condition that may expose the invitees to an unreasonable risk of harm. Recovery is allowed only when the proprietor had knowledge of the hazard and the invitee did not." Ward v. Autry Petroleum Co., 281 Ga. App. 877, 637 S.E.2d 483 (2006) (punctuation and citation omitted).

In Ward, the Court of Appeals reversed the grant of summary judgment in favor of the defendant. In this case, the plaintiff was injured when he tripped on a water hose outside the defendant's convenience store. The plaintiff testified that when he parked in a designated parking spot, it was dark out and the area was dimly lit. The hose was beside his driver side door and he admitted he must have stepped over it on his way inside the store. When he came out of the store, he walked toward the passenger side of his car. Although he saw the hose on the driver's side, he did not realize it ran beneath his car to the passenger side. He stepped off the curb and onto the hose which was hidden from his view, causing him to fall and severely injure his foot. The Court concluded that whether the plaintiff had actual knowledge of the hose running underneath his car was a question for the jury. Whether the plaintiff must have seen the hose because it was open and obvious "creates, at most, a jury issue as to whether [the plaintiff] had actual knowledge of the hazard prior to his fall." Ward, 281 Ga. App. at 879.

The Court also agreed that, even if the plaintiff had actual knowledge of the hose near his driver's side, this did not constitute constructive knowledge that the hose also ran underneath the car to the passenger side. "[I]t is the plaintiff's knowledge of the specific hazard which caused the fall that determines whether the plaintiff can prevail on the premises liability claim, not merely the plaintiff's knowledge of generally prevailing hazardous conditions or of other hazardous conditions in the area which plaintiff observes and avoids." Id. (emphasis in the original). The Court also rejected application of the prior traversal rule. "[C]onstructive knowledge is not necessarily imputed to an invitee whose successfully traverses an area, but then slips or trips on a hazard while taking a different route across the same general area." Id. at 880.

The plaintiff argued also that the plain view doctrine did not apply, and the Court agreed. Under the plain view doctrine, constructive knowledge is imputed to the plaintiff when large objects "are in plain view at a location where they are customarily found and expected to be." Id. "When there is conflicting evidence on whether the object fits this description, however, the defendant is not entitled to summary judgment, and the issue of whether the plaintiff should have seen the object in the exercise of ordinary care is for the jury." Id. at 880-81.

In an odd federal case, Fuchs v. Wal-Mart Stores, Inc., 205 U.S. Dist. LEXIS 38051 (N.D. Ga. Dec. 22, 2005), the Court denied the defendant's motion for summary judgment even though it appeared the plaintiff had equal knowledge of the hazard. In this case, the defendant's employee dropped two colas being purchased by the plaintiff and, when the colas fell to the floor and spewed, plaintiff slipped and fell while trying to back-up. Although it cited Robinson v. Kroger Co., supra, the Court omitted any discussion of the plaintiff's knowledge of

the spilled cola. Instead, the Court focused on the negligence of the employee in dropping the colas and simply held there was contradicting evidence as to negligence.

In many of the recent cases, however, the defendants were able to show the plaintiff's knowledge of the hazard was equal or superior to their own, and the defendants prevailed in their motions for summary judgment. In Rowland v. Murphy Oil USA, Inc., 280 Ga. App. 530, 634 S.E.2d 477 (2006), the plaintiff tripped over an advertising sign outside the defendant's gas station. The Court held that the sign was a static condition, and when the condition is open and obvious and there are no obstructions, the owner may assume the plaintiff will see it and avoid it. Here, the legs on the sign "were long and black and... 'stuck out like sore thumbs' against the gray pavement." Rowland, 280 Ga. App. at 531. The Court rejected the plaintiff's argument that the sign was not static because it was a movable object which could have been moved from day to day. The Court held that, although the signs "theoretically could have been moved, there is no evidence they ever were moved, or that they were a transient or temporary condition." Id. at 532. The Court further noted that the plaintiff had visited the gas station prior to the accident and had successfully walked past the sign moments before tripping over it.

In Callaway Gardens Resort, Inc. v. Bierman, Case No. A07A1856 (Ga. Ct. App., Mar. 7, 2008) 2008 Ga. App. LEXIS 256, the plaintiff fell from a raised deck at the defendant's café. She was aware of the thirty-inch drop off and knew the deck had no railing. She was helping other family members move their table away from the edge when she walked backwards and fell off the deck. The plaintiff argued that, although she had knowledge of the drop off beside their table, she did not have knowledge of the specific hazard caused by the "L" where the two sides of the deck met. The trial court agreed and denied the defendant's motion for summary judgment. The Court of Appeals reversed. The Court noted the plaintiff's testimony that she

was in fact aware of the “indentation” on the side of the deck but forgot about it. Thus, the plaintiff’s “own testimony establishes that she had knowledge of both the general unsafe nature and shape of the raised deck and the specific hazard created by it.” The defendant’s showing of the plaintiff’s equal knowledge of the hazard entitled the defendant to summary judgment.

Walker v. Sears Roebuck & Co., 278 Ga. App. 677, 629 S.E.2d 561 (2006), involved a rainy day slip and fall. The plaintiff visited the defendant’s store in the afternoon after a morning of rain and while it was still damp outside. She walked across an entrance mat and slipped and fell after stepping onto the tiled floor. The defendant’s employee testified they put up warning cones, inspected the floor, and did not see any water or wet spots. The plaintiff testified, however, she noticed water on the floor after her fall. The Court affirmed the grant of summary judgment in favor of the defendant, holding that the plaintiff had equal knowledge of the floor’s hazardous condition. “Store proprietors are not liable to patrons who slip and fall on floors made wet by rain conditions unless there has been an unusual accumulation of water and the proprietor has failed to follow reasonable inspection and cleaning procedures.” Walker, 278 Ga. App. at 680. When it is raining outside, it is “a matter of common knowledge” that the floor will be wet around the doors. Id. Here, the plaintiff could not state that the amount of water was unusual or unreasonable for a rainy day. Furthermore, the defendant did conduct an inspection. The defendant was entitled, therefore, to summary judgment.

In Billings v. Starwood Realty, 2006 U.S. Dist. LEXIS 65182 (N.D. Ga. Sept. 13, 2006), where the plaintiff slipped in the defendant hotel’s bathtub, the Court held that, to the extent the absence of a non-slip mat or strips constituted negligence, the plaintiff’s knowledge was superior because she could readily see there was no such material in the bathtub before she stepped in. Similarly, in Whitley v. H & S Homes, LLC, 279 Ga. App. 877, 632 S.E.2d 728

(2006), the defendant was able to show the plaintiff had equal knowledge of the alleged hazard. In this case, the plaintiff was walking around the defendant's mobile home lot when she slipped on gravel and fell against the trailer hitch on one of the homes. Affirming summary judgment in favor of the defendant, the Court of Appeals held that the plaintiff could not show the defendant had superior knowledge, even assuming the loose gravel and unbuffered trailer hitch constituted dangerous conditions. The accident occurred during daylight hours, the plaintiff could plainly see the trailer since she said she walked around it, the trailer hitches were open and obvious, and, furthermore, the defendant's employee testified he was unaware of anyone else falling on the property in the past eleven years. Because the essential element of the defendant's superior knowledge was unsupported by the evidence, the trial court properly granted summary judgment to the defendant.

### **III. PLAINTIFF'S EXERCISE OF ORDINARY CARE: THE JURY DECIDES**

When there is evidence of the defendant's knowledge of the hazard, and the question is whether the plaintiff failed to exercise ordinary care for his or her own personal safety, the courts continue to apply Robinson's directive that, in most cases, the jury must decide this issue. In Augusta Country Club, Inc. v. Blake, 280 Ga. App. 650, 634 S.E.2d 812 (2006), the defendant's motion for a directed verdict included the argument that the plaintiff failed to exercise ordinary care as a matter of law. Not surprisingly, the Court of Appeals disagreed. In this case, the plaintiff tripped on a magnolia seed on the defendant's property. The Court held that when a plaintiff shows "a legitimate reason why she did not discover the hazard," this supports a finding of ordinary care. Augusta County Club, 280 Ga. App. at 656 (punctuation and citation omitted). The Court found that the plaintiff failed to detect the seed upon which she tripped because it was obscured by the lip of the step. Although the plaintiff was aware of

other seeds on the ground, “it cannot be said as a matter of law that plaintiff had knowledge of the specific hazard.” Id. (punctuation and citations omitted).

In Turner v. Wendy’s Int’l, Inc., 282 Ga. App. 121, 637 S.E.2d 739 (2006), the plaintiff slipped and fell on a floor recently mopped by the defendant’s employee. Although the employee set up a wet floor sign, the plaintiff argued the defendant’s negligence included failing to adequately warn about the wet floor, as well as failing to adequately wring out the mop. Applying Robinson, supra, the Court of Appeals first found that the defendant had actual knowledge of the hazard.

Therefore, the analysis here turns on (a) whether [the plaintiff] intentionally and unreasonably exposed herself to a hazard of which she, in the exercise of ordinary care, should have known, and (b) whether [the plaintiff] lacked knowledge of the wet floors (despite the exercise of ordinary care) due to actions or conditions within the control of [the defendant].

Turner, 282 Ga. App. at 122. Given the contradictory evidence concerning the number of wet floor signs and whether the employee adequately wrung out the mop, the Court declined to hold as a matter of law that the plaintiff had constructive knowledge of the hazardous condition of the floor.

In Britton v. Farmer, 283 Ga. App. 733, 642 S.E.2d 415 (2007), the plaintiff went onto the defendants’ property to install a telephone and was injured when he fell through a hole just inside the door of a room above the defendant’s garage. Reversing the grant of summary judgment in favor the defendants, the Court of Appeals rejected the defendants’ argument that the opening was an open and obvious hazard and should have been avoided in the exercise of ordinary care by the plaintiff. “This may well be the conclusion ultimately reached by a jury, but we cannot so conclude as a matter of law.” Britton, supra. Not surprisingly, the Court held that the plaintiff’s admission that he would have seen the opening had he looked up when he

ascended the stairs did not establish failure to exercise ordinary care as a matter of a law. See also Ward v. Autry Petroleum Co., 281 Ga. App. 877, 637 S.E.2d 483 (2006) (where plaintiff tripped on water hose left uncoiled on the defendant's property, defendant was not entitled to summary judgment even if plaintiff had been able to see the hose and avoid his fall had he looked down at the ground before he stepped off the curb).

Although the courts no longer grant summary judgment based on the plaintiff's admission that she would have seen the hazard had she been looking at it, that admission will negate a claim for attorneys fees under O.C.G.A. § 13-6-11 as a matter of law. Metropolitan Atlanta Rapid Transit Auth. v. Mitchell, 289 Ga. App. 1, \_\_\_ S.E.2d \_\_\_ (2007). In this case, the plaintiff tripped on the defendant's elevator. The plaintiff testified that she was looking straight ahead and would have seen the three-inch variance between the floor and the elevator had she been looking at the floor. The Court held that the defendant was entitled to a directed verdict on the plaintiff's claim for attorneys fees because the plaintiff's testimony established a bona fide controversy as to whether the plaintiff exercised ordinary care for her own safety.

## **CONCLUSION**

The slip and fall cases decided within the last couple of years contain no surprises. The courts continued to apply Robinson v. Kroger Co. in reviewing the defendants' motions for summary judgment. A number of defendants were able to prevail, however, by the negating the evidence of a hazard, either by showing the condition is not a hazard in and of itself, or showing that the plaintiff is unable to identify the cause of the slip and fall. The courts did not hesitate to affirm summary judgment when the defendant showed it lacked knowledge of the hazard or showed plaintiff's equal knowledge. The courts continued to deny motions for

summary judgment based on the argument that the plaintiff failed to exercise ordinary care for his own safety. That question, at least, remains one for the jury.