

WHEN THE BOUGH BREAKS: A PROPOSAL FOR GEORGIA SLIP AND FALL LAW AFTER *ALTERMAN FOODS, INC. V. LIGON*

INTRODUCTION

Before the Georgia Supreme Court's recent decision in *Robinson v. Kroger Co.*¹ ("*Robinson*"), the authors of a yearly survey of Georgia tort law succinctly described the status of the subset of commercial premises liability law known as slip-and-fall² cases by stating: "Something is fundamentally wrong with the appellate standard of review for slip and fall cases in Georgia."³ The problems

1. 493 S.E.2d 403 (Ga. 1997) (reexamining Georgia's slip-and-fall law for the first time since *Barentine v. Kroger Co.*, 443 S.E.2d 485 (Ga. Ct. App. 1994)).

2. For the purposes of this note, the term "slip-and-fall" refers only to business invitees, *i.e.*, customers in stores, but not to tenants or other types of invitees, except in cases where the court draws comparisons between the type of care owed to various categories of invitees.

3. Cynthia T. Adams & Charles R. Adams, *Torts*, 48 MERCER L. REV. 493, 498-99 (1996). The authors go onto state that:

[We] empirically have observed for many years that a hugely disproportionate number of these cases wind up on appeal, and the results are so fact-intensive as to be wholly unpredictable. The degree of evidence-weighting that occurs in these cases sometimes reminds one more of *Twelve Angry Men* than of a judicial opinion. . . .

....

This is obviously an area that needs to be revisited by the Supreme Court of Georgia. A review of slip and fall decisions, as well as other areas of tort law over the past several years, indicates that certain members of the court of appeals are giving perhaps an overly expansive reading to the supreme court's decision in *Lau's Corp. v. Haskins*, 405 S.E.2d 474 (Ga. 1991) ("*Lau's Corp.*"), by interpreting that case to authorize a weighing of evidence at the appellate level. The responsibility resting on a court in this situation is not to weigh the evidence, but to "[view] all the facts and reasonable inferences from those facts in a light most favorable to the non-moving party."

with Georgia's slip-and-fall law emerged recently as the Georgia Court of Appeals attempted to incorporate an existing standard of slip-and-fall liability with a modified standard for summary judgment.⁴ This combination of standards led to an increase in the number of slip-and-fall cases receiving appellate review⁵ and created sharp divisions among the Georgia Court of Appeals regarding the continued use of the liability standard set out in *Alterman Foods, Inc. v. Ligon*⁶ ("Alterman"). Furthermore, this inconsistency in the law not only created uncertainty among business defendants as to the standard of care necessary to avoid liability, but deprived plaintiffs of both their legitimate rights to recover and their constitutional right to trial by jury.⁷ Moreover, the *Alterman* standard created judicial inefficiency by requiring the court of appeals to serve as a constant check on the decisions of the state trial courts.⁸

Although the *Robinson* decision attempts to resolve most of the

Id. (footnotes omitted).

4. See *Adams v. Sears, Roebuck & Co.*, 490 S.E.2d 150, 156 (Ga. Ct. App. 1997) (Eldridge, J., dissenting). Judge Eldridge wrote:

Since *Alterman Foods v. Ligon*, 346 Ga. 620, 272 S.E.2d 327 (Ga. 1980), this Court has followed dicta in that opinion to create an extensive body of decisions that radically departed from the jurisprudence of tort law and created a unique power in the trial courts to grant summary judgment in slip and fall cases. . . . Further, this problem of analysis has been compounded by a misapplication of *Lau's Corp.*

Id. But see *Baldwin County Hosp. Auth. v. Coney*, 373 S.E.2d 252, 255 (Ga. Ct. App. 1988) (explaining the difficulties of applying summary judgment to slip-and-fall cases before *Lau's Corp. v. Haskins*). For a detailed discussion of the modified standard of summary judgment, see *infra* note 86 and accompanying text.

5. See *Adams & Adams*, *supra* note 3, at 412. "As always, the current survey period produced a seemingly inordinate number of appeals involving 'slip and fall' cases."

6. 272 S.E.2d 327, 330 (Ga. 1980). The standard is as follows:

[I]n order to state a cause of action where the plaintiff alleges that due to an act of negligence by the defendant he slipped and fell on a foreign substance on the defendant's floor, the plaintiff must 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 the foreign substance.

Id.

7. See *Service Merchandise v. Jackson*, 473 S.E.2d 209, 211 (Ga. Ct. App. 1996) (quoting *Johnson v. Currenton*, 195 S.E.2d 279, 281 (Ga. Ct. App. 1972)). "The granting of summary judgment or directed verdict is 'a very, very grave matter' . . . what is at stake is of constitutional magnitude." *Id.*

8. See *Adams & Adams*, *supra* note 3, at 498.

problems with Georgia's slip-and-fall law,⁹ several issues remain unanswered. First, Georgia's Court of Appeals must correctly follow and interpret this new standard, a problem due to pre-existing divisions within the court of appeals.¹⁰ Secondly, *Robinson* raises the issue of whether its holding effectively addresses the related problems of burden of proof, the distraction doctrine,¹¹ and the duty of invitees to use reasonable care.¹² Closely related to this is the question of whether the *Robinson* standard offers any advantages to resolving slip-and-fall cases over alternative proposals,¹³ such as using an ordinary standard of negligence to resolve premises liability cases.¹⁴

This note proposes the creation of a new standard of liability using a multi-faceted test to simplify Georgia's slip-and-fall law.¹⁵ In determining liability in a slip-and-fall case, the proposed standard directs the court to first look to whether the plaintiff can produce evidence of the factual cause of the fall; if not, the plaintiff cannot recover.¹⁶ However, if the plaintiff can produce evidence establishing the factual cause of the fall, the test then requires the court to consider whether the defendant had actual or constructive knowledge

9. 493 S.E.2d at 413. The *Robinson* court held that a plaintiff need only produce some evidence of the defendant's negligence to survive a motion for summary judgment. *Id.* Further, the court clarified the "distraction doctrine" by holding that a plaintiff need only produce evidence of a reasonable distraction caused by, or known to, the defendant. *Id.* at 412. Finally, according to the *Robinson* court, the duty of plaintiffs to take reasonable precautions for their own safety only required plaintiff to avoid "large objects in plain view which are at a location where they are customarily placed and expected to be. . . ." *Id.* at 409 (quoting *Stenhouse v. Winn-Dixie Stores*, 249 S.E.2d 276, 278 (Ga. Ct. App. 1978)).

10. See *Adams*, 490 S.E.2d at 158-59 (Eldridge, J., dissenting) (advocating the use of different standards according to the type of hazard alleged to have caused the plaintiff's fall).

11. See *infra* note 96.

12. See *infra* notes 129-38 and accompanying text for an explanation of *Robinson's* holding.

13. See *Robinson*, 493 S.E.2d at 414 (Hunstein, J., concurring) ("I would prefer to resolve slip and fall cases on the basis of pure comparative negligence. However, I recognize that resolution would require legislative change"). See also *Rowland v. Christian*, 443 P.2d 561, 568-569 (Cal. 1968) (en banc) (abandoning with common law distinctions between licensees, invitees, and trespassers).

14. See *infra* note 22.

15. Cf. *Adams*, 490 S.E.2d at 158-59 (Eldridge, J., dissenting) (advocating the use of different standards according to the type of hazard alleged to have caused the plaintiff's fall).

16. This standard mirrors current Georgia law dating back to *Alterman*, 272 S.E.2d at 331: "[P]roof of nothing more than the occurrence of the fall is insufficient to establish the proprietor's negligence." *Id.* (citing 63 A.L.R.2d 634, § 10).

of the hazard causing the fall.¹⁷ If the defendant had either actual or constructive knowledge of the hazard, the proposed standard allows the defendant to present evidence to show that the plaintiff had the opportunity to avoid or correct the hazard.¹⁸ This new standard eliminates much of the confusion surrounding Georgia's current method for determining slip-and-fall liability and restores the fact-finding distinction between the judge and the jury while still requiring plaintiffs to meet a high standard of proof before they can recover.¹⁹

Part I.A of this note reviews the common law standards of duty in premises liability cases. Parts I.B through I.F trace the development of Georgia's statutory²⁰ and case²¹ law relating to slip-and-fall liability. Part II of this note explains other approaches to commercial premises liability²² while Part III examines the problems that Georgia courts, particularly the Georgia Court of Appeals, encountered in applying the *Alterman* standard of slip-and-fall liability and evaluates

17. If the defendant was the only party with knowledge of the cause, then this test would automatically assign liability to the defendant. Conversely, if only the plaintiff knew of the hazard, this test would prevent the plaintiff's recovery.

18. For example, if plaintiffs can show that they were distracted by someone or something in control of the defendant, this would create a presumption of liability on the part of the defendant. By comparison, if the defendant could show insufficient time to correct the hazard, the defendant can avoid liability.

19. As the Georgia courts often lament, "[t]o presume that because a customer falls in a store that the proprietor has somehow been negligent would make the proprietor an insurer of his customer's safety which he is not in this state." *Alterman*, 272 S.E.2d at 331 (citing *Boatright v. Rich's, Inc.*, 173 S.E.2d 232, 233 (Ga. Ct. App. 1970) and *Angel v. Varsity, Inc.*, 148 S.E.2d 451, 452-53 (Ga. Ct. App. 1966)). See also *Adams*, 490 S.E.2d at 154; *Key v. J.C. Penney Co.*, 299 S.E.2d 895, 896 (Ga. Ct. App. 1983).

20. Sections 51-3-1 and 51-3-2 of the Georgia Code set the standards for premises liability in Georgia. GA. CODE ANN. §§ 51-3-1 to -2 (Michie 1982). Further, section 9-11-56 establishes the requirements for summary judgment in Georgia and plays a large role in slip-and-fall cases because the majority of cases on appeal claim error in the trial court's decision to grant, or not grant, summary judgment. GA. CODE ANN. § 9-11-56 (Michie 1993).

21. Until *Robinson*, 493 S.E.2d 403, the Georgia courts routinely recognized *Alterman*, 272 S.E.2d 327, as the judicial standard of review for slip-and-fall cases. See, e.g., *Piggly Wiggly Southern, Inc. v. Weathers*, 453 S.E.2d 74, 75 n.1 (Ga. Ct. App. 1995) (describing *Alterman* as a "landmark decision") overruled by *Robinson*, 493 S.E.2d at 407, 410.

22. This section covers both judicial attempts to redefine slip-and-fall cases, such as *Rowland*, 443 P.2d 561, and law review articles proposing new standards of review for slip-and-fall cases. See, e.g., Steven D. Winegar, Comment, *Reapportioning the Burden of Uncertainty: Storekeeper Liability in the Self-Service Slip-and-Fall Case*, 41 UCLA L. REV. 861 (1994).

proposals for reforming Georgia's slip-and-fall doctrine.²³ Finally, Part IV proposes a new approach to slip-and-fall cases²⁴ and discusses the benefits of the proposed test.

I. HISTORY

A. Common Law Foundations of Premises Liability

Beginning with early common law, courts resolved premises liability cases by dividing entrants onto land into three categories: trespassers, licensees, and invitees.²⁵ Under the common law, landowners owe invitees the highest standard of care and have a duty to inspect their premises for hidden dangers to ensure the invitees' safety.²⁶ In contrast, licensees and trespassers received protection only against known or obvious dangers.²⁷ The distinction between invitees, licensees, and trespassers served as the foundation for modern slip-and-fall cases because the law treated customers as invitees.²⁸ However, courts modified the standard of care owed to invitees to reflect the inability of contemporary store owners to keep constant watch over their premises.²⁹ These modifications aided in creating the morass of judicial decisions that exist today.³⁰

23. See, e.g., *infra* notes 102-28 and accompanying text, discussing the problems the Georgia Court of Appeals encountered in recent years attempting to apply the *Alterman* standard.

24. See *infra* notes 181-91 and accompanying text, discussing the new proposal.

25. W. PAGE KEETON ET AL, PROSSER AND KEETON ON THE LAW OF TORTS § 58, at 393; § 60, at 412; § 61, at 419 (5th ed. 1984).

26. *Id.* § 61, at 419. "[T]he [owner] is under an affirmative duty to protect [invitees], not only against dangers of which he knows, but also against those which with reasonable care he might discover." *Id.*

27. *Id.* § 58, at 393; § 60, at 412.

28. *Alterman*, 272 S.E.2d at 329. See generally, Donald M. Zupanec, Annotation, *Store or Business Premises Slip-and-Fall. Modern Status of Rules Requiring Showing of Notice of Proprietor of Transitory Interior Condition Allegedly Causing Plaintiff's Fall*, 85 A.L.R.3d 1000 (1978).

29. *Alterman*, 272 S.E.2d at 329 (stating that a "proprietor is permitted [in "foreign substance" cases] a reasonable time to exercise care in inspecting the premises and maintaining them in a safe condition.") *Id.* (citing *Klinn-Dixie Stores v. Hardy*, 226 S.E.2d 142, 144 (Ga. Ct. App. 1976); *Burger Barn, Inc. v. Young*, 207 S.E.2d 234, 236 (Ga. Ct. App. 1974).

30. See *supra* notes 1-2, 4, and 6-7 and accompanying text.

B. *The Foundations of Georgia Slip-and-Fall Law*

Georgia statutes recognize the common-law distinctions between licensees and invitees.³¹ The Georgia code requires owners or occupiers of land to exercise ordinary care to keep their premises safe for an invitee,³² while requiring landowners to protect licensees only from "willful or wanton injury."³³ These provisions, along with the section of the Georgia code that outlines the conditions for summary judgment,³⁴ provide the framework for *Alterman*³⁵ and its progeny.

Alterman arose out of an ordinary slip-and-fall accident involving Ms. Ligon, the plaintiff, who sued for damages after she fell while shopping in the defendant's grocery store.³⁶ The plaintiff alleged a dangerously slippery floor caused her fall and that the defendant knew, or should have known, of this dangerous condition.³⁷ The record indicated that not only did no one see the plaintiff fall, but—although it was raining—the plaintiff admitted to not seeing any water on the floor. Neither could she produce evidence of any material on the floor nor any marks on her clothing, which related to

31. GA. CODE ANN. §§ 51-3-1 to -2.

32. GA. CODE ANN. § 51-3-1 provides: "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 persons for injuries caused by his failure to exercise ordinary care in keeping the premises and approaches safe."

33. GA. CODE ANN. § 51-3-2 provides:

(a) A licensee is a person who:

- (1) Is neither a customer, a servant, nor a trespasser;
- (2) Does not stand in any contractual relation with the owner of the premises;
and
- (3) Is permitted, expressly or impliedly, to go on the premises merely for his own interests, convenience, or gratification.

(b) The owner of the premises is liable to a licensee only for willful or wanton injury.

34. GA. CODE ANN. § 9-11-56. Subsection (e) provides in relevant part:

When a motion for summary judgment is made and supported as provided in this Code section, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this Code section, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

35. 272 S.E.2d 327.

36. *Id.* at 328.

37. *Id.*

the cause of her fall.³⁸ The defendant, Alterman Foods, refuted the plaintiff's allegations by producing testimony of a fellow shopper who assisted the plaintiff and an employee who inspected the area where the plaintiff fell; both testified that the floor was clear of any foreign substance which could have caused the plaintiff's fall.³⁹ In response, the plaintiff produced an affidavit of a witness in another suit who claimed to have witnessed an earlier fall in the same store.⁴⁰

The trial court granted summary judgment in favor of the defendant and the plaintiff appealed.⁴¹ The Georgia Court of Appeals reversed,⁴² holding that the affidavit of the witness in the separate suit, as well as other evidence produced by the plaintiff, created an issue of fact for the jury as to the defendant's knowledge of the allegedly dangerous condition.⁴³ The Georgia Supreme Court granted certiorari and reversed the court of appeals, holding that the plaintiff's evidence did not support her claim of negligence.⁴⁴ More importantly, the Supreme Court outlined its test to determine store

38. *Id.* The Supreme Court explained:

In her deposition plaintiff testified that she had gone to the store to shop sometime after 2:00 p.m. on Friday afternoon as she had customarily done for four years; that although it was raining outside she noticed no water or wet areas on the floor; that the floor was "slippery and highly polished as usual"; that she did not notice the floor to be any more slippery than it had been on any other day she had been in the store until her foot slipped out from under her; that she did not see what she had slipped on either before or after she fell; that she did not know if there was a foreign substance on the floor which had caused her fall or if her fall was due to the slipperiness of the floor itself; that there were no marks or streaks on the floor or stains on her clothing which would have indicated what it was she slipped on.

Id.

39. 272 S.E.2d at 329. The defendant's employee also testified that the floor was waxed with a "non-slip wax." *Id.*

40. *Ligon v. Alterman Foods, Inc.*, 268 S.E.2d 701 (Ga. Ct. App. 1980) (explaining that affidavit was produced by plaintiff to show knowledge on the part of store).

41. *Id.* at 702.

42. *Id.*

43. *Id.* The court explained: "We hold that the appellant's statements, given the benefit of all favorable inferences, produce a genuine issue of material fact as to whether the floor was so slippery as to create an unreasonable risk that a store patron in the appellant's circumstances would slip and fall on it." *Id.* (citing *Langley v. Ellman's, Inc.*, 237 S.E.2d 415, 416 (Ga. Ct. App. 1977)).

44. *Alterman*, 272 S.E.2d at 332. "It cannot be inferred from a silent record that defendant negligently maintained its floor. Plaintiff's statements taken in the light most favorable to her, are merely conclusions and are probative of nothing." *Id.*

owner liability in slip-and-fall cases involving “foreign substances.”⁴⁵ According to the court, the plaintiff must prove both that the defendant possessed actual or constructive knowledge of the “foreign substance,” and the plaintiff either did not know of the substance or was prevented by the defendant from discovering the substance.⁴⁶ Applying this test, the Georgia Supreme Court concluded that the trial court properly granted summary judgment because the plaintiff not only failed to produce evidence or offer testimony explaining the exact cause of her fall, but the defendant produced evidence generally refuting the plaintiff’s allegations.⁴⁷

C. Applications of the *Alterman* Test Prior to *Lau’s Corp.*

By requiring plaintiffs to prove both their lack of knowledge and the actual or constructive knowledge of the defendant, the *Alterman* court set a high bar for plaintiffs to meet in order to state a successful claim.⁴⁸ Several cases decided before the Georgia Supreme Court

45. *Id.* at 330. According to the court:

In the majority of the so-called ‘slip and fall’ cases the plaintiff alleges either that he slipped on a foreign substance—grit, vegetable leaves, trash, objects which have fallen from store shelves, etc.—on defendant’s floor, or that defendant’s floor has been made dangerously slippery by waxing, oiling or otherwise treating it.

Id. at 329.

46. *Id.* at 330. In the court’s words:

[I]n order to state a cause of action in a case where the plaintiff alleges that due to an act of negligence by the defendant he slipped and fell on a foreign substance on the defendant’s floor, the plaintiff must 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 the foreign substance.

Id. For a seemingly prophetic commentary on the *Alterman* case when first received, see Frank M. Eldridge, *Torts*, 33 MERCER L. REV. 247, 263 (1981), explaining that “[t]he bench and bar should be cautious in reading too much into this case because the decision is narrowly confined by the particular facts of the case.”

47. 272 S.E.2d at 331-332. The court rested its finding on the version of Georgia’s summary judgment act then in effect, GA. CODE ANN. § 81A-156 (Michie 1972), which largely mirrors Georgia’s current summary judgment act, section 9-11-56(e). Nowhere in the opinion does the court explain why Mrs. Ligon’s affidavit regarding the other shopper who allegedly fell in the store failed to create an issue of constructive knowledge on the part of the store owner.

48. See *supra* note 46 and accompanying text.

modified the standard for summary judgment⁴⁹ found that the plaintiffs produced sufficient evidence to meet this standard, often based on the defendant's constructive knowledge of the hazard.⁵⁰ For example, in *Telligman v. Monumental Properties, Inc.*, the plaintiff appealed a grant of summary judgment in favor of the defendant dismissing her claim that she allegedly slipped on ice while attempting to enter the defendant's store.⁵¹ Based on a storm that occurred the night before the plaintiff's fall, the court of appeals found that the plaintiff's complaint presented an issue of fact as to whether the storeowner had constructive knowledge of the ice on his premises.⁵² However, the court found that the plaintiff did not know of the ice even though she knew of the storm.⁵³ The court of appeals reversed the trial court's grant of summary judgment, finding that the plaintiff's evidence established both the defendant's specific knowledge of the ice and her own ignorance of the condition, thus satisfying both prongs of the *Alterman* test.⁵⁴

Cases decided by both the Georgia Supreme Court and the Georgia Court of Appeals after *Telligman* reaffirmed the *Alterman* standard and served as a proof positive to plaintiffs that they could clear the *Alterman* bar and present issues of fact before the jury. Many of these cases involved disputes over the factual cause of the

49. *Lau's Corp.*, 405 S.E.2d 474. See *infra* note 86, discussing the modified standard of summary judgment.

50. See *infra* notes 52-54 and accompanying text.

51. 288 S.E.2d 846 (Ga. Ct. App. 1982).

52. *Id.* at 848. The court apparently determined that the defendant possessed constructive knowledge of the ice because several hours lapsed between the storm and the plaintiff's fall and the defendant attempted to melt the ice by dispatching maintenance crews to clear the premises before the plaintiff's fall. *Id.*

53. *Id.* at 849. The court noted that:

[The defendant's] argument therefore becomes, in essence, an assertion that [the plaintiff] cannot claim a lack of knowledge of the . . . ice hazard because she was aware of the generally existing icy weather conditions and of the specific presence of ice on at least some of the portions, of appellee's sidewalks. However, it is a plaintiff's knowledge of the *specific* hazard which precipitates the slip and fall which is determinative. . . .

Id. The court also took note of the fact that the plaintiff telephoned the defendant's store to make certain the store was open before venturing out of her house. *Id.* The defendant assured her that "there was no need for [her] to remain a 'captive' in her home because of the icy conditions." *Id.*

54. *Id.*

plaintiff's fall.⁵⁵ For example, *Martin v. Sears, Roebuck & Co.* demonstrated that a plaintiff's personal knowledge of an alleged hazard can raise issues of fact.⁵⁶ The *Martin* plaintiff allegedly slipped and fell on an excessively waxed floor.⁵⁷ After the trial court directed a verdict in favor of the defendant, the court of appeals affirmed, holding that the plaintiff failed to produce evidence showing the defendant improperly treated the store's floor.⁵⁸ However, the Georgia Supreme Court reversed the court of appeals and held that the plaintiff's testimony established that she had significant knowledge of the methods of waxing and polishing floors, thereby creating a factual issue for the jury regarding the treatment of the floor.⁵⁹

Later, in *Begin v. Georgia Championship Wrestling, Inc.*, the court of appeals found an issue of fact in the defendant's failure to refute its knowledge of a hazardous condition even though the

55. See generally *Perkins v. Peachtree Doors, Inc.*, 397 S.E.2d 54, 56 (Ga. Ct. App. 1990) (holding that the plaintiff produced evidence that the floor felt slick and wet); *Stone v. Dayton Hudson Corp.*, 388 S.E.2d 909, 913 (Ga. Ct. App. 1989) (using store manager's inconsistent testimony regarding inspection of the floor, and lack of evidence that the floor was not slippery, to create the issue for jury); *Dykes v. Toombs County*, 386 S.E.2d 730, 731 (Ga. Ct. App. 1989) (holding that plaintiff created a jury issue regarding the excessive waxing of the floor); *Artesiano v. K-Mart Corp.*, 363 S.E.2d 177, 179 (Ga. Ct. App. 1987) (relying on plaintiff's testimony that she found wax on her dress after falling; that she was able to smell, feel, and see excess wax after her fall; and that she knew wax to be excessive from personal knowledge to create a jury issue); *Mazur v. Food Giant, Inc.*, 359 S.E.2d 178, 180 (Ga. Ct. App. 1987) (discussing plaintiff's evidence that condensation from defendant's "refrigeration unit" caused a "film" to form on floor); *Dillon v. Grand Union Co.*, 306 S.E.2d 670, 673 (Ga. Ct. App. 1983) (finding a jury issue because there was evidence of defendant's negligence in not providing footmats to prevent build-up of a "meaty substance" which allegedly caused plaintiff's fall); *Cowart v. Five Star Mobile Homes, Inc.*, 291 S.E.2d 13, 15 (Ga. Ct. App. 1982) (holding that plaintiff presented evidence of defendant's negligence by not including guard or hand rails on mobile home steps).

56. 320 S.E.2d 174, 175-76 (Ga. 1984).

57. *Id.* at 175.

58. *Id.* (citing *Martin v. Sears, Roebuck & Co.*, 318 S.E.2d 144, 145 (Ga. Ct. App. 1984)).

59. *Martin*, 320 S.E.2d at 176. "The petitioner testified that she was familiar, based on forty years' experience, with proper methods of waxing and polishing floors. . . . We hold [the plaintiff's] testimony satisfies the test in *Alterman* by offering some evidence of negligent application of materials used in treating the floor." *Id.* at 175-176. The *Martin* court contrasted the situation with the facts of *Alterman*, which also involved an allegation of an excessively waxed floor, by noting that the defendant in *Alterman* introduced testimony of both a store employee and a customer who assisted the plaintiff admitting that the floor in that case did not seem slippery. *Id.* (citing *Alterman*, 272 S.E.2d 327).

defense evidence established that the plaintiff knew of the hazard.⁶⁰ *Begin* arose after the plaintiff tripped on plastic strips used by the defendant during a wrestling match to protect a hardwood floor.⁶¹

60. 322 S.E.2d 737, 740-41 (Ga. Ct. App. 1984). "Defendant did not produce evidence to show it did not have constructive notice of the inherent danger of plastic strips partially taped together with masking tape which covered portions of the gym over which invitees traveled." *Id.* For other cases creating a jury issue regarding the defendant's actual or constructive knowledge, see, for example, *Ellis v. Sears, Roebuck & Co.*, 388 S.E.2d 920, 921 (Ga. Ct. App. 1989) (finding defendant possessed actual knowledge of allegedly defective escalator because plaintiff's husband informed defendant's employee of the problem ten to fifteen minutes before plaintiff's fall); *Boss v. Food Giant, Inc.*, 388 S.E.2d 37, 38 (Ga. Ct. App. 1989) (holding that defendant failed to negate theory of constructive knowledge because of lack of evidence regarding employees' inspection of premises); *Ware County v. Medlock*, 385 S.E.2d 429, 430 (Ga. Ct. App. 1989) (refusing to dismiss constructive knowledge allegation because defendant's employees testified they did not inspect area of fall for safety); *Little v. Liberty Savings Bank (FSB)*, 382 S.E.2d 734, 736 (Ga. Ct. App. 1989) (according defendant's specific knowledge of glue used to install new carpeting in defendant's building greater weight than plaintiff's general knowledge of the hazardous conditions caused by the removal of the carpeting); *Flowers v. Kroger Co.*, 382 S.E.2d 184, 185 (Ga. Ct. App. 1989) (establishing that plaintiff need not produce evidence showing how long debris remained on floor because defendant's employees possessed actual knowledge of the hazard); *Baldwin County Hosp. Auth. v. Coney*, 373 S.E.2d 252, 255 (Ga. Ct. App. 1988) (requiring defendant to present evidence refuting theory of actual knowledge when alleged by plaintiff); *Baggs v. Chatham County Hosp. Auth.*, 371 S.E.2d 653, 655 (Ga. Ct. App. 1988) (finding lack of actual knowledge on part of defendant's director of engineering and maintenance, and lack of reports regarding rain puddle, inconclusive to defendant's total lack of actual knowledge, especially in light of employees working near puddle); *Mitchell v. Rainey*, 370 S.E.2d 673, 675 (Ga. Ct. App. 1988) (creating jury issue regarding adequate time for defendant's employees to remove hazard of partially melted ice cream); *Shiver v. Singletary*, 368 S.E.2d 523, 524 (Ga. Ct. App. 1988) (relying on plaintiff's testimony regarding defendant's constructive knowledge to create factual issue because of wet skid mark left by plaintiff's boot during fall and presence of defendant's employee near accident); *Food Giant, Inc. v. Cooke*, 366 S.E.2d 781, 783-784 (Ga. Ct. App. 1988) (refusing to presume defendant exercised of ordinary care even where defendant shows adherence to ordinary inspection procedure); *Rodriguez v. Piggly Wiggly Southern, Inc.*, 363 S.E.2d 291, 292 (Ga. Ct. App. 1987) (holding that mop and bucket near water puddle evidence of defendant store's constructive knowledge of water puddle); *Great Atlantic & Pacific Tea Co. v. Turner*, 349 S.E.2d 537, 539 (Ga. Ct. App. 1986) (allowing jury to find that defendant knew of gap between door and floor in defendant's store and failure to fix this hazard resulted in plaintiff's injury); *Burkhead v. American Legion, Post Number 51, Inc.*, 332 S.E.2d 311, 313-314 (Ga. Ct. App. 1985) (regarding defendant's instruction to janitor to sweep pecan hulls from steps as evidence of constructive knowledge on part of defendant); *McGinnis v. Sunbelt Western Steers, Inc.*, 326 S.E.2d 3, 5 (Ga. Ct. App. 1985) (creating jury issue regarding actions of restaurant employees who witnessed spilled food and failed to warn plaintiff of danger); *Foster v. Kenimer*, 307 S.E.2d 30, 32 (Ga. Ct. App. 1983) (explaining that defendants failed to present evidence refuting charge that mixture of rain water on painted steps outside defendant's premises created dangerously slick surface); *Weight Watchers of Greater Atlanta v. Welborn*, 299 S.E.2d 760-61 (Ga. Ct. App. 1983) (finding jury issue because of employee's testimony admitting to knowledge of rain water on floor and failure to act to remove water).

61. *Begin*, 322 S.E.2d at 738-739.

The court of appeals concluded that the defendant, Georgia Championship Wrestling, owed the plaintiff a duty to inspect the plastic coverings⁶² even though someone other than the defendant installed the strips.⁶³ The *Begin* court reversed the trial court's grant of summary judgment because issues remained regarding the defendant's constructive knowledge and the plaintiff's alleged failure to exercise reasonable care.⁶⁴

In contrast to *Telligman*, *Martin*, and *Begin* the Georgia Supreme Court and Georgia Court of Appeals consistently refused to find jury issues in slip-and-fall cases decided after *Alterman*.⁶⁵ The plaintiffs in these cases often failed to present evidence of either the defendant's knowledge of the hazard or of the precise substance or defect that caused their fall.⁶⁶ For example, in *Browning v. Sears, Roebuck & Co.* ("*Browning*") the plaintiff allegedly slipped in water in the defendant's store.⁶⁷ However, the defendant offered evidence showing that the assistant store manager inspected the area where the plaintiff fell ten minutes before the accident, thus showing that the defendant exercised ordinary and reasonable care and entitling the defendant to summary judgment.⁶⁸

62. *Id.* at 741. "It cannot be said as a matter of law that the defendant exercised ordinary care in inspecting the premises and not observing the alleged defect, and if they should have observed it, in not rectifying the defect or warning the plaintiff of its existence." *Id.* (citing to *Sharpton v. Great Atlantic & Pacific Tea Co., Inc.*, 145 S.E.2d 101, 103 (Ga. Ct. App. 1965)).

63. *Id.* at 739. The court reasoned that Georgia Championship Wrestling constituted the "promoter and occupier of the premises" and, therefore, owed the plaintiff a "duty of keeping the approaches and premises safe[.]" *Id.* (citing to GA. CODE ANN. § 51-3-1).

64. *Begin*, 322 S.E.2d at 741. The court explained:

An issue remains as to whether the defendant should have discovered the alleged defect, or whether inspection was taken at all. Did the defendant make the premises safe for its invitees? Was it negligent to tape only portions of the plastic strips together, or was it sufficient to use masking tape to accomplish this result?

Id. The court of appeals concluded that both the issue of the plaintiff's alleged failure "to watch for the open seams in the plastic strips" and the issue of "whether or not the wrestling was a distraction to invitees" required jury determination. *Id.*

65. See *infra* notes 66-80 and accompanying text for a discussion of cases affirming grants of summary judgment under the *Alterman* standard.

66. See *infra* notes 67-76.

67. 328 S.E.2d 580, 581 (Ga. Ct. App. 1985).

68. *Id.* at 582. The court held that to require the store to exercise greater care would, in effect, make the store the insurer of its customer's safety, which was not. *Id.* See also *Alterman*, 272 S.E.2d at 331.

An example of the plaintiff failing to show that the defendant possessed actual or constructive knowledge occurred in *K-Mart Corp. v. Spruell* (“*K-Mart*”).⁶⁹ There the plaintiff allegedly slipped in a “wet substance” on the defendant’s floor but produced no evidence identifying the precise nature of the substance, where the substance came from, or how long the substance remained on the floor.⁷⁰ Furthermore, the plaintiff produced no evidence showing that the defendant had actual or constructive knowledge of the substance.⁷¹ The trial court refused to grant the defendant summary judgment but the court of appeals reversed on interlocutory appeal because the plaintiff failed to present evidence of the defendant’s negligence.⁷²

In *Wolling v. Johnny Harris Restaurant, Inc.* (“*Wolling*”)⁷³—an opinion representative of a separate line of cases following *Alterman*⁷⁴—the Georgia Court of Appeals held that plaintiffs fail to

69. 328 S.E.2d 577 (Ga. Ct. App. 1985).

70. *Id.* at 578. The court noted in detail that:

[The plaintiff] slipped on a wet substance forming a spot on the floor approximately three inches in diameter (or the size of a grapefruit). She did not see the spot and did not have any idea of its possible origin. She thought it might have been a spot of unpolished wax but could not identify the substance by sight, touch or smell. [The plaintiff] stated she not only did not see the spot, she doubted she could have seen it if she had been looking at it. She had no idea how long the spot had been on the floor but assumed the spot had not been there very long.

Id.

71. *Id.* The court again explained that “[the plaintiff] did not see any [of the defendant’s] employees in the immediate area and did not have any idea whether [the defendant’s] employees might have been aware of the existence of the spot. No one saw her slip nor observed the fall.” *Id.*

72. *Id.* at 579. The court held:

[A]s to the crucial issue of negligence there are no contested facts, and [the plaintiff] has failed to meet the standard required to withstand a motion for summary judgment. The uncontested evidence before the trial court showed that [the plaintiff] had at least equal knowledge of the floor conditions. It certainly did not show a situation where [the defendant] knew of the situation (or failed to take measures to acquaint itself with such a situation) and a situation that [the plaintiff] was in an inferior situation to observe.

Id. at 578.

73.

74. See *Boyd v. Garden Center, Inc.*, 397 S.E.2d 626, 627-628 (Ga. Ct. App. 1990) (using plaintiff’s contradictory testimony regarding the cause of her fall to disregard her initial explanation); *Batts v. Bozeman & Sons, Inc.*, 396 S.E.2d 505, 506 (Ga. Ct. App. 1990) (finding plaintiff’s affidavit alleging a slippery floor unsupported by probative evidence); *McConnell v. Winn-Dixie Atlanta, Inc.*, 391 S.E.2d 785, 786 (Ga. Ct. App. 1990) (relying on testimony of

state a claim under *Alterman* when they cannot identify the precise substance or defect that caused their fall.⁷⁵ The trial court granted the defendant's motion for summary judgment, although the plaintiff claimed that her case was factually distinguishable from *Alterman*.⁷⁶ On review, the Georgia Court of Appeals refused to reverse, finding the plaintiff's situation factually similar to *Alterman* in that both she and Ms. Ligon lacked evidence of negligence.⁷⁷

In later cases, the Georgia Court of Appeals upheld grants of summary judgment to defendants in cases where plaintiffs failed to exercise reasonable care to protect their own safety.⁷⁸ Such was the case in *Bowman v. Richardson* ("*Bowman*"), where the plaintiff allegedly slipped on a wet manhole cover inside an amusement park.⁷⁹ The trial court granted summary judgment in favor of the defendant and the court of appeals affirmed, holding that the plaintiff failed to exercise reasonable care for her safety when she voluntarily walked through an area she knew was wet.⁸⁰

defendant's store manager and two other witness to refute the plaintiff's allegation of slipping on wax); *Bradley v. Red Food Stores, Inc.*, 345 S.E.2d 127, 128 (Ga. Ct. App. 1986) (explaining that the plaintiff admitted to not knowing the cause of his fall).

75. *Wolling*, 305 S.E.2d 168, 169 (Ga. Ct. App. 1983). As the court of appeals explained:

[The plaintiff] slipped and fell in a restaurant on a waxed floor. She had been in the restaurant many times before and was aware that there was a dance floor and that the floor did not look any different than it had on her previous visits. She believed the wax on the floor caused her to fall. There was no evidence of any defect or any foreign substance on the floor

Id.

76. *Id.* at 168-69. "[The plaintiff] argued that *Alterman* is factually distinguishable because she fell on a dance floor, which had an alternate use as a dining area." *Id.* at 169.

77. The court concluded: "We do not find these differences sufficient to distinguish *Alterman*, which was properly applied by the trial court." *Id.* at 169.

78. See *infra* notes 79-80. See also *Alterman Foods, Inc. v. Munford*, 342 S.E.2d 480, 481 (Ga. Ct. App. 1986) (explaining that plaintiff failed to look at a mat to see if it was wet or dry); *Allen v. Big Star Food Market*, 324 S.E.2d 820, 821 (Ga. Ct. App. 1984) (holding that plaintiff slipped on floor she knew to be wet); *Brownlow v. Six Flags Over Georgia, Inc.*, 322 S.E.2d 548, 549 ("*Brownlow*") (Ga. Ct. App. 1984) (refusing liability because plaintiff knew area where she slipped had been "traversed by wet individuals").

79. 338 S.E.2d 297, 297 (Ga. Ct. App. 1905).

80. *Id.* at 297-98. The court reasoned that the plaintiff should have known the area was wet from the sprinklers she admitted seeing. *Id.* "Under these circumstances, it appears [the plaintiff] was not in the exercise of due care for her own safety and she cannot recover." *Id.* at 298 (citing to GA. CODE ANN. § 51-11-7 and *Brownlow*, 322 S.E.2d 548).

D. *The Decision in Lau's Corp., Inc. v. Haskins*

The plaintiffs in *Lau's Corp., Inc. v. Haskins* ("Lau's Corp.") brought suit against the defendant, a restaurant, after unknown assailants robbed them in the defendant's parking lot.⁸¹ The plaintiffs alleged that the defendant failed to provide adequate security for its patrons.⁸² Trial court granted summary judgment in favor of the defendant but the court of appeals reversed.⁸³ On a grant of certiorari, Georgia's Supreme Court reversed the court of appeals, holding that the plaintiffs produced no evidence of the defendant's negligence.⁸⁴ More importantly, the supreme court delineated a new interpretation of Georgia's summary judgment statute.⁸⁵ Under the *Lau's Corp.* standard, a party can survive a motion for summary judgment by showing that any one of the essential elements of the opposing side's case lacks the evidence to support it.⁸⁶

E. *Slip-and-Fall Cases After Lau's Corp.*

The Georgia Court of Appeals soon began to rely on the *Lau's Corp.* decision to determine whether a case presented issues of fact for a jury. An archetypal case is *Shansab v. Homart Development Co.*

81. 405 S.E.2d 475, 475 (Ga. 1991).

82. *Id.*

83. *Id.* (citing to *Haskins v. Lau's Corp.*, 402 S.E.2d 58 (Ga. Ct. App. 1991)).

84. *Id.* at 475, 478.

85. GA. CODE ANN. § 9-11-56(e) (Michie 1993).

86. 405 S.E.2d at 475. The court explained the burdens on the respective parties:

A defendant who will not bear the burden of proof at trial need not affirmatively disprove the nonmoving party's case; instead, the burden on the moving party may be discharged . . . by reference to the affidavits, depositions and other documents in the record that there is an absence of evidence to support the nonmoving party's case. If the moving party discharges this burden, the nonmoving party cannot rest on its pleading, but rather must point to specific evidence giving rise to a triable issue. . . .

....

In other words, summary judgment is appropriate when the court, viewing all the facts and reasonable inferences from those facts in a light most favorable to the non-moving party, concludes that the evidence does not create a triable issue as to each essential element of the case.

Id. at 476, 478. The court also held that the plaintiff's assertion that the defendant should have provided greater security because of a prior robbery and the restaurant's location in a "high crime" area failed to create a material issue of fact. *Id.* at 477-78.

(“*Shansab*”).⁸⁷ In *Shansab*, the plaintiff appealed from a grant of summary judgment on behalf of the defendant after she allegedly slipped on ice while exiting her car on the top deck of the defendant’s parking garage.⁸⁸ The court of appeals found that the plaintiff failed to meet the *Alterman* test by demonstrating that the defendant had superior knowledge of the icy conditions atop the parking garage.⁸⁹ By not satisfying the *Alterman* test, the court found that the plaintiff failed to disprove one of the essential elements of the defendant’s case; hence, under the *Lau’s Corp.* standard for summary judgment, the court reaffirmed the trial court’s decision granting the defendant summary judgment.⁹⁰ Therefore, the court of appeals relied on both *Alterman* and *Lau’s Corp.* to bar the plaintiff’s recovery.

In contrast to *Shansab*, the court of appeals found an issue of fact in *Jackson v. Camilla Trading Post, Inc.* (“*Jackson*”).⁹¹ While shopping for a refrigerator in the defendant’s store, the plaintiff slipped and fell on a concrete floor; according to the plaintiff and one witness, an oily substance covered the floor.⁹² The trial court granted the defendant’s motion for summary judgment and the plaintiff appealed, claiming that issues of fact existed regarding the defendant’s knowledge of the allegedly slick substance.⁹³ Reversing the trial court, the court of appeals held that issues of fact did indeed exist, particularly considering that the defendant’s employee led the plaintiff into an area restricted for “employees only” and after the plaintiff fell, removed a chainsaw leaking oil from the area.⁹⁴

87. 422 S.E.2d 305 (Ga. Ct. App. 1992).

88. *Id.* at 306, 309.

89. *Id.* at 308. “[W]e find the record demonstrates as a matter of law, by plain, palpable, and indisputable evidence, that appellant had equal knowledge of the icy condition or hazard but nevertheless thereafter attempted to cross the icy parking deck on foot.” *Id.* The court also concluded that the plaintiff’s situation was factually distinguishable from cases involving plaintiffs who slipped and fell while leaving their apartments because there were other ways for her to exit the parking garage. *Id.* See, e.g., *Hull v. Mass. Mut. Life Ins. Co.* 235 S.E.2d 601 (Ga. Ct. App. 1977) and *Phelps v. Consolidated Equities Corp.*, 210 S.E.2d 337 (Ga. Ct. App. 1974).

90. *Id.* at 306-08.

91. 460 S.E.2d 849 (Ga. Ct. App. 1995).

92. *Id.* at 850.

93. *Id.* at 851.

94. *Id.* at 851. The court, relying on *Lau’s Corp.*, noted that the employee’s actions raised issues of fact with regard to the existence of the hazard, the defendant’s constructive knowledge, and the possibility that the employee attempted to “cover up the existence of an oil

The Georgia Supreme Court did not revisit slip-and-fall liability after *Lau's Corp.* until *Barentine v. Kroger Co.* ("*Barentine*").⁹⁵ There, the court's implicit application of the distraction doctrine—a theory premised on the notion that individuals cannot exercise the same degree of care in discovering danger in moments of stress or when their attention is diverted⁹⁶—further complicated Georgia's slip-and-fall law.⁹⁷ In *Barentine*, the plaintiff allegedly fell in a puddle of clear liquid near the check-out counter in the defendant's

spill which caused [the plaintiff's] fall." *Id.* at 851-52. However, several justices dissented or concurred in the judgment only in this case, foreshadowing the malady that was to come. *Id.* at 853-854 (Beasley, C.J. and Johnson, J., concurring in judgment only; Birdsong, P.J. and Andrews and Smith, JJ., dissenting).

95. 443 S.E.2d 485 (Ga. Ct. App. 1994).

96. The court explained the distraction doctrine in *Robinson v. Kroger Co.* as follows:

Stated succinctly, the distraction doctrine holds that "one is not bound to the same degree of care in discovering or apprehending danger in moments of stress or excitement or when the attention has been necessarily diverted. . . ." Application of the doctrine has the effect of excusing an invitee from exercising the otherwise required degree of care because of the circumstances created by the purported distraction. "[T]his is particularly true where the distraction is placed there by the defendant or where the defendant in the exercise of ordinary care should have anticipated that the distraction would occur." Thus, when an invitee asserts that the hazard was not seen before the injury because the invitee's attention was diverted, the examination of whether the invitee exercised ordinary care for personal safety must take into account the circumstances surrounding the presence of the diversion. If the distraction has its source the invitee, the invitee "can no more take the benefit of it to excuse his lack of care for his own safety than one who creates an emergency can excuse himself because of its existence. . . ." However, "[w]here the distraction comes from without, and is of such a nature as naturally to divert the [invitee], and also of such a nature that the defendant might have anticipated it, the result is different."

493 S.W.2d 403, 411-412 (Ga. 1997) (citations omitted).

97. See, e.g., *Robinson*, 493 S.E.2d at 412 ("Since the *Barentine* decision, the court of appeals has taken divergent paths when discussing the distraction theory in conjunction with an invitee's exercise of ordinary care for personal safety"); *Coffey v. Wal-Mart Stores, Inc.*, 482 S.E.2d 720, 725 (Ga. Ct. App. 1997) (holding distraction doctrine inapplicable to "self-induced" distraction, i.e., looking at sales clerk); *Hornbuckle Wholesale Florist of Macon, Inc. v. Castellaw*, 477 S.E.2d 348, 351 (Ga. Ct. App. 1996) (holding distraction theory only "applies to the second prong of the *Alterman* test to prevent summary judgment to a defendant when a plaintiff could have easily seen the hazard yet failed to exercise ordinary care for her own safety" (citing to *Barentine*, 443 S.E.2d 485)); *Moore v. Kroger Co.*, 471 S.E.2d 916, 918-919 (Ga. Ct. App. 1996) (holding distraction doctrine inapplicable to store merchandise displayed on shelves); *Spartan Food Systems v. Williams*, 442 S.E.2d 489, 490 (Ga. Ct. App. 1994) (holding distraction doctrine inapplicable when claimed distraction is also very reason the plaintiff is in store; in this case, a salad bar).

store while talking with a cashier.⁹⁸ The plaintiff won at trial only to be reversed on appeal.⁹⁹ The Georgia Supreme Court then granted certiorari.¹⁰⁰ Believing that the plaintiff's conversation with the cashier constituted a distraction, the Supreme Court held that the plaintiff had sufficient evidence to prove that he exercised reasonable care for his safety.¹⁰¹

In light of the Georgia Supreme Court's holdings in *Alterman, Lau's Corp.*, and *Barentine*, the Georgia Court of Appeals issued an increasing number of opinions in which several judges disagreed as to the proper application of Georgia's slip-and-fall doctrine.¹⁰² For

98. 443 S.E.2d at 485 (quoting *Kroger Co. v. Barentine*, 437 S.E.2d 629, 630 (Ga. Ct. App. 1993)).

99. *Id.*

100. *Id.* at 486.

101. *Id.* The court explained specifically:

[T]hat [the plaintiff] looked at the cashier as he was walking toward the check-out line so that he could tell [the cashier] he was ready to check out; and that as he told the cashier he was ready to check out, he slipped and fell. This testimony is some evidence that [the plaintiff] exercised reasonable care for his own safety in approaching the check-out counter.

Id. (citing *Food Giant, Inc. v. Cooke*, 366 S.E.2d 781 (Ga. Ct. App. 1988)). The court failed to explain why approaching the check-out counter and talking to the cashier constituted a distraction.

102. See, e.g., *Bruno's Food Stores, Inc. v. Taylor*, 491 S.E.2d 881, 890 (Ga. Ct. App. 1997) ("*Bruno's*") (Birdsong, P.J., and Ruffin, J. concurring specially); *BBB Service Co. v. Glass*, 491 S.E.2d 870, 879 (Ga. Ct. App. 1997) ("*BBB Service Co.*") (Birdsong, P.J. and Ruffin, J. concurring specially); *Adams v. Sears, Roebuck & Co.*, 490 S.E.2d 15p (Ga. Ct. App. 1997) (Beasley, Blackburn, Ruffin, J.J. and Pope, P.J. concurring and concurring specially; Eldridge, J. and McMurray, P.J. dissenting); *Hartley v. Macon Bacon Tune, Inc.*, 490 S.E.2d 403, 409 (Ga. Ct. App. 1997), cert. granted, judgment vacated (Blackburn, J. concurring specially; Eldridge, J., dissenting); *Moore v. Kroger Co.*, 471 S.E.2d 916, 919 (Ga. Ct. App. 1996) (Ruffin, J., concurring specially; McMurray, P.J., dissenting); *Sheriff v. Hosp. Auth. of Houston County*, 471 S.E.2d 3, 5 (Ga. Ct. App. 1996) ("*Sheriff*") (McMurray, P.J. and Ruffin, J., dissenting).

For an examination of the split between the competing factions on the Georgia Court of Appeals, see *Deron R. Hicks, Torts*, 49 MERCER L. REV. 285, 293 (1997). Hicks explains:

How [the *Alterman Foods*] test is to be applied, however, has literally divided the Georgia Court of Appeals in the years since the *Alterman Foods* decision. Two different approaches to applying the test have arisen in the court of appeals. As anyone generally familiar with the area of slip and fall law in Georgia is aware, these [two] approaches to the application of the *Alterman Foods* test are identified with two judges on the court of appeals: Presiding Judge William McMurray and Judge Gary Andrews. Judge Andrews has adopted a very formalistic approach to the application of the *Alterman Foods* test, resulting more often than not in the grant of summary judgment to defendants. On the other hand, Judge McMurray views the *Alterman Foods* test as a

example, in *Sheriff v. Hospital Authority of Houston County* (“*Sheriff*”), the plaintiff fell in the reception area of the defendant’s hospital and sued, claiming that the defendant was negligent “in failing to properly inspect and maintain the premises.”¹⁰³ However, the plaintiff apparently failed to demonstrate that the defendant had actual or constructive knowledge of a substance which caused her to fall; the trial court granted summary judgment in favor of the defendant.¹⁰⁴ The court of appeals affirmed, holding that the plaintiff failed to present evidence that the defendant had constructive knowledge of the substance, a fatal defect under *Alterman* and *Lau’s Corp.*¹⁰⁵

Judges McMurray and Ruffin both dissented from the *Sheriff* majority.¹⁰⁶ According to Judge McMurray, the facts of record established that a hazardous puddle of water existed in the hospital reception area for a sufficient amount of time to infer that the defendant had constructive knowledge of the hazard.¹⁰⁷ Judge Ruffin, in contrast, argued that the majority failed to distinguish the instant case from other cases in which the court found issues of fact to exist.¹⁰⁸ Furthermore, Judge Ruffin concluded that the majority failed to recognize potential factual issues, such as the reasonableness of the

flexible tool to guide the trial court and the fact finder’s evaluation of the evidence but not as a basis for withdrawing the issues of negligence and knowledge from the fact finder’s consideration. Therefore, Judge McMurray’s approach to the *Alterman Foods* test generally results in a determination that a question of fact exists for the jury, thus precluding summary judgment.

Id. at 293.

103. 471 S.E.2d 3, 4 (Ga. Ct. App. 1996).

104. *Id.* at 4-5.

105. *Id.* According to the court’s opinion, the defendant presented evidence refuting the plaintiff’s claim of constructive knowledge by showing that the defendant’s employees continually monitored the area in question. *Id.* at 4-5. The plaintiff also failed to present any evidence establishing the existence of a substance or defect had existed. *Id.*

106. *Id.* at 5-6 (McMurray, P.J. and Ruffin, J., dissenting).

107. *Id.* at 5. McMurray reasoned that because the plaintiff saw no event which caused the puddle to appear, the puddle existed at least for the length of time during which the plaintiff sat in the hospital, approximately twenty-nine to thirty minutes. *Id.* Furthermore, because no employee discovered the puddle, McMurray drew several inferences: “Those who ‘patrolled’ did not look; those who looked did so perfunctorily and did not see the spill; or else, those that looked saw the spill and did nothing to cause its removal.” *Id.*

108. *Id.* (Ruffin, J., dissenting) (citing to *Jackson*, 460 S.E.2d 849; *Sacker v. Perry Realty Servs., Inc.*, 457 S.E.2d 208 (Ga. Ct. App. 1995); *Flood v. Camp Oil Co.*, 411 S.E.2d 348 (Ga. Ct. App. 1991)).

hospital's inspection plan which made no one specifically responsible for locating and reporting hazardous conditions.¹⁰⁹

Adams v. Sears, Roebuck & Co. ("Adams")¹¹⁰ provided another example of the growing divisions within the Georgia Court of Appeals over the proper application of Georgia's slip-and-fall doctrine. In *Adams*, the plaintiff fell and injured her knee after she stepped on a clothes hanger while shopping in one of the defendant's Sears, Roebuck & Co. stores.¹¹¹ The defendant moved for summary judgment, claiming lack of both actual and constructive knowledge of the hanger and, further, that the plaintiff failed to exercise ordinary care for her own safety.¹¹² Without deciding whether the defendant had actual or constructive knowledge of the conditions, the trial court granted the defendant summary judgment based on the plaintiff's failure to exercise ordinary care for her own safety.¹¹³ After reciting the language of *Alterman*, the court of appeals affirmed the judgment of the trial court, holding that the plaintiff failed to show that the defendant had either actual or constructive knowledge of the hanger.¹¹⁴ Further, the court held that the plaintiff failed to prove that she exercised ordinary care for her own safety.¹¹⁵ The *Adams* court then addressed several issues raised by Justice Eldridge in his dissenting opinion by explaining that it was powerless to avoid or

109. 471 S.E.2d at 6 (Ruffin, J., dissenting).

The point is, that except in clear, palpable and undisputed cases, questions of reasonableness should properly be left for the jury to decide. . . . [Hence,] [i]s not there a factual issue concerning the reasonableness of such an inspection plan where no one was specifically delegated the responsibility to locate and report hazardous conditions? Could not the jury find that a responsibility given to everyone is a responsibility given to no one?" *Id.*

110. 490 S.E.2d 150 (Ga. Ct. App. 1997).

111. *Id.* at 151-52.

112. *Id.* at 152. An employee for the defendant submitted an affidavit stating that he was in the area of the plaintiff's fall fifteen to twenty minutes prior to the accident and saw no hangers or other objects on the floor. *Id.* In response to the defendant's motion, the plaintiff submitted her own affidavit and that of a friend; both parties averred that they did not see the hanger until after the plaintiff fell. *Id.*

113. *Id.*

114. *Id.* at 153, 155. The court of appeals reasoned that the plaintiff's failure to present evidence showing the length of time the hanger remained on the floor precluded an inference of constructive knowledge on behalf of the defendant. *Id.*

115. *Id.* The court of appeals also rejected the plaintiff's contention that the rack of clothes she was looking at distracted her from seeing the hanger. *Id.* Moreover, the court reasoned that even if the plaintiff was distracted, she failed to present evidence of the defendant's knowledge. *Id.*

modify the holding of *Alterman* and that the dissent confused the burdens of proof discussed in *Alterman* with common law affirmative defenses.¹¹⁶

Judge Eldridge's dissent in *Adams* took issue with several aspects of the majority's holding.¹¹⁷ Judge Eldridge argued that the majority failed to correctly interpret *Lau's Corp.* and thereby misconstrued the respective burdens of proof accorded to each party in slip-and-fall cases.¹¹⁸ In addition, Judge Eldridge contended that the slippery surfaces of Georgia's slip-and-fall jurisprudence are typically caused by either (1) negligently maintained floors; (2) design or construction defects; (3) foreign substances, such as rain or mud; (4) indigenous substances, such as cleaning solutions or spills from food or other products; or (5) misplaced, discarded, or fallen merchandise or other objects, such as clothes hangers or wrapping materials.¹¹⁹ Considered against these paradigms, Judge Eldridge argued that the *Alterman* standard applies only to those cases in which the plaintiff slips and falls as a result of either a negligently maintained floor or a foreign substance because it is only in these cases where an issue of fact exists concerning the defendant's superior knowledge of the hazard; in all other cases the defendant has a duty to anticipate recurring hazards or

116. *Id.* at 153-55. Relying on *Hartley v. Macon Bacon Tune, Inc.*, 490 S.E.2d 403, 406 (Ga. Ct. App. 1997), the court explained:

Although the dissent seeks to avoid the reach of *Alterman Foods v. Ligon*, this cannot be done. "The Supreme Court of Georgia has not rejected or revised *Alterman Foods*. Therefore, the *Alterman Foods* standards are binding on this Court even though some may believe there is a better concept for allocating the burdens on the parties in these cases. . . ."

Adams, 490 S.E.2d at 153-54 (citations omitted). The majority also rejected the dissent's attempt to reclassify slip-and-fall cases according to the type of substance alleged to have caused the fall; the majority claimed the dissent's standard would require proprietors to constantly patrol their premises, in contravention of Georgia law. *Id.* at 154.

117. *Id.* at 156 (Eldridge, J., dissenting).

118. *Id.* In his opinion, Eldridge explained that "under this misapplication of *Lau's Corp.*, there is no burden placed upon the [defendant], even as to issues such as contributory negligence or assumption of the risk, upon which issues the defendant does have the burden of proof at trial." *Id.* Thus, as Judge Eldridge saw it, the majority's opinion required the plaintiff to prove the exercise of reasonable care for her own safety in response to a motion for summary judgment even though the defendant would ordinarily be required to prove her failure to exercise reasonable care at trial. *Id.* at 156-57.

119. *Id.* at 158.

has voluntarily assumed a duty to inspect for such hazards.¹²⁰ Therefore, *Alterman* could not apply to the instant case because the plaintiff slipped and fell as a result of a fallen object—the clothes hanger—and not a negligently maintained floor or a foreign substance.¹²¹

The Georgia Court of Appeals issued its opinions in *BBB Service Co. Inc. v. Glass* (“*BBB Service Co.*”)¹²² and *Bruno’s Food Stores, Inc. v. Taylor* (“*Bruno’s*”)¹²³ shortly after *Adams*. Although Judges Birdsong and Ruffin joined the majority in both *BBB Service Co.* and *Bruno’s* in affirming the trial court’s refusal to grant summary judgment to the defendants because issues of material fact existed,¹²⁴

120. *Id.* at 158-59. Judge Eldridge argued:

Since each category is distinguishable as to whether the potential hazard is foreseeable by the owner/occupier, each presents a different analysis in considering whether the defendant’s efforts are reasonable under the circumstances, as well as whether the plaintiff could discover and recognize the risk and act accordingly for his or her own safety once the risk is known and should be appreciated. The *Alterman Foods* analysis may function quite well regarding negligent maintenance cases . . . *Alterman Foods* also provides guidance in foreign and indigenous substance cases, where the presence of the substance is not previously known to exist by either plaintiff or defendant. In these cases, the defendant’s superior knowledge of the problem must be proven by the plaintiff in order to recover, and the defendant can disprove any knowledge by showing simply that is used reasonable inspection procedures to identify and remove the slippery substances. Where, however, the defendant has a duty to foresee a recurring danger or has voluntarily assumed a duty to inspect for a recurring danger, the duty to foresee by the owner/occupier does not require actual or constructive notice of such danger when it, in fact, recurs.

Id. (Eldridge, J., dissenting).

121. *Id.* Judge Eldridge proposed a new test for deciding slip-and-fall cases that involved a five-step determinations:

(1) that a hazard or danger existed; (2) that the defendant’s acts or omissions caused the hazard; (3) that, if not, the defendant had actual or constructive knowledge of the alleged hazard caused by others; (4) that the defendant was negligent in inspecting or preventing such hazard from occurring or in removing the hazard once it occurred; and (5) that the hazard caused the plaintiff’s injury.

Id. at 159.

122. 491 S.E.2d 870 (Ga. Ct. App. 1997).

123. 491 S.E.2d 881 (Ga. Ct. App. 1997).

124. *BBB Service Co.*, 491 S.E.2d at 871, 877; *Bruno’s*, 491 S.E.2d at 882, 887. The court of appeals held that the defendant failed to negate the plaintiff’s evidence of a slick floor which caused her to fall. *BBB Service Co.* 491 S.E.2d at 877. In a succinct explanation of *Lau’s Corp.*, 405 S.E.2d 474, the court also stated that a trial court should grant summary judgment only after “viewing all the evidence in a light most favorable to a denial of summary judgment” and concludes no issues of fact exist with respect to “an essential element of the plaintiff’s claim.”

both judges issued a sharply worded concurrence in each case.¹²⁵ In his concurring opinion in *BBB Service Co.*, Judge Birdsong, joined by Judge Ruffin, criticized the majority for misinterpreting the necessary burdens of proof in a motion for summary judgment by requiring the moving party (typically the defendant) to affirmatively disprove an essential element of the non-moving party's case.¹²⁶ Judge Birdsong argued instead that the moving party can win its motion for summary judgment by proving that any one element of the non-moving party's claim lacks the evidence to support it.¹²⁷ Judge Birdsong took his criticism of the majority a step further in *Bruno's*, arguing that the majority's "expansive" opinion misconstrued the law of summary judgment by refusing to allow inferences on behalf of the moving party, rendering the use of summary judgment impotent in resolving slip-and-fall cases—a serious error for both Georgia law and public policy.¹²⁸

BBB Service Co., 491 S.E.2d at 875. In *Bruno's*, 491 S.E.2d at 888, the court explained:

Clearly . . . material issues of fact exist . . . as to whether [the plaintiff], who was pushing a shopping buggy, could have seen the sheen of the narrow strip of damp floor prior to reaching it and, . . . whether she could have seen it in time to avoid the danger, particularly when this danger was at or near the corner of intersecting aisles.

125. *BBB Service Co.*, 491 S.E.2d at 879 (Birdsong, P.J. and Ruffin, J., concurring specially) ("I write separately to make clear my objections to the analysis used by the majority in affirming that result. Additionally, I deem it important to note that certain inaccuracies in the majority's narrative of the facts played no part in my disposition of this case"); *Bruno's*, 491 S.E.2d at 890 (Birdsong, P.J. and Ruffin, J., concurring specially) ("I write separately because I cannot agree with the analysis the majority used in reaching that result. In my view, the majority misconstrues and misapplies our law concerning summary judgment, inferences, active negligence, and distractions").

126. *BBB Service Co.*, 491 S.E.2d at 879-80 (Birdsong, P.J., and Ruffin, J., concurring). Nevertheless, because the plaintiff's evidence in the instant case created an issue with respect to the defendant's care of its floors, Judge Birdsong agreed with the majority's outcome. *Id.* Judge Birdsong concluded by explaining that certain statements relied on by the majority failed to appear in the affidavit of record and that the holding of *Alterman*, 272 S.E.2d 327, remained controlling precedent for this case. *Id.* at 880-81.

127. *Id.* at 880.

128. *Bruno's*, 491 S.E.2d at 890-93 (Birdsong, P.J., and Ruffin, J., concurring). "I am concerned that the majority's expansive and, I believe erroneous, opinion could . . . result in a framework for consideration of slip and fall cases on summary judgment so that regardless of the evidence summary judgment could never be granted." *Id.* at 890. After discussing the importance of summary judgment proceedings, Judge Birdsong accused the majority of misconstruing the law of summary judgment by refusing to allow inferences on behalf of a moving party. *Id.* at 891. The majority responded to this charge by claiming that Judge Birdsong upset the role of the reviewing court by weighing the evidence in the absence of a

F. *Robinson v. Kroger Co. and Its Aftermath*

Like earlier cases, *Robinson v. Kroger Co.* arose after the plaintiff slipped in a foreign substance on the floor of the defendant's supermarket.¹²⁹ The trial court granted the defendant's motion for summary judgment and the Georgia Court of Appeals affirmed, holding that the plaintiff failed to exercise ordinary care for her safety.¹³⁰ The Georgia Supreme Court granted certiorari to resolve the apparent division within the court of appeals regarding the proper standard for determining whether a plaintiff exercised ordinary care sufficient to survive a motion for summary judgment in slip-and-fall cases.¹³¹

A review of Georgia's slip-and-fall jurisprudence revealed that the court of appeals made liberal use of summary judgment to dispense slip-and-fall cases in the face of conflicting evidence within the record.¹³² It did so while overemphasizing the invitee's duty to

jury. *Id.* at 888-89. As in *BBB Service Co.*, Judge Birdsong joined the majority's disposition of the case, explaining that the plaintiff here need only present evidence of proximate causation and exercise of ordinary care for her safety. *Id.* at 890.

129. 493 S.E.2d 403, 405 (Ga. 1997). Neither the Georgia Supreme Court nor the Georgia Court of Appeals revealed any evidence of the nature of the substance, other than its green color. *Robinson v. Kroger Co.*, 476 S.E.2d 29, 30 (Ga. Ct. App. 1996). *Cf. Alterman*, 272 S.E.2d at 329 (finding no evidence of the cause of the plaintiff's fall in the defendant's supermarket).

130. *Robinson*, 476 S.E.2d at 30-31.

131. *Robinson*, 493 S.E.2d at 405 ("We granted certiorari to examine 'the proper standard for determining whether the plaintiff in a "slip and fall" premises liability case has exercised ordinary care sufficient to prevail against a motion for summary judgment.'").

132. *Id.* at 408. The court held:

[B]y routinely adjudicating as a matter of law questions of the plaintiff's and defendant's negligence, proximate cause, and the exercise of ordinary care, these decisions have made commonplace what is, in reality, an unusual circumstance in tort law, since

[a]s a general proposition, issues of negligence, contributory negligence and lack of ordinary care for one's own safety are not susceptible of summary adjudication . . . but should be resolved by trial in the ordinary manner. The trial court can conclude as a matter of law that the facts do or do not show negligence on the part of the defendant or the plaintiff only where the evidence is plain, palpable, and undisputable.

Where reasonable minds can differ as to the conclusion to be reached with regard to questions of whether the owner/occupier breached the duty of care to invitees and whether an invitee exercised reasonable care for personal safety, summary adjudication is not appropriate.

exercise reasonable care and de-emphasizing the landowner's duty to ensure the safety of the invitee.¹³³ The Georgia Supreme Court also criticized the court of appeals for applying the "plain view" doctrine to the point of frivolity by barring recovery to invitees who fell in hazards in their "plain view."¹³⁴ Based on the above the court overruled the line of cases holding that an invitee's failure to see the hazard before falling constitutes a failure of ordinary care.¹³⁵

Id. (citations omitted).

133. *Id.* The court noted:

[T]hese decisions have placed in the limelight an invitee's duty to exercise reasonable care for personal safety and, in doing so, have regulated to the shadows the duty owed by an owner/occupier to an invitee . . . While not an insurer of the invitee's safety, the owner/occupier is required to exercise ordinary care to protect the invitee from unreasonable risks of harm of which the owner/occupier has superior knowledge . . .

...

By encouraging others to enter the premises to further the owner/occupier's purpose, the owner/occupier makes an implied representation that reasonable care has been exercised to make the place safe for those who come for that purpose, and that representation is the basis for the liability of the owner/occupier for an invitee's injuries sustained in a "slip-and-fall."

Id. at 408-09 (citations omitted).

134. *Id.* at 409, 410-11. "The doctrine is 'that one is under a duty to look where he is walking and to see large objects in plain view at the location where they are customarily placed and expected to be. . .'" *Id.* (quoting *Stenhouse v. Winn Dixie Stores*, 249 S.E.2d 276 (Ga. Ct. App. 1978)). The court outlined the proper perimeters of the "plain view" doctrine:

[The Court of Appeals has used the "plain view" doctrine] in such a manner as to remove any reasonable limits on its application when it has repeatedly held that a hazard which was not seen by the invitee before the fall but which would have been seen by the invitee had the invitee looked at the floor is a "plainly visible defect" in "plain view," and the failure of the invitee to see such a hazard bars recovery under the "plain view" doctrine . . . The "plain view" doctrine is the equivalent of the "constructive knowledge" aspect of voluntary negligence on the part of the plaintiff. Voluntary negligence is applicable when the invitee knew or should have known of the hazard and proceeded, and the "plain view" doctrine is applied to a hazard in plain view at the location where it is customarily found and can be expected to be, but which the invitee professes not to have seen prior to the fall. Even though the invitee had no actual knowledge of the hazard before being injured, the invitee should have known of the hazard's presence.

Id.

135. *Id.* at 410 ("[W]e conclude that we must disapprove of the appellate decisions which hold as a matter of law that an invitee's failure to see before falling the hazard which caused the invitee to fall constitutes a failure to exercise ordinary care.") *Id.* at 410. The court reasoned:

Demanding as a matter of law the an invitee visually inspect each footfall requires an invitee to look continuously at the floor for defects, a task the invitee is not required to

The court then revisited *Barentine*.¹³⁶ The court held that an issue of fact exists as to invitees' reasonable care when they claim that "something in control of the defendant" distracted them and the defendant could reasonably anticipate the hazard; the ultimate decision of the reasonableness of the invitees' actions is a decision for the jury.¹³⁷ In addition, the *Robinson* Court modified the slip-and-fall standard of summary judgment by holding that plaintiffs need to present evidence that they exercised reasonable care only after the defendant presents evidence to the contrary.¹³⁸

Although the Georgia Court of Appeals now follows *Robinson* to resolve burden-of-proof issues, *Robinson's* long term impact remains unclear. *Kelley v. Piggly Wiggly Southern, Inc.* ("*Kelley*"), for example, provides some indication of *Robinson's* immediate impact.¹³⁹ Prior to *Robinson*, a divided panel of the court of appeals upheld the trial court's grant of summary judgment to the defendant, Piggly Wiggly Southern, because the plaintiff failed to satisfy the first prong of *Alterman* by showing that the defendant constructively knew that its floor cleaning machine leaked the water that caused the

perform since the invitee is entitled to assume that the owner/occupier has exercised reasonable care to make the premises safe for the invitee and continues to exercise such care while the invitee remains on the premises.

Id. (citations omitted).

136. 443 S.E.2d 485 (Ga. 1994).

137. *Robinson*, 493 S.E.2d at 412. The court concluded that, "the conduct of a store employee, the premises construction or configuration, or a merchandise display of such a nature that its presence would not have been anticipated by the invitee" might constitute evidence of the invitee's exercise of reasonable care. *Id.*

138. *Id.* at 413-14. The court explained that:

Only after the defendant has produced evidence of the plaintiff's negligence does the plaintiff have the burden of producing rebuttal evidence that the invitee's failure to ascertain the existence of the hazard was due to actions or conditions within the control of the defendant, which actions or conditions are of such a nature that the defendant knew or should have known they would have diverted the invitee's attention from looking where he was going. By re-establishing the evidentiary burdens to where they were at the time *Alterman Foods* was decided, we lighten the load placed on plaintiffs by more recent judicial decisions, and place on defendants that which is normally required of a defendant—the establishment of a defense to liability.

Id. at 414.

139. 496 S.E.2d 732 (Ga. Ct. App. 1997) *vacating* *Kelley v. Piggly Wiggly Southern, Inc.* 1997 WL 742065, at *1 (Ga. Ct. App. Dec. 3, 1997).

plaintiff's fall.¹⁴⁰ On reconsideration, the court reversed its previous holding and, relying on *Robinson*, overturned the original grant of summary judgment.¹⁴¹ The court found that the plaintiff's *prima facie* evidence of the defendant's negligence—a "routine issue" of premises liability not open to summary judgment under *Robinson*—and the defendant's failure to show that it inspected the floors for excess water after cleaning precluded summary judgment.¹⁴² Slip-and-fall cases since *Robinson* provide little indication of its long-term impact in resolving the earlier disagreements within the Georgia Court of Appeals.¹⁴³

II. CONTRASTING APPROACHES TO SLIP-AND-FALL CASES AND PREMISES LIABILITY

In *Rowland v. Christian* ("Rowland") the California Supreme Court eliminated the common law distinction between invitees,

140. *Kelley*, 1997 WL 742065, at *1. The court held that the plaintiff failed to present evidence of the defendant's constructive knowledge, because no employees witnessed the accident and the plaintiff failed to show how long the substance remained on the floor. *Id.* at *2-*3. Judge Beasley, dissenting, argued that the defendant retained the burden of proving lack of negligence because the plaintiff apparently slipped on water left by the defendant's cleaning crew. *Id.* at *4-*5.

141. *Kelley*, 496 S.E.2d at 735-36.

142. *Id.* at 736. As the court explained:

The proprietor has not pierced the pleading by showing it fulfilled the duty imposed by [GA. CODE ANN. § 51-3-1 (Michie 1982)]. Nor has it rebutted the inference that the water came from the cleaning process that was supposed to end about three hours earlier. [The defendant] has not rebutted this evidence by showing a reasonable inspection and cleaning procedure.

Id.

143. *Compare Dumas v. Tripps of North Carolina, Inc.*, 495 S.E.2d 129, 130 (Ga. Ct. App. Dec. 12, 1997) (holding that a jury issue remained regarding the plaintiff's "knowledge of the ice and whether she failed to exercise ordinary care for her own safety"), and *Ray v. Restaurant Management Services, Inc.*, 495 S.E.2d 613, 614 (Ga. Ct. App. 1998) (reversing trial court's grant of summary judgment because defendant failed to show that plaintiff did not exercise ordinary and reasonable care), and *Dobbins v. Bi-Lo, Inc.*, 494 S.E.2d 397 (Ga. Ct. App. 1998) (relying on *Robinson* to find issues of fact for a jury to resolve), with *Kolomichuk v. Bruno's, Inc.*, 497 S.E.2d 10, 11 (Ga. Ct. App. Jan. 27, 1998) (affirming trial court's grant of summary judgment because of plaintiff's failure to present evidence regarding the cause of his fall), and *Anderson v. Service Merchandise Co., Inc.*, 496 S.E.2d 743, 746 (Ga. Ct. App. 1998) (refusing to find negligence because of defendant's reasonable inspection procedures), and *Haskins v. Piggly Wiggly Southern, Inc.*, 496 S.E.2d 471, 473 (Ga. Ct. App. 1998) (finding plaintiff's testimony insufficient to infer constructive knowledge on behalf of defendant).

licensees, and trespassers.¹⁴⁴ The *Rowland* court reasoned that the common law distinctions created unnecessary confusion among judges and juries; therefore, the court replaced these antiquated classifications with a system of ordinary negligence.¹⁴⁵ Furthermore, the California Supreme Court held that the resolution of premise liability cases depends upon the reasonableness of the landowner's actions under California statutory law.¹⁴⁶ While the plaintiff's status as invitee, licensee, or trespasser retains some relevancy to the issue of liability, it has nothing to do with the reasonableness of the landowner's acts.¹⁴⁷ Applying this test to the facts of *Rowland*, in which the plaintiff was severely injured after using a cracked faucet handle in the defendant landlord's apartment, the court concluded that the defendant's awareness of a defective faucet handle, coupled with her failure to warn plaintiff of the hazard, constituted negligence.¹⁴⁸

Commentators addressing slip-and-fall liability also present several alternative methods for resolving the common issues of knowledge and burden of proof. Some advocate the use of a strict liability standard in slip-and-fall cases.¹⁴⁹ This standard, according to its supporters, shifts the burden of proof away from store owners to require plaintiffs to prove only the unreasonableness of the alleged hazard.¹⁵⁰ Others argue for a standard based on the particular

144. 443 P.2d 561, 568 (Cal. 1968) (en banc). *Cf. supra* notes 25-30 and accompanying text, discussing the common law origins of premises liability.

145. *Rowland*, 443 P.2d at 565-567. The California Supreme Court looked to the increasing number of exceptions carved out of the common-law rules of liability, changes in society between the origin of the common-law distinctions, and an apparent movement in some jurisdictions away from the common-law classifications. *Id.*

146. CAL. CIV. CODE § 1714 (West 1998).

147. *Id.* at 568. According to the court:

The proper test to be applied to the liability of the possessor of land in accordance with section 1714 of the Civil Code is whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others, and, although the plaintiff's status as a trespasser, licensee, or invitee may in the light of the facts giving rise to such status have some bearing on the question of liability, the status is not determinative.

Id.

148. *Id.* at 562.

149. John M. Robinson, Comment, *Self-Service Slip and Falls: Is the Storekeeper's Burden Too Great?*, 48 LA. L. REV. 1443, 1464 (1988).

150. *Id.* The author explains:

knowledge of a store owner and the probability of customers dropping or placing items on a store's floor.¹⁵¹ Finally, one commentator proposes a rule containing a rebuttable presumption assuming the defendant's negligence in slip-and-fall cases.¹⁵²

III. ANALYSIS

A. The Problems With Georgia's Slip-and-Fall Cases

Beginning with *Alterman Foods*, the Georgia Supreme Court tried to simplify Georgia's slip-and-fall jurisprudence so that fewer cases would require appellate review and trial courts would resolve cases based on undisputed factual issues through summary judgment proceedings.¹⁵³ Georgia's codification of the standard of care store owner's owe to their customers¹⁵⁴ allowed the *Alterman* court to expedite slip-and-fall cases by distilling the issues into the defendants' actual or constructive knowledge and the plaintiffs' exercise of ordinary care for their safety.¹⁵⁵ Applying this new standard gave the court little difficulty: since the plaintiff failed to present any evidence beyond a mere allegation of negligence, the

A test is needed which is fairer to the storeowner but still protects the plaintiff.

Strict liability is such a test. Under this theory, the burden of proof would no longer be on the storeowner, while the plaintiff would not have the difficult burden of proving negligence . . . [T]he determinative issue would be whether the condition of the floor presented an unreasonable risk

Id

151. Andrew Flach, Note, *Missouri Removes a Tough Hurdle for "Slip and Fall" Plaintiffs*, 56 MO L. REV. 163, 171-72 (1991) (explaining author's probability based theory of slip-and-fall liability).

152. Steven D. Winegar, Comment, *Reapportioning the Burden of Uncertainty: Stovekeeper Liability in the Self-Service Slip-and-Fall Case*, 41 UCLA L. REV. 861 (1994). Winegar's rule "shifts only the burden of producing evidence to the defendant." *Id.* If the defendant presents evidence proving a lack of negligence, "the presumption disappears" and, presumably, the plaintiff must come forward with new evidence. *Id.* at 901. On the other hand, if the defendant's evidence fails to rebut the presumption, the defendant either loses (if no other factual issues exist) or a jury issue arises regarding the "basic facts." *Id.*

153. See, e.g., *Alterman*, 272 S.E.2d at 329 ("The cases have tended to drift toward a jury issue in every 'slip and fall' case").

154. See GA. CODE ANN. §§ 51-3-1 to -2 (Michie 1982) (defining the standard of care owed to invitees and separating invitees from licensees).

155. *Alterman*, 272 S.E.2d at 330.

Georgia Supreme Court had to affirm the grant of summary judgment.¹⁵⁶

At the outset, the Georgia Court of Appeals also had little difficulty following *Alterman* in deciding whether a case presented factual issues for a jury.¹⁵⁷ *Telligman*, *Martin*, and *Begin* all presented factual issues, either as to the cause of the plaintiffs' fall or the extent of the defendants' knowledge.¹⁵⁸ In contrast, the court of appeals upheld grants of summary judgment to the defendants in *Browning*, *K-Mart*, *Wolling*, and *Bowman*.¹⁵⁹ In *Browning*, the defendant rebutted the plaintiff's evidence with proof of the defendant's reasonable inspection procedures.¹⁶⁰ In *K-Mart* and *Wolling*, the plaintiffs failed to produce evidence of the defendants' knowledge.¹⁶¹ The court of appeals upheld the grant of summary judgment in *Bowman* because the defendant presented evidence of the plaintiff's failure to exercise ordinary and reasonable care.¹⁶² In all of these early cases, the Georgia Court of Appeals had no difficulty allocating the burdens for producing evidence between the plaintiff and the defendant. In each case, the plaintiff needed to present evidence of both the precise cause of the accident and the defendant's knowledge of the hazard, while the defendant needed to rebut the plaintiff's evidence and present any evidence tending to prove that the plaintiff failed to exercise ordinary and reasonable care.

Lau's Corp. dramatically changed the landscape of Georgia slip-and-fall jurisprudence by allowing the defendant to rebut the plaintiff's case simply by pointing to a lack of evidence for "any essential element of [the] plaintiff's claim."¹⁶³ Soon thereafter, the court of appeals began to rely on *Lau's Corp.* to decide whether the

156. *Id.* at 332.

157. *See supra* notes 48-80 and accompanying text, discussing the Court of Appeal's distinctions between cases presenting jury issues and cases ripe for summary judgment.

158. *See supra* notes 48-64 and accompanying text, explaining the requirements to prove actual or constructive knowledge on behalf of the defendant and the exercise of reasonable care on the plaintiff's behalf.

159. *See supra* notes 65-80 and accompanying text, discussing the Georgia Supreme Court and Georgia Court of Appeals' refusal to find jury issues in many slip-and-fall cases.

160. *See supra* notes 67-68 and accompanying text, discussing *Browning*.

161. *See supra* notes 69-77 and accompanying text, discussing *K-Mart* and *Wolling*.

162. *See supra* notes 78-80 and accompanying text, discussing *Bowman*.

163. *Lau's Corp.*, 405 S.E.2d at 475 (emphasis added).

plaintiff's evidence presented an issue of fact under *Alterman*. Initially, the court of appeals returned judgments similar to those it made prior to *Lau's Corp.* by focusing on the *Shansab* plaintiff's failure to present evidence of the defendant's negligence¹⁶⁴ and an employee's apparent attempts to conceal evidence of his employer's negligence in *Jackson*.¹⁶⁵ However, after the Georgia Supreme Court's exploration of the distraction doctrine in *Barentine*, the Georgia Court of Appeals frequently divided over the construction of Georgia's slip-and-fall law.¹⁶⁶ For instance, in *Sheriff*, the members of the court of appeals disagreed over whether an issue of fact existed under *Lau's Corp.* because the plaintiff failed to present evidence of either the existence of the hazard or the defendant's actual or constructive knowledge.¹⁶⁷ In contrast, the *Sheriff* dissent claimed that the defendant's failure to properly inspect the premises gave rise to a factual issue.¹⁶⁸ The *Adams* court also split as to whether the *Alterman* standard applied to the facts of that case.¹⁶⁹ While the majority applied the *Alterman* standard, Judge Eldridge's dissent argued for a new standard to determine specific types of slip-and-fall cases.¹⁷⁰ Finally, *Bruno's* and *BBB Service Co.* illustrate situations in which the members of the court of appeals agreed with the results but not the method of analysis used to reach the holding.¹⁷¹

These divisions within the Georgia Court of Appeals demonstrate the inability of the court to reconcile the holdings of *Alterman* and *Lau's Corp.* Members of the court in these cases reached widely divergent results as to the applicability, meaning, and continued vitality of *Alterman* and *Lau's Corp.*, as well as burden of proof issues. Specifically, several members of the court of appeals

164. See *supra* notes 87-90 and accompanying text, discussing *Shansab*.

165. See *supra* notes 91-94 and accompanying text, discussing *Jackson*.

166. See *supra* notes 102-28 and accompanying text, discussing the divisions within the court of appeals.

167. See *supra* notes 103-09 and accompanying text, explaining the divisions within the court of appeals regarding the outcome of *Sheriff*.

168. See *supra* notes 106-09 and accompanying text.

169. See *supra* notes 110-21 and accompanying text, discussing *Adams*.

170. See *supra* notes 117-21 and accompanying text (explaining Judge Eldridge's proposal for a new set of slip-and-fall guidelines in *Adams*).

171. See *supra* notes 125-28 and accompanying text, explaining the concurring opinions by Presiding Judge Birdsong and Judge Ruffin.

apparently understood *Lau's Corp.* to require plaintiffs to prove that they exercised ordinary care for their safety even when the defendant failed to produce any evidence placing this requirement at issue.¹⁷²

B. Proposals to Change Slip-and-Fall Cases

Judge Eldridge first proposed to change Georgia's slip-and-fall law in his dissent in *Adams* by creating new categories of premises liability cases.¹⁷³ However, as the *Adams* majority correctly pointed out, the Georgia Court of Appeals lacked any authority to overrule or change the precedents outlined by the Georgia Supreme Court.¹⁷⁴ Ultimately, the Georgia Supreme Court revisited *Alterman* and *Lau's Corp.* in *Robinson* in an attempt to provide more guidance to the court of appeals.¹⁷⁵ *Robinson's* holding seemingly clarified Georgia's slip-and-fall law in three areas: exercise of reasonable care, the distraction doctrine, and burdens of proof.¹⁷⁶ *Robinson's* holding relating to the burden of proof did the most to alter Georgia's slip-and-fall law by requiring plaintiffs to present evidence of their use of reasonable care only after the defendant produces evidence placing the plaintiff's exercise of reasonable care at issue.¹⁷⁷ However, as *Kelley* and the other cases demonstrate, *Robinson's* final impact remains unclear and, in any case, still requires plaintiffs to prove the store owner's actual or constructive knowledge.¹⁷⁸

In contrast to the relatively mild changes in premises liability set out in *Robinson*, other courts and commentators advocate more significant changes in premises liability cases. In *Rowland*, for example, the California Supreme Court eliminated the common law distinctions between trespassers, licensees, and invitees in favor of a

172. See, e.g., *supra* notes 114-15 and accompanying text, discussing the holding in the *Adams* case. Cf. *infra* notes 188-91 and accompanying text, discussing the new proposal's standard in relation to the plaintiff's exercise of ordinary care.

173. See *supra* notes 117-21 and accompanying text, discussing Judge Eldridge's proposal.

174. See *supra* note 116 and accompanying text, explaining the majority's reasoning in *Adams*.

175. See *supra* notes 131-35 and accompanying text, explaining the Georgia Supreme Court's reasons for reevaluating Georgia's slip-and-fall doctrine.

176. See *supra* notes 132-38 and accompanying text, discussing the *Robinson* holding.

177. See *supra* note 138 and accompanying text, discussing the *Robinson* holding in relation to the plaintiff's exercise of ordinary and reasonable care.

178. See *supra* notes 139-43 and accompanying text, discussing *Kelley*.

common law form of negligence; a marked departure from precedent.¹⁷⁹ These commentators also present interesting new approaches to slip-and-fall cases, ranging from strict liability and rebuttable presumptions of negligence for store owners to proposals resembling the approach taken by the Georgia courts.¹⁸⁰ However, none of these proposals clearly explain the precise evidentiary burdens on the parties in a slip-and-fall case.

V. PROPOSAL

A. Overview

Because many of the problems within the Georgia Court of Appeals result from confusion over the dictates of the Georgia Supreme Court, this note proposes a three part test that delineates the common issues in slip-and-fall cases.¹⁸¹ First, this test requires plaintiffs to present evidence of the factual cause of their fall. Second, if the plaintiff succeeds in producing preliminary evidence of the hazard, both parties will then present evidence relating to their opponent's knowledge of the hazard. If both parties possess equal knowledge of the hazard, this proposal allows the defendant to produce evidence that the plaintiff had the opportunity to correct or avoid the hazard. This standard incorporates some key elements of Georgia's slip-and-fall law while avoiding much of the semantic confusion that plagues Georgia's slip-and-fall jurisprudence, as well as the ambiguous suggestions of members of the Georgia Court of Appeals, other judiciaries, and commentators.¹⁸²

179. See *supra* notes 144-47 and accompanying text, explaining the *Rowland* court's approach.

180. See Flach, *supra* note 151 and accompanying text. Compare Robinson, *supra* notes 149-50, at 1464; and Winegar, *supra* note 152, at 900, in their explaining alternative approaches to slip-and-fall liability.

181. See, e.g., *supra* notes 102-28 and accompanying text, discussing the divisions within the Georgia Court of Appeals.

182. For example, this proposal retains the high initial burden of proof for plaintiffs found in *Alterman*. See *supra* notes 45-46 and accompanying text, explaining *Alterman's* burden. See also *supra* notes 117-21 and accompanying text, discussing Judge Eldridge's dissent in *Adams*; *supra* notes 144-47 and accompanying text, discussing *Rowland*. and *supra* notes 149-52 and accompanying text, discussing alternative methods of resolving slip-and-fall cases.

B. Application and Rationale of the New Proposal

Plaintiffs bringing suit under this proposal must first present evidence of the precise hazard that allegedly caused their fall, such as a wet floor or broken or discarded merchandise. This initial burden resembles the mandate of *Alterman* which requires plaintiffs to present evidence of the store owner's knowledge, but differs because it *precedes* any determination of knowledge on the part of the store owner by requiring plaintiff's to present evidence of a hazard. A plaintiff's failure to present evidence of the cause of the fall will always prevent an inquiry into the store owner's liability and, thus, the store owner's knowledge of the hazard.¹⁸³ By requiring evidence of the hazard from the start, this test also promotes the use of summary judgment by barring plaintiffs without any evidence from advancing to a jury trial.¹⁸⁴

The second step of the test focuses on the knowledge possessed by both the plaintiff and the defendant in a slip-and-fall case; however, unlike *Alterman*, plaintiffs do not need to prove the store owner's actual or constructive knowledge.¹⁸⁵ Instead, this test balances the evidence presented by both sides regarding their own knowledge and the knowledge of the opposing party, including any evidence that the hazard existed before the accident, whether the plaintiff observed the hazard prior to the accident, and the store owner's inspection policies.¹⁸⁶ By eliminating the burdens of proving the store owner's actual or constructive knowledge, this test recognizes the inability of many plaintiffs to find conclusive evidence of the store owner's knowledge and therefore allows juries to decide this key factual

183. From *Alterman* through *Robinson*, Georgia's slip-and-fall cases have always held that a plaintiff's failure to present evidence of the cause of the fall ended any further inquiry into the matter. See, e.g., *supra* notes 69-72, 103-05, discussing *K-Mart* and the majority opinion in *Sheriff*.

184. Cf. *supra* note 128 and accompanying text, Presiding Judge Birdsong's views on the importance of summary judgment in *Bruno's*.

185. See *supra* note 46 and accompanying text, discussing *Alterman's* holding requiring the plaintiff to present evidence of the defendant's actual or constructive knowledge.

186. A party producing conclusive evidence of the other party's superior knowledge merits summary judgment under this standard. However, an inconclusive showing of the party's knowledge results in a factual issue for the jury to determine.

issue.¹⁸⁷

Finally, this test allows store owners to present evidence of plaintiffs' ability to avoid or prevent the hazard.¹⁸⁸ This incorporates factors such as a plaintiff's failure to observe large objects or obvious dangers.¹⁸⁹ Because evidence of the plaintiff's exercise of reasonable care often rests solely with the plaintiff, this test allows defendants to make the plaintiff's exercise of reasonable care an issue while permitting the plaintiff an opportunity to rebut the evidence.

CONCLUSION

By eliminating the confusion within the Georgia judicial system, this new test achieves several objectives in a fair, straightforward manner. The test retains a high initial burden of proof to prevent frivolous law suits, promotes judicial economy, and precludes store owners from the impossible task of constantly monitoring their entire premises. However, this standard also requires juries to decide crucial factual issues, thereby preventing interference in the party's right to a trial by jury.¹⁹⁰ Most importantly, this standard balances these interests in economy and fairness in a clear set of requirements while avoiding the confusion of other proposals.¹⁹¹

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187. This inability results from the difficulty plaintiffs confront in collecting information in the immediate aftermath of the accident, as well as the fact that a store's cleaning procedure often take place during non-business hours.

188. The third prong of the proposed test mirrors the holding in *Robinson* which required the defendant to produce evidence of the plaintiff's lack of reasonable care. *Robinson*, 493 S.E.2d at 414; see also *supra* note 138 and accompanying text, discussing *Robinson*. However, the new test contrasts with *Alterman* which required the plaintiff to prove his or her exercise of reasonable care. *Alterman*, 272 S.E.2d at 330.

189. Cf. *supra* notes 79, 96-101 and accompanying text, discussing the courts' explanations of ordinary and reasonable care.

190. See *supra* note 7 and accompanying text, explaining the significance of summary judgment.

191. See, e.g., *supra* notes 118-21, 147-52 and accompanying text.

* J.D. 1999, Washington University.

