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Robinson v. Kroger: A Leveling of the Field or Fatal Fall for Summary Judgment?

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Robinson v. Kroger: A Leveling of the Field or Fatal Fall for Summary Judgment?

In *Robinson v. Kroger*,[1] the Supreme Court of Georgia reaffirmed that an invitee can recover in a slip-and-fall action when (1) the owner/occupier had actual or constructive knowledge of the hazard; and (2) plaintiff lacked knowledge of the hazard despite the exercise of ordinary care. However, in a drastic departure from existing case law, the court held that the evidentiary burden regarding plaintiff's knowledge of the hazard and exercise of reasonable care does not shift, for the purpose of summary judgment, until the defendant establishes negligence on the part of the plaintiff.[2]

I. FACTUAL BACKGROUND

Henrietta Robinson injured her knee when she slipped and fell on a green substance while walking through the produce section of a store owned by the Kroger Company. The green substance that caused Robinson's slip and fall was on the floor between two produce bins. Robinson claimed that the overhang of the produce bin obstructed her view of the floor, and, therefore, she could not see the substance that caused her fall. Based on this, Robinson brought a negligence action against Kroger to recover for injuries caused by her fall.[3]

The trial court granted summary judgment in favor of Kroger based on Robinson's failure to exercise ordinary care for her own safety.[4] The court of appeals affirmed and agreed that Robinson had failed to exercise ordinary care by neglecting to use her senses, namely her eyesight, to avoid the hazard on the floor.[5] The Supreme Court of Georgia granted certiorari to determine "the proper standard for determining whether the

1. 268 Ga. 735, 493 S.E.2d 403 (1997).

2. *Id.* at 748-49, 493 S.E.2d at 414. The Georgia Supreme Court also addressed the "plain view" doctrine and the "distraction doctrine" in this opinion, but a discussion of those issues is beyond the scope of this article. *Id.* at 742-43, 493 S.E.2d at 409-11 ("plain view" doctrine); *Id.* at 744-46, 493 S.E.2d at 411-12 ("distraction doctrine").

3. Robinson v. Kroger, 222 Ga. App. 711, 711-12, 476 S.E.2d 29, 30 (1996).

4. *Id.* at 711, 476 S.E.2d at 30.

5. *Id.* at 714, 476 S.E.2d at 31.

plaintiff in a 'slip and fall' premises liability case has exercised ordinary care sufficient to prevail against a motion for summary judgment."[6]

The supreme court reversed and held that (1) an invitee's failure to exercise reasonable care is not established as a matter of law by her failure to look at the area where she is walking; and (2) an invitee has presented some evidence of the exercise of reasonable care when she establishes that something in the control of the owner/occupier, of which the owner or occupier knew or should have known, caused the invitee to be distracted; and (3) that the plaintiff does not shoulder the evidentiary burden to disprove negligence in a slip-and-fall case until the defendant has produced some evidence that the plaintiff failed to exercise ordinary care.[7]

II. LEGAL BACKGROUND

In *Alterman Foods v. Ligon*,[8] the Supreme Court of Georgia addressed the state of slip-and-fall law in Georgia in an attempt to curb the trend of "drift[ing] toward a jury issue in every . . . case."[9] Plaintiff in *Alterman Foods* slipped on defendant's floor while shopping on a rainy day. Defendant introduced testimony establishing that no foreign substance was on the floor where plaintiff had fallen, and further, that the floors were cleaned weekly with a nonslip wax.[10] The court of appeals reversed the trial court's grant of summary judgment in favor of defendant on the grounds that a material question of fact existed on whether an unreasonable danger was presented by the slippery floor.[11]

In reversing the appellate court's decision, the supreme court reiterated many basic tenets of premises liability law, including the statutory principle[12] that an owner or occupier of land must exercise ordinary care to keep the premises safe.[13] The court, recognizing that knowledge is the main basis for an owner/occupier's liability, stated that recovery may be had in a slip-and-fall case "only when the perilous instrumentality is known to the owner or occupant and not known to the person injured . . . ."[14] In addition, the court noted that an invitee

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6. 268 Ga. at 735, 493 S.E.2d at 405.
7. *Id.* at 748-49, 493 S.E.2d at 414.
8. 246 Ga. 620, 272 S.E.2d 327 (1980).
9. *Id.* at 621, 272 S.E.2d at 329.
10. *Id.* at 620-21, 272 S.E.2d at 328-29.
11. *Id.* at 621, 272 S.E.2d at 329.
12. GA. CODE ANN. § 105-401 (Harrison 1933) (currently codified at O.C.G.A. § 51-3-1 (1981)).
13. 246 Ga. at 622, 272 S.E.2d at 329.
14. *Id.* (quoting Sears, Roebuck & Co. v. Reid, 132 Ga. App. 136, 138, 207 S.E.2d 532, 534 (1980)).

must exercise ordinary care to avoid hazards, and in doing so, the invitee must utilize all senses in a reasonable manner to discover and avoid hazards.[15]

The court concluded that in order "to state a cause of action . . . 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."[16] Because plaintiff in *Alterman Foods* failed to establish that defendant had negligently maintained the premises, the appellate court's reversal of summary judgment in favor of defendant was in error.[17]

This new standard proved to be owner/occupier friendly because it provided defendants with two prongs through which a plaintiff's claim could be defeated at summary judgment: The defendant may defeat the plaintiff's claim by either (1) establishing that the defendant lacked actual or constructive knowledge of the hazard, or (2) proving either the plaintiff had actual knowledge of the hazard that was at least equal or superior to that of the defendant, or that the plaintiff should have had knowledge in the exercise of ordinary care.[18] If the plaintiff failed to carry either of the two burdens, summary judgment in favor of the defendant was proper.[19]

Initially, the majority of cases decided pursuant to *Alterman Foods* were disposed of by summary judgment based on the first prong of the test, namely the owner/occupier's lack of actual or constructive knowledge regarding the hazard.[20] In a few cases, the court analyzed the second prong, and determined summary judgment was appropriate because the invitee admitted he had knowledge of the danger and had voluntarily encountered it.[21]

The Georgia Court of Appeals decision in *Smith v. Wal-Mart Stores*[22] dramatically shifted the emphasis from obtaining summary judgment based on the first prong of the *Alterman Foods* test to the second prong,

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15. *Id.* at 623, 272 S.E.2d at 330.

16. *Id.*

17. *Id.* at 625-26, 272 S.E.2d at 332.

18. *Id.*, 272 S.E.2d at 330.

19. *Id.* at 624-25, 272 S.E. at 331.

20. 268 Ga. at 736-37, 493 S.E.2d at 406 (citing Kenny v. M & M, 183 Ga. App. 225, 358 S.E.2d 641 (1987); DeGracia v. Huntingdon Assoc., 176 Ga. App. 495, 336 S.E.2d 602 (1985); Player v. Bassford, 172 Ga. App. 135, 322 S.E.2d 520 (1984)).

21. *Id.* (citing Lindsey v. J.H. Harvey Co., 213 Ga. App. 659, 445 S.E.2d 810 (1994); Lea v. American Home Equities, 210 Ga. App. 214, 435 S.E.2d 734 (1993); Bloch v. Herman's Sporting Goods, 208 Ga. App. 280, 430 S.E.2d 86 (1993)).

22. 199 Ga. App. 808, 406 S.E.2d 234 (1991).

an invitee's failure to use ordinary care for his personal safety. In *Wal-Mart* plaintiff slipped on a clear substance while shopping in defendant's store. Plaintiff testified that if she had been looking down she would have seen the substance on the floor. In addition, plaintiff's shopping companion testified that she saw the substance.[23]

In affirming the trial court's grant of summary judgment in favor of defendant, the court of appeals determined that plaintiff failed to exercise ordinary care for her own safety as a matter of law.[24] Plaintiff's admission that she would have seen the hazard if she had been looking at the floor where it was located established that her knowledge of the danger was at least equal to defendant's knowledge of the danger, and therefore, summary judgment in favor of defendant was proper under the second prong of the test established in *Alterman Foods*.[25]

The holding in *Wal-Mart* broadened the second prong of the *Alterman Foods* test to such a degree that it created an almost insurmountable obstacle for a plaintiff to overcome to avoid summary judgment. The holding imputed knowledge to the invitee because she would have seen the hazard if she had been looking where she placed her foot. In *Colevins v. Federated Department Stores*,[26] the court took the holding from *Wal-Mart* to the extreme and held that an invitee had failed to exercise ordinary care even though the invitee testified he would not have seen the hazard even if he had been looking directly at the area where it was located.

The already formidable burden placed on slip-and-fall plaintiffs was worsened by the Supreme Court of Georgia's holding in *Lau's Corp. v. Haskins*.[27] According to the court, ". . . the burden on the moving party may be discharged by pointing out by reference to the . . . record that there is an absence of evidence to support the nonmoving party's case."[28] This placed the slip-and-fall plaintiff in the position of not only having to establish the defendant's knowledge of the foreign substance to avoid summary judgment, but also to prove that the plaintiff had exercised reasonable care for her own safety.

The triple threat posed by the test in *Alterman Foods* as well as the holdings in *Wal-Mart* and *Lau's Corp.* created a legal obstacle that few plaintiffs could overcome. The Georgia Supreme Court addressed slip-and-fall law in *Alterman Foods* specifically because these type of cases

23. *Id.* at 810, 406 S.E.2d at 236.
24. *Id.*
25. *Id.*
26. 213 Ga. App. 49, 52, 443 S.E.2d 871, 873-74 (1994).
27. 261 Ga. 491, 405 S.E.2d 474 (1991).
28. *Id.* at 491, 405 S.E.2d at 474.

were being overly litigated and too many were going before a jury. Since *Alterman Foods*, and even more so since *Wal-Mart* and *Lau's Corp.*, the pendulum had swung to the other extreme with few slip-and-fall cases making it past the summary judgment stage. By holding that an invitee failed to exercise ordinary care when she should have seen a hazard, the courts were in effect circumventing the superior knowledge requirement and determining an invitee had acted negligently, an inherently factual determination, as a matter of law. In addition, the slip-and-fall plaintiffs not only had to establish that the owner/occupier had knowledge of the hazard to avoid summary judgment, but the plaintiffs had to prove they had exercised reasonable care as well. Based on this, the supreme court determined that *Robinson* presented a much needed opportunity to revisit the test in *Alterman Foods*.[29]

III. THE RATIONALE OF THE COURT

The supreme court recognized that recent slip-and-fall cases had hinged on the suspect determination that an invitee failed to use ordinary care as a matter of law.[30] Further, these decisions had erroneously placed the emphasis on the actions of the invitee while downplaying the statutory obligation placed on owner/occupiers to safely maintain the premises.[31] The court also took the opportunity to address the near insurmountable burden placed on the slip-and-fall plaintiff in order to avoid a motion for summary judgment.[32]

The court noted that "issues of negligence, contributory negligence, and lack of ordinary care for one's own safety are not susceptible to summary adjudication . . . but should be resolved by trial in the ordinary manner."[33] However, the court acknowledged that a trial court can conclude that an invitee failed to exercise ordinary care when the evidence is "plain, palpable, and undisputable."[34] The court reiterated the basic principle that when reasonable minds can differ on whether an invitee has exercised reasonable care for her own safety, summary adjudication is not warranted.[35]

The court was further concerned with the recent movement in slip-and-fall case law that had de-emphasized the burden on the own-

29. 268 Ga. at 746, 493 S.E.2d at 412-13.
30. *Id.* at 739, 493 S.E.2d at 408.
31. *Id.* at 740, 493 S.E.2d at 408.
32. *Id.* at 746, 493 S.E.2d at 412-13.
33. *Id.* at 739, 493 S.E.2d at 408.
34. *Id.*
35. *Id.* at 740, 493 S.E.2d at 408 (citing Pound v. Augusta Nat'l, 158 Ga. App. 166, 279 S.E.2d 342 (1981)).

er/occupier and had placed a greater emphasis on the actions of the invitee.[36] The court noted that the foundation of premises liability law, as codified by O.C.G.A. section 51-3-1, rests on the failure of the owner/occupier to exercise reasonable care in keeping the premises safe and not exposing invitees to unreasonable risk.[37] The basis of premises liability, according to the court, is that when an owner/occupier encourages others to enter his property, he makes an implied representation that he has exercised reasonable care to make the premises safe.[38]

An invitee is required to exercise ordinary care to maintain his own safety and to use all senses to ascertain and avoid hazards.[39] Therefore, the court reasoned, an invitee "is not barred from recovery simply because by extreme care on his part it would have been possible for him to have discerned the articles negligently left in the aisles or passageways customarily used by the store's patrons at the merchant's tacit invitation."[40] The court noted that an invitee is bound to utilize a "reasonable lookout," which is a fact-sensitive determination based on the time and place of the accident, to avoid a hazard.[41]

In light of the preceding arguments, the court reversed the appellate court's decision affirming the grant of summary judgment in favor of defendant Kroger, citing that plaintiff had not failed to exercise ordinary care for her safety as a matter of law.[42] However, the court's inquiry did not end there as it took the opportunity to analyze another "troubling aspect" of modern slip-and-fall case law, namely the disproportionate burden placed on plaintiffs in light of the decision in *Lau's Corp.*[43]

The court was concerned that since the holding in *Lau's Corp.* was applied to the *Alterman Foods* test, a plaintiff in a slip-and-fall case was required not only to actively prove that an owner/occupier had actual or

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36. *Id.*

37. *Id.* The court recognized that an owner/occupier is not required to protect all people from every possible danger, but only to exercise reasonable care to maintain the premises in a safe condition. *Id.*

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

39. *Id.* at 741, 493 S.E.2d at 409.

40. *Id.* at 741-42, 493 S.E.2d at 409 (citing King Hardware Co. v. Teplis, 91 Ga. App. 13, 15, 84 S.E.2d 686, 687 (1954)).

41. *Id.* at 742, 493 S.E.2d at 409.

42. *Id.* at 743, 493 S.E.2d at 411 (This concluded the first division of the *Robinson* opinion, in which all Justices concurred. The court also addressed the "plain view" doctrine in this division of the opinion. However, as noted earlier, a discussion of that doctrine is not included in this article.)

43. *Id.* at 744, 493 S.E.2d at 411 (This began division two of the court's holding, in which all Justices, except Justice Fletcher, concurred. The court also discussed the "distraction doctrine" at this point in the opinion.)

constructive knowledge of the hazardous condition, but also that he exercised reasonable care for his own safety by pointing to evidence in the record.[44] Conversely, the defendant had no burden to produce any evidence to disprove the plaintiff's case. "At the time *Alterman Foods* was decided . . . a defendant moving for summary judgment had the burden of producing evidence which negated at least one essential element of the plaintiff's case."[45] "Under Lau's Corp. [sic], the defendant proprietor has no burden whatsoever on summary judgment to produce evidence to negate the plaintiff's theory of recovery."[46]

The court determined that the test set out in *Alterman Foods* had been unfairly altered due to the changes in the standard for summary judgment established in *Lau's Corp.*[47] In light of this inequitable burden, the court modified the second prong of the test established in *Alterman Foods*.[48] Thus an invitee, in order to withstand a summary judgment, must still produce evidence that the owner/occupier knew or should have known of the hazardous condition.[49] However, under the modified *Alterman Foods* test, the plaintiff need only come forward with evidence tending to prove that he exercised reasonable care after the defendant produces evidence that the plaintiff's injuries were caused by the plaintiff's voluntary negligence or failure to exercise ordinary care for his own safety.[50]

Therefore, the evidentiary burden would require the defendant to establish the plaintiff's negligence only after the plaintiff had established that the defendant knew or should have known of the hazardous condition.[51] Only then, the court concluded, would the plaintiff have to come forward with evidence that established that he had exercised ordinary care.[52] The court noted that this balanced the burdens on the respective parties in slip-and-fall actions and placed the normal burden, that of establishing a defense to liability, on the owner/occupier.[53]

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44. *Id.* at 746, 493 S.E.2d at 412-13.

45. *Id.*, 493 S.E.2d at 413. This was accomplished by the defendant establishing either a lack of knowledge of the hazard on his part, or by affirmatively proving that the plaintiff had failed to exercise reasonable care to maintain his own safety. *Id.* at 747, 493 S.E.2d at 413.

46. *Id.* at 747, 493 S.E.2d at 413 (citing Brown v. Amerson, 220 Ga. App. 318, 469 S.E.2d 723 (1996)).

47. *Id.*

48. *Id.*

49. *Id.* at 747-48, 493 S.E.2d at 413.

50. *Id.* at 748, 493 S.E.2d at 413.

51. *Id.*, 493 S.E.2d at 413-14.

52. *Id.*, 493 S.E.2d at 414.

53. *Id.*

IV. IMPLICATIONS

The holding in *Robinson* represented a drastic and unexpected departure from existing slip-and-fall case law. Following *Robinson*, not one motion for summary judgment has been granted in favor of an owner/occupier based on the failure of the invitee to exercise reasonable care absent clear and palpable evidence that the invitee actually knew of the danger.[54] Therefore, the most obvious effect of the holding in *Robinson* is that more cases have survived summary judgment.[55]

Ironically, the major controversy and misunderstanding surrounding the *Robinson* holding does not relate to the second prong of the *Alterman Foods* test, but instead concerns whether the burden for the purpose of summary judgment has been altered for the first prong. The renewed focus on the knowledge of the owner/occupier has created a split between the Supreme Court of Georgia's holding in *Robinson* and the treatment it has received from the Georgia Court of Appeals.

In *Robinson* the supreme court reaffirmed that "in order to recover for injuries sustained in a slip-and-fall action, an invitee must prove . . . that the defendant had actual or constructive knowledge of the hazard . . . ."[56] In essence this reaffirmed the holding in *Lau's Corp.*, namely that the moving party may prevail at summary judgment by pointing to an absence of evidence in the record to support the nonmoving parties case, as it related to the first prong of the *Alterman Foods* test.

However, in *Kelley v. Piggly Wiggly Southern, Inc.*,[57] one of the first cases heard since the decision in *Robinson*, the court of appeals reversed the grant of summary judgment based on the owner/occupier's constructive knowledge of the hazard.[58] The court reasoned that the owner/occupier had failed to pierce the pleadings of the invitee by establishing a reasonable inspection and cleaning procedure had been implemented and, therefore, summary judgment was appropriate.[59] Justice Andrews vigorously dissented, arguing that the owner/occupier had no burden to establish that a reasonable inspection process was implemented and need only point to an absence of evidence in the record to support the fact it had constructive knowledge.[60] Justice Andrews contended

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54. *See* Denham v. Young Men's Christian Assoc. & Youth Center of Thomasville, Inc., 231 Ga. App. 197, 499 S.E.2d 94 (1998).

55. *See* West Lumber Co. v. Beck, 231 Ga. App. 46, 497 S.E.2d 647 (1998); Jones v. Ingles Market, Inc., 231 Ga. App. 338, 498 S.E.2d 365 (1998).

56. 268 Ga. at 748-49, 493 S.E.2d at 414.

57. 230 Ga. App. 508, 496 S.E.2d 732 (1997).

58. *Id.* at 511, 496 S.E.2d at 736.

59. *Id.*

60. *Id.* at 517, 496 S.E.2d at 740.

that the *Robinson* decision had left the first prong of the *Alterman Foods* test untouched, so the court's apparent shifting of the burden in regard to the owner/occupier's actual or constructive knowledge was improper.[61]

Sharfuddin v. Drug Emporium, Inc.,[62] which was heard just after *Kelley*, gave the court another opportunity to apply the principles established in *Robinson*. The court agreed that the invitee had failed to establish either the actual or constructive knowledge of the owner/occupier regarding the danger and affirmed the grant of summary judgment.[63] The court reasoned that the decision in *Robinson* had left the first prong of the *Alterman Foods* test untouched, and therefore, summary judgment was still proper when the invitee failed to establish either the actual or constructive knowledge of the owner/occupier.[64] In a complete departure from *Kelley*, the court further rejected the invitee's argument that the owner/occupier has the burden of establishing that an inspection process was in operation, noting the cases that required this of the owner/occupier were either decided prior to the elimination of the burden by *Lau's Corp.* or erroneously relied on decisions decided before *Lau's Corp.*[65]

The *Sharfuddin* opinion was also accompanied by a zealous dissent, authored by Justice Eldridge and joined by Justice Blackburn, that indicated the emerging split between the justices over the implications of *Robinson* and foreshadowed how the court would rule in subsequent opinions.[66] Justice Eldridge argued that *Robinson* had reallocated the burden for summary judgment in both the first and second prongs of the *Alterman Foods* in an attempt to ameliorate the heavy burden that invitee's previously had shouldered.[67]

In the opinions that followed, the court of appeals repeatedly reversed grants of summary judgment on appeal based on the owner/occupier's failure to establish that reasonable inspection procedures were in place and followed.[68] The opinions, which were written by Justice Blackburn, based the alteration of the first prong of the *Alterman Food* test on what the court thought was the "clear thrust" of *Robinson*, "an exhortation to

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61. *Id.* at 516, 496 S.E.2d at 740.
62. 230 Ga. App. 679, 498 S.E.2d 748 (1998).
63. *Id.* at 686, 498 S.E.2d at 754.
64. *Id.* at 684, 498 S.E.2d at 753.
65. *Id.* at 686, 498 S.E.2d at 754.
66. *Id.*
67. *Id.* at 687-88, 498 S.E.2d at 755.
68. *See* McCullogh v. Kroger Co., 231 Ga. App. 453, 498 S.E.2d 594 (1998); Straughter v. J.H. Harvey Co., 232 Ga. App. 29, 500 S.E.2d 353 (1998); Hartley v. Macon Bacon Tune, Inc., 234 Ga. App. 815, 507 S.E.2d 259 (1998).

avoid creating impossible hurdles for slip and fall plaintiffs at the summary judgment stage."[69] The court reasoned that requiring an absolute rule that an invitee must establish the amount of time a substance had been on the floor, as was required to establish constructive knowledge prior to *Robinson*,[70] created an almost impossible hurdle for most invitees.[71] The court viewed this approach as contrary to the purpose of *Robinson*, namely to "lighten the load" for an invitee at summary judgment, and in essence, refused to adopt it.[72] This line of reasoning has practically rendered the summary judgment standard as established in *Lau's Corp.* obsolete as it applies to slip-and-fall cases.

The aforementioned line of cases was accompanied by scathing dissents written by Justice Andrews.[73] Justice Andrews's biggest concern, consistent with his dissent in *Kelley*, was that the court has misconstrued the holding in *Robinson* as applying to the first prong of the *Alterman Foods* test and, in the process, changed the burden for summary judgment as established in *Lau's Corp.* by requiring the owner/occupier to produce evidence it complied with a reasonable inspection procedure.[74]

The supreme court's attempt to "regain balance in the allocation of the burden of proof" in slip-and-fall cases has resulted in a possible overcorrection on the part of the court of appeals.[75] The tension between the holding in *Robinson* and subsequent appellate decisions, and between existing appellate court decisions, has created an issue that surely will have to be revisited by the supreme court. If the supreme court affirms the application of *Robinson* in *Kelley*, and many of the cases that followed, it will in effect abrogate *Lau's Corp.* as it applies to slip-and-fall cases by requiring an owner/occupier to produce evidence it complied with a reasonable inspection procedure. If the court establishes that the decision in *Sharfuddin* was a correct analysis of its decision in *Robinson*, then summary judgment would be proper when the

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69. 232 Ga. App. at 32, 500 S.E.2d at 356.

70. *Id.* Justice Andrews argued in his dissent that a plaintiff can show constructive knowledge "either by showing the hazard had been there so long that the defendant should have discovered it by reasonable inspection, or by showing that an employee of the defendant was in the immediate area of the hazard and could have easily removed it." *Id.* at 33, 500 S.E.2d at 357.

71. *Id.* at 32, 500 S.E.2d at 356.

72. *Id.* at 33, 500 S.E.2d at 357.

73. *See* 231 Ga. App. at 455, 498 S.E.2d at 596; 232 Ga. App. at 33, 500 S.E.2d at 357; 234 Ga. App. at 819, 507 S.E.2d at 262.

74. 234 Ga. App. at 824, 507 S.E.2d at 266.

75. 268 Ga. at 747, 493 S.E.2d at 413.

owner/occupier can point to an absence of evidence in the record regarding its knowledge of the hazard.

The holding in *Robinson* indeed leveled the playing field, but the interpretation adopted by the majority of the cases decided by the appellate court skewers it in favor of the invitee, creating the exact problem that *Alterman Foods* was designed to address: over litigation of slip-and-fall cases. Judging from the plain language in *Robinson*, which reallocates the invitee's burden concerning the second prong only, the supreme court will most likely stand by its analysis that *Lau's Corp.* still applies to the first prong of the *Alterman Foods* test. However, the only certainty is that the supreme court will have to revisit the holding in *Robinson* and clarify its position as it relates to the first prong of the *Alterman Foods* test.

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