522 S.E.2d 772
241 Ga. App. 109
MAHAN
v.
McRAE.

No. A99A0829.
Court of Appeals of Georgia.
November 24, 1999.

[522 S.E.2d 773]

Crumbley & Crumbley, R. Alex Crumbley, McDonough, for appellant.

Smith, Welch, Studdard & Brittain, Benjamin W. Studdard III, Thomas B. McFarland, McDonough, Kutner & Bloom, Jeanney M. Kutner, Atlanta, for appellee.

John P. Partin, Columbus, amicus curiae.

POPE, Presiding Judge.

William Franklin McRae, Jr. and Jane Newman McRae Mahan were divorced in the Superior Court of Troup County on June 28, 1996. The divorce decree awarded joint legal custody of their two boys, born in 1990 and 1992, to both parents but gave the mother primary physical custody. In August, Mahan remarried and moved from Troup County to Henry County. In response, McRae filed a petition for change of custody which was resolved in October 1996 when the parties agreed to modified visitation terms to accommodate the move. The terms were incorporated into a judgment. On March 30, 1998, McRae filed a second suit seeking change of custody after receiving notice that Mahan planned to move in June to Massachusetts with the two boys and her new family. After a bench trial, the court granted the modification and gave primary physical custody to McRae. We granted Mahan's application for appeal in which she contends there was insufficient evidence to merit a change. The mother has custody pending resolution of this appeal, but the boys have been with their father for the summer.

"Once a permanent child custody award has been entered, the test for use by the trial court in change of custody suits is whether there has been a change of conditions affecting the welfare of the **[241 Ga. App. 110]** child. Gazaway v. Brackett, 241 Ga. 127, 128, 244 S.E.2d 238 (1978)." (Punctuation omitted). In the Interest of S.D.J., 215 Ga.App. 779, 452 S.E.2d 155 (1994). See also OCGA § 19-9-3(a); Arp v. Hammonds, 200 Ga.App. 715, 716, 409 S.E.2d 275 (1991). An award of custody vests in that parent the prima facie right of continued custody. Ormandy v. Odom, 217 Ga.App. 780-781(1), 459 S.E.2d 439 (1995); Hill v. Rivers, 200 Ga. 354, 357, 37 S.E.2d 386 (1946). "This judgment, however, is not conclusive, except as to the status existing at the time of its rendition, and is subject to a change or modification on a showing of a change in circumstances or conditions since the rendition of the decree. [Cit.]" Id.

Whether conditions, which affect the welfare of the child, have changed since the rendition of a former final custody judgment depends on the facts of the case. If reasonable evidence exists in the record to support the trial court's decision to change custody or visitation rights, then the decision of that court will stand. Daniel v. Daniel, 235 Ga.App. 184, 185(1), 509 S.E.2d 117 (1998). The trial court's decision will not be overturned absent abuse of discretion. In the Interest of S.D.J., 215 Ga.App. at 780, 452 S.E.2d 155. "Though the trial judge is given a discretion, he is restricted to the evidence and is unauthorized to change the custody where there is no evidence to show new and material conditions that affect the welfare of the child. [Cit.]" Young v. Young, 216 Ga. 521, 522, 118 S.E.2d 82 (1961).

Mahan asserts that the trial court abused its discretion because the judge erroneously

[522 S.E.2d 774]

granted a change in custody based on her remarriage and relocation. In the Interest of R.R., 222 Ga.App. 301, 305(3), 474 S.E.2d 12 (1996). We note that the court's order states that "neither the mere fact of a move nor a remarriage is in and of itself a change of condition ..." and that the court's decision was not based on either of those factors. We also note that the court found that both McRae and Mahan are good parents.

Nevertheless, we find no reasonable evidence in the record supporting the decision to change custody. The facts may reveal grounds for other relief, but they are not sufficient to warrant a change in custody. The facts support only the conclusion that McRae was thwarted in his attempt to be involved with the boys more than the custody order required, and that the parties have been almost incapable of agreeing to any variances from the custody order.

The time period under consideration was October 1996, the date of the previous custody determination, to August 25, 1998, the date of the trial. The court concluded that during this period, the father made "extraordinary efforts" to remain actively involved in his children's lives, but found himself "increasingly marginalized," since the mother "acted as if the children were part of her new family with her new husband, to the exclusion of any significant role in [the children's] **[241 Ga. App. 111]** lives for their Father." The court based its decision on the following findings of fact: (1) Mahan expressed resentment for McRae's presence at the children's baseball games on her time; (2) Mahan consistently denied McRae's requests to allow the children to attend special events outside of court-ordered visitation time, such as basketball picture day, despite the fact that McRae sacrificed time when he was entitled to have the children so they could participate in activities they enjoyed; (3) McRae's attempts to call the children more than once a day, though rare, were plainly unwelcome; and (4) Mahan tended to make decisions regarding the children without consulting McRae even though the existing custody order required cooperation and mutual agreement regarding important matters.

With regard to visitation, the custody order in effect at the time provided in part:

> The wife shall be the primary physical custodian of the children.... The husband may have the children of the parties with him, apart from the wife, at such times and for such periods of time as the wife and husband shall mutually agree upon. In the event the parties cannot agree, the husband shall, at his option, have the right to have said children apart from the residence of the wife as follows....

The detailed provisions for custody were then laid out. Thus, the order clearly contemplates that the divorced couple might be unable to agree on visitation and then establishes comprehensive minimum visitation requirements. One requirement provides, "The parties agree to allow the children telephone contact with the other parent on a daily basis."

None of the court's first three factual findings involves a violation of the custody agreement by Mahan. The court only found fault with Mahan's failure to go above and beyond the minimum requirements of the order. These findings may show that Mahan does not have an appropriately flexible approach given McRae's consistent and well-intentioned efforts to be involved with the children as much as possible. The findings may also reveal Mahan's frustration, rightly or wrongly, at trying to balance her efforts to be a good parent with McRae's desire to be involved. But these factors are not a reasonable basis for a change in custody.

It is true that "a pattern of continued wilful acts obviously intended to thwart and nullify the visitation provisions of the decree," Moore v. Wiggins, 230 Ga. 51, 55, 195 S.E.2d 404 (1973), or "the repeated denial of the non-custodial parent's visitation rights," Bull v. Bull, 243 Ga. 72(2), 252 S.E.2d 494 (1979), authorizes a change in custody. See also Arp v. Hammonds, 200 Ga.App. at 717-718, **[241 Ga. App. 112]** 409 S.E.2d 275 (father refused summertime visitation and visitation over the phone). But, the court did not find that McRae's court-ordered visitation rights had been affected.[1] Rather it found Mahan failed to

[522 S.E.2d 775]

cooperate above and beyond the court-ordered rights. We find no law nor does McRae cite any for the proposition that failure to agree to more than the court-ordered minimum visitation rights can result in a change of custody.

With regard to joint decision-making, the custody order provides:

> [T]he parties shall cooperate and make every good faith effort to reach mutual agreements on all issues and decisions concerning their children, and neither party shall arbitrarily or without good reason disagree with the other in making decisions regarding said children, however the primary physical custodian shall bear responsibility for such final decisions.

Although the court found that Mahan failed to consult with McRae on important decisions for the children, a violation of the custody order, McRae did not present any evidence that her actions affected his visitation rights. Further, McRae presented no proof, nor did the court find, that any decisions made without his advice affected the welfare of the children. Without new and material conditions that substantially affect the welfare of the child, a change of custody is not authorized. Young v. Young, 216 Ga. at 522, 118 S.E.2d 82.

Finally, the court found that the children had become less independent and more "clingy" around their father. But, the court attributed these ill emotional effects to the boys' "relative separation from their father," and McRae testified that the changes were "associated with the thought of the possibility of having to move [to Boston]." Out-of-state moves by the custodial parent necessarily result in increased separation between the children and the non-custodial parent. But, "[r]elocating and remarrying are not in and of themselves sufficient changes in condition to authorize a change in custody." Ormandy v. Odom, 217 Ga.App. at 781(1), 459 S.E.2d 439; In the Interest of R.R., 222 Ga.App. at 305(3), 474 S.E.2d 12.

There is no evidence that Mahan was no longer able or suited to retain custody, Ormandy, 217 Ga.App. at 781, 459 S.E.2d 439, and because the trial court's findings of fact do not provide a basis for a change in custody, **[241 Ga. App. 113]** the court erred in changing custody to the father.

Because visitation rights are a part of the trial court's order and because McRae's visitation rights are in issue as a result of Mahan's move, the case is remanded for further proceedings regarding visitation rights. See Ofchus v. Isom, 239 Ga.App. 738, 521 S.E.2d 871 (1999) (physical precedent); see also Tirado v. Shelnutt, 159 Ga.App. 624, 626(2), 284 S.E.2d 641 (1981) (physical precedent) (court with jurisdiction over custody may modify visitation rights).

Judgment reversed and remanded.

JOHNSON, C.J., ELDRIDGE and BARNES, JJ., concur.

BLACKBURN, P.J., SMITH and ELLINGTON, JJ., dissent.

SMITH, Judge, dissenting.

I respectfully dissent, because I conclude that the trial court, in a thoroughly reasoned order, acted within its discretion in awarding primary physical custody to the father.

The decision of whether to change custody after the entry of a final divorce decree rests exclusively within the discretion of the trial judge, and an appellate court's scope of review of such a decision is severely limited. As explained in Arp v. Hammonds, 200 Ga. App. 715, 716, 409 S.E.2d 275 (1991), the task of a trial court faced with a change of custody suit is to determine "whether there has been a change of conditions affecting the welfare of the child." (Citations and punctuation omitted.) The court must exercise its discretion to decide whether a change in custody is in the child's best interest and whether a change will best promote the welfare and happiness of the child. Id. at 716-717, 409 S.E.2d 275. And

> [t]his rule of law lays the Solomonic task squarely upon the shoulders of the judge who can see and hear the parties and their witnesses, observe their demeanor and attitudes, and assess their credibility. It is
>
> [522 S.E.2d 776]
>
> that judge upon whom it is incumbent to hear evidence with respect to changed conditions and render a decision based upon that judge's discretion and good judgment as that judge viewed the evidence, giving primary consideration to the welfare of the child.... Unless the record before this court clearly indicates that the judge based his or her decision upon illegal evidence or upon a misapprehension of the law, it will be presumed that upon rendering his or her decision he or she considered only legal and admissible evidence. So it is that the remote reviewing court recognizes not only the physical limitations put upon it by distance in time and space, but it also recognizes that by law it has no judgment to impose in the matter. The exercise of discretion is granted solely and exclusively to the trial **[241 Ga. App. 114]** judge, and if there is any reasonable evidence to support the trial court's decision concerning change of custody as between parents, such decision will be affirmed on appeal.

(Citations and punctuation omitted; emphasis in original.) Id. at 717, 409 S.E.2d 275.

Here, nothing in the record suggests that the trial court's decision was based on "illegal evidence" or a "misapprehension of the law," and reasonable evidence existed on which the trial court based its conclusions. I cannot agree with the majority's statement that "[t]he facts support only the conclusion that [the father] was thwarted in his attempt to be involved with the boys more than the custody order required, and that the parties have been almost incapable of agreeing to any variances from the custody order." On the contrary, the facts support the trial court's conclusion that the children suffered emotionally because of the mother's consistent refusal to cooperate with the father's own efforts to be actively involved in their lives, resulting in a material change of condition. For example, in addition to evidence that the children appeared to be "clingy," evidence was presented of the children's increased fearfulness of losing their relationship with the father and their lack of self-assurance, conditions which manifested themselves after their move to Massachusetts.

Furthermore, evidence was presented supporting the trial court's conclusion "that the children's best interests are served by allowing them to have the most possible contact with both parents." As pointed out by the father in his brief on appeal, evidence was presented that the

children had a large support network in the LaGrange area, including both parents' lifelong friends as well as extended family of both the father and mother. And as noted in the report of the guardian ad litem, if the children were to reside in Georgia, the mother would enjoy the advantage, because she has relatives in LaGrange, of visiting with the children at her convenience, as opposed to the disadvantage to the father of being required to stay in a hotel and rent a car in Massachusetts, if custody was awarded to the mother. Based on these circumstances, I cannot agree with the majority that the trial court's conclusion was unsupported by reasonable evidence. Because the trial court was the sole judge of witness demeanor and credibility and because that court's conclusions were supported by the evidence, this court cannot substitute its judgment for that of the trial court or usurp that court's discretion. See Arp, supra. I would affirm the decision of the trial court.

I am authorized to state that Presiding Judge BLACKBURN and Judge ELLINGTON join in this dissent.

[**[241 Ga. App. 115]** 522 S.E.2d 751]

1. The standard of review applicable to motions for summary judgment is well established:

> To prevail at summary judgment under OCGA § 9-11-56, the moving party must demonstrate that there is no genuine issue of material fact and that the undisputed facts, viewed in the light most favorable to the nonmoving party, warrant judgment as a matter of law.

Lau's Corp. v. Haskins, 261 Ga. 491, 405 S.E.2d 474 (1991). Moreover, with respect to slip-and-fall cases, we are reminded by the Supreme Court that

> the "routine" issues of premises liability, i.e., the negligence of the defendant and the plaintiff, and the plaintiff's lack of ordinary care for personal safety are generally not susceptible of summary adjudication, and that summary judgment is granted only when the evidence is plain, palpable, and undisputed.

Robinson v. Kroger Co., 268 Ga. 735, 748, 493 S.E.2d 403 (1997).

Viewed in the light most favorable to Reddick, the evidence shows as follows. At approximately 5:55 p.m. on September 5, 1996, Reddick slipped and fell while shopping in a Harvey grocery store in Americus. Reddick was walking down an aisle displaying bread on one side and frozen foods on the other when her right foot slipped on "something slippery," causing her to fall forward onto her knees. As she was getting up, Reddick saw two scuppernongs[2] on the floor to her left. Reddick does not know whether she actually stepped on the scuppernongs, does not recall whether they were whole or squashed flat, and does not know if they caused her to fall. Reddick does not recall seeing anything else on the floor that might have caused her to fall, and she does not remember seeing any substance on the knees of her slacks after she got up. Reddick assumed, however, that the scuppernongs caused her to fall because she noticed them on the floor near her after she fell.

After Reddick got up, she reported the incident to the store's assistant manager, Bruce Jones. Reddick and Jones returned to the aisle where Reddick had fallen, and Jones saw two scuppernong skins on the floor. According to Jones, scuppernongs are generally located in the produce department, several aisles away, and one would not expect to find them in the aisle where Reddick fell. After examining the area, Jones completed an accident report in which he stated that "[a]n unknown customer was apparently eating scuppernongs and threw the outer skin on the floor. (2 scuppernongs).

[Reddick] walked around the corner next to the bread and said she slipped and fell on her knees." During his deposition, Jones explained that in the past, customers at the store had eaten scuppernongs and thrown them on the floor. A former Harvey employee, Reginald Adams, testified by affidavit that the Americus store "had problems with items on the floor. These problems included customers eating items in the store and then throwing the items on the floor."

Harvey filed a motion for summary judgment, and the trial court denied it. We then granted Harvey's application for interlocutory appeal.

To prove negligence in a foreign substance slip-and-fall case, 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." (Punctuation omitted.) Robinson, supra at 736, 493 S.E.2d 403. Harvey maintains that it is entitled to summary judgment on several grounds, each of which we reject.

(a) First, Harvey argues that Reddick failed to present any evidence that her fall was caused by the scuppernongs on the floor of the store. To survive summary judgment, a slip-and-fall plaintiff "must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result." (Punctuation omitted.) Christopher v. Donna's Country

[522 S.E.2d 752]

Store, 236 Ga.App. 219, 220(1), 511 S.E.2d 579 (1999). Reddick admitted during her deposition that she did not know what caused her to fall, but stated that she assumed the scuppernongs were responsible. Citing Hall v. Cracker Barrel &c., 223 Ga.App. 88, 476 S.E.2d 789 (1996), Harvey contends that Reddick's testimony demonstrates the absence of causation in this case. We disagree.

In Hall, the plaintiff slipped and fell on wood flooring which she described as "slippery." Id. at 88, 476 S.E.2d 789. Although she alleged that the floor was excessively waxy, the plaintiff failed to present any evidence of a foreign substance on the floor which could have created a slippery condition. Likewise, the plaintiff failed to show that the defendant improperly cleaned or maintained the floors. We concluded that the plaintiff's bare assertion that the floor was "slippery," without more, was insufficient to create an issue of fact as to whether the fall was caused by the defendant's negligence. Id. at 93, 476 S.E.2d 789. We noted that "proof of nothing more than the occurrence of the fall is insufficient to establish the proprietor's negligence." (Punctuation omitted.) Id. at 90, 476 S.E.2d 789.

In this case, by contrast, Reddick has presented evidence of a foreign substance—two scuppernongs on the floor in the area where she fell—that could have created the slippery condition she alleged. We are required on a motion for summary judgment to view the facts and inferences in a light most favorable to Reddick. See Lau's Corp., supra. Although Reddick could not positively state that the scuppernongs caused her to fall, reasonable jurors could make such an inference based on the proximity of the fruit to Reddick after the fall, the alleged "slippery" condition of the floor, and the assistant manager's statement after Reddick's fall that he saw scuppernong skins, rather than whole fruit. See Williams v. EMRO Marketing Co., 229 Ga.App. 468, 472(2), 494 S.E.2d 218 (1997) (Ruffin, J., concurring specially) (evidence permitted reasonable inference that plaintiff slipped and fell on ice even though plaintiff did not see what he slipped on).

(b) Second, Harvey contends that Reddick failed to prove that it had actual or constructive knowledge of the presence of the scuppernongs on the floor. Reddick argues that Harvey had both actual and constructive knowledge of the hazard. We find no evidence of actual knowledge, but agree with Reddick that there

are factual disputes concerning Harvey's constructive knowledge.

Reddick's actual knowledge argument is based on (1) Jones' deposition testimony that customers previously had eaten scuppernongs and thrown them on the floor and (2) the affidavit of former Harvey's employee Reginald Adams that the store had a problem with customers throwing food on the floor. To establish actual knowledge, however, Reddick must do more than merely show that Harvey's employees had a general knowledge that a hazardous condition might exist. See J.H. Harvey Co. v. Johnson, 211 Ga.App. 809, 810, 440 S.E.2d 548 (1994) ("although management had knowledge of the periodic defrosting of the meat cooler, the record does not show that any employee or manager of the supermarket had actual knowledge of the alleged water leakage onto the floor prior to Johnson's fall"), overruled in part on other grounds, Robinson, supra. Here, Jones testified merely that customers had thrown scuppernongs on the floor in the past. There is no evidence concerning the date or frequency of such incidents and no evidence that Jones had actual knowledge of any customers throwing food on the floor on the day that Reddick fell. Adams averred only that the store had "problems with items on the floor ... includ[ing] customers eating items in the store and then throwing the items on the floor." Adams did not state that he was aware of scuppernongs on the floor on the day of Reddick's fall, or even that he was working in the store that day. This evidence is not sufficient to establish Harvey's actual knowledge of the hazard.

Reddick also maintains that Harvey had constructive knowledge of the hazard. Constructive knowledge can be proven by showing either (1) "that an employee of the proprietor was in the immediate area of the hazardous condition and could have easily seen the substance" or (2) "that a foreign substance remained on the floor for such a time that ordinary diligence by the proprietor should have effected its discovery."

[522 S.E.2d 753]

(Punctuation omitted.) Brown v. Piggly Wiggly Southern, 228 Ga.App. 629, 631(3)(b), 493 S.E.2d 196 (1997). As Reddick testified that she did not see any Harvey employees around when she fell, and there was no other evidence of store employees in her immediate vicinity, she must use the second method of proving constructive knowledge. To withstand a motion for summary judgment using that method, "a plaintiff need not show how long a substance has been on the floor unless the defendant has established that reasonable inspection procedures were in place and followed at the time of the incident." Straughter v. J.H. Harvey Co., 232 Ga.App. 29, 30(1), 500 S.E.2d 353 (1998) (whole court). Thus, we must determine whether Harvey has established that it had in place a reasonable inspection procedure which it was following on the afternoon of Reddick's fall.

Harvey presented evidence that, at the time of Reddick's fall, the Americus store had an inspection policy requiring that the floor be swept and spot mopped at least every two hours, or more often as needed. The sweeping included spot mopping to remove foreign substances from the floor. Employees were required to punch in and out on a "sweep card" when beginning and ending the sweep and to initial the card upon completion. Harvey also submitted the affidavit of employee Brad Satterfield, who averred that on the day Reddick fell he swept the entire floor area of the store from 3:25 p.m. until 4:14 p.m., and again from 5:17 p.m. until 6:01 p.m., as indicated on the relevant sweep card. Satterfield testified that he swept the aisle where Reddick fell approximately one hour and forty-two minutes before her fall and found no trash, debris, or liquid in the area. Finally, Harvey submitted the sweep card for the week of Reddick's fall, which bears Satterfield's initials beside two punched entries on the day in question recording time "in a type of military time with minutes reflected in hundredths of an hour." In the absence of any evidence to the contrary, the sweep card, coupled with the testimony of Jones and Satterfield, establishes that the area where Reddick fell was swept one

hour and forty-two minutes prior to her fall, and that no foreign substance was found.[3]

We cannot conclude as a matter of law, however, that Harvey's inspection procedure was reasonable under the circumstances. The length of time that a foreign substance must remain on the floor before a proprietor should have discovered it—and, by extension, what constitutes a reasonable frequency of inspections—"will vary with the circumstances of each case (the nature of the business, size of the store, the number of customers, the nature of the dangerous condition and the store's location)." (Punctuation omitted.) Kelley v. Piggly Wiggly Southern, 230 Ga.App. 508, 510(2), 496 S.E.2d 732 (1997). In cases where a proprietor has shown that an inspection occurred within a brief period prior to an invitee's fall, we have held that the inspection procedure was adequate as a matter of law. See, e.g., Deloach v. Food Lion, 228 Ga.App. 393, 394-395, 491 S.E.2d 845 (1997) (area where plaintiff fell was inspected ten minutes prior to fall, establishing reasonable care as a matter of law); Jenkins v. Bi-Lo, 223 Ga.App. 735, 736-737, 479 S.E.2d 14 (1996) (same); Super Discount Markets v. Clark, 213 Ga.App. 132, 133, 443 S.E.2d 876 (1994) (inspection occurred fifteen to twenty minutes prior to incident). Here, the floor had not been swept or inspected for one hour and forty-two minutes before Reddick fell, and the scuppernongs could have remained on the floor that long. There also was testimony that Harvey was aware that customers occasionally ate food—including scuppernongs— and threw the residue on the floor, and that the floor was brown and could camouflage dropped or spilled food. Moreover, Jones

[522 S.E.2d 754]

admitted during his deposition that one hour and forty-two minutes was "too long for a substance to be on the floor." Under these circumstances, we conclude that the reasonableness of Harvey's inspection and cleaning procedures is a question for the jury and that Harvey was not entitled to summary judgment on the issue of constructive knowledge. See Jones v. Krystal Co., 231 Ga.App. 102, 104-105(d), 498 S.E.2d 565 (1998) (failure to inspect floor of fast food restaurant for twenty minutes or longer could be unreasonable); Smith v. Toys "R" Us, 233 Ga.App. 188, 191-192(1), 504 S.E.2d 31 (1998) (failure to inspect store entrance area during period of one hour and thirty minutes gave rise to jury question on reasonableness of inspection procedures).

(c) Harvey also sought summary judgment on the ground that Reddick failed to exercise ordinary care for her own safety. Reddick testified that she did not look down at the floor before she fell. She also testified that the fruit on which she allegedly slipped was large and could have been as big in diameter as a soda can. Harvey argues that this evidence establishes that had she been exercising ordinary care for her own safety, Reddick would have noticed the fruit before she fell. However, this, too, is a jury question.

In Robinson, the Supreme Court rejected the argument that "an invitee fails to exercise ordinary care for personal safety as a matter of law when the invitee admits she failed to look at the location where she subsequently placed her foot." Id. at 743, 493 S.E.2d 403. An invitee is not required to maintain a constant lookout, but "is entitled to assume that the owner/occupier has exercised reasonable care to make the premises safe." Id. Accordingly, Reddick's failure to look before she stepped does not establish negligence on her part as a matter of law. Additionally, contrary to Harvey's assertions, the evidence does not establish conclusively that Reddick would have noticed the fruit had she glanced down. The size of the scuppernongs is a matter of dispute, as Jones testified that they were approximately the size of a quarter. Moreover, the evidence showed that the color of the floor could have camouflaged the scuppernongs. Under these circumstances, Harvey is not entitled to summary judgment on this issue. See Kroger Co. v. Brooks, 231 Ga.App. 650, 656(2), 500 S.E.2d 391 (1998).

2. In its second enumeration of error, Harvey contends that the trial court erred in

denying its motion to strike and objections to Reddick's substantive changes to her deposition. We find no error.[4]

After giving her deposition, Reddick submitted an errata sheet listing 16 changes to answers in her deposition transcript. Most of the changes substantively altered her testimony as previously recorded on material issues in the case, but did not clearly contradict it. For example, Harvey's attorney asked Reddick during her deposition about the size of the fruit on which she allegedly slipped, as follows: "Q. We have got a 7-Up can on the table. Were they the size of that 7-Up can, that big around? A. Yes, they were. If I can remember, as far as my knowledge, when I was getting up, they was large red plums." On her errata sheet, Reddick changed her answer to "[t]hey were regular size plums" and gave as the reason for the change, "I did not understand the question." This change is consistent with her answer to a previous question that the plums were "regular" in size. As another example, Reddick replied, "I don't know," when asked in her deposition whether she had reached a conclusion about what caused her to fall, but in her errata sheet she changed this answer to "[s]omething slippery on the floor," citing confusion about the question as the reason for the change. The new answer on the errata sheet is consistent with other testimony in Reddick's deposition in which she attributed her fall to a "slippery" substance on the floor. Harvey filed a motion to strike and objections to the errata sheet, arguing that Reddick could not substantively change her deposition testimony

[522 S.E.2d 755]

because her lawyer did not object to the questions posed to Reddick at the deposition.

OCGA § 9-11-30(e) provides as follows:

> If requested by the deponent or a party before completion of the deposition, the deponent shall have 30 days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them. The officer shall indicate in the certificate ... whether any review was requested and, if so, shall append any changes made by the deponent during the period allowed.

(Emphasis supplied.) Although our Georgia courts have not directly addressed the question of whether a witness may make substantive, material changes to his deposition,[5] the statute expressly contemplates changes to form or substance. In addition, federal courts which have addressed this issue have overwhelmingly concluded that a witness may make "any changes in form or substance which the witness desires, even if the changes contradict the original answers or even if the deponent's reasons for making the changes are unconvincing."[6] (Citation and punctuation omitted.) Lugtig v. Thomas, 89 F.R.D. 639, 641 (N.D.Ill.1981); see also, e.g., Podell v. Citicorp Diners Club, 112 F.3d 98, 103 (2nd Cir.1997); Innovative Marketing &c. v. Norm Thompson Outfitters, 171 F.R.D. 203, 204-205 (W.D.Tex.1997); Allen & Co. v. Occidental Petroleum Corp., 49 F.R.D. 337, 340 (S.D.N.Y.1970); Colin v. Thompson, 16 F.R.D. 194, 195 (W.D.Mo. 1954). These decisions are based on the plain language of Federal Rule 30(e), which is virtually identical to OCGA § 9-11-30(e).

There are several important safeguards which curtail abuse on the part of the deponent. First, the deponent's original answers remain part of the record and can be read at trial to impeach the witness or for further clarification. Scarbrough v. Dover Elevator Co., 232 Ga.App. 149, 153(a) n. 5, 500 S.E.2d 616 (1998); Lugtig, supra at 641. This is because "a deposition is not a `take home examination' and an `errata sheet' will not eradicate the import of previous

testimony taken under oath." Rios v. Welch, 856 F.Supp. 1499, 1502 (D.Kan.1994), aff'd, Rios v. Bigler, 67 F.3d 1543 (10th Cir.1995). Second, if the changes are "so substantial as to cause the deposition to become incomplete or useless without further testimony," then the examiner may reopen the deposition and propound further questions to the witness concerning the nature of and reason for the changes. Allen & Co., supra at 341; see also Lugtig, supra at 642. Finally, where the deponent is a party, his self-contradictory testimony must be construed against him and cannot create an issue of fact for the purpose of summary judgment unless the contradiction is adequately explained. See Prophecy Corp. v. Charles Rossignol, Inc., 256 Ga. 27, 28-29(1), 343 S.E.2d 680 (1986).

Despite the plain language of OCGA § 9-11-30(e), Harvey argues that a witness' ability to change his deposition is limited by OCGA § 9-11-32(d)(3)(B), which provides that

> [e]rrors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, ... and errors of any kind which might be obviated, removed, or cured if promptly presented are waived unless seasonable objection thereto is made at the taking of the deposition.

According to Harvey, Reddick's failure to understand the questions posed to her constituted an error or irregularity that could have been corrected during the deposition and was therefore waived. We disagree. First, we

[522 S.E.2d 756]

question whether a witness' failure to understand a question is an "error or irregularity" within the meaning of OCGA § 9-11-32(d)(3)(B). Georgia courts have interpreted deposition errors and irregularities to include such matters as failure of the attorney to object to the form of a question, Haynes v. McCambry, 203 Ga.App. 464, 468(3), 416 S.E.2d 893 (1992); to the competency of the deponent to testify, Rigby v. Powell, 236 Ga. 687-688(1), 225 S.E.2d 48 (1976); or to the videotaping of the deposition, DuBois v. Ray, 177 Ga.App. 349, 351-352(1), 339 S.E.2d 605 (1985). Harvey cites no case holding that a witness' failure to understand a question constitutes a deposition error or irregularity. Second, as a matter of common sense, the waiver provision of OCGA § 9-11-32(d)(3)(B) can apply only to errors or irregularities which were known at the time of the deposition. Harvey asserts that Reddick must have known during the deposition that she did not understand the questions at issue, but this is not necessarily the case. Reddick may have thought that she understood the questions, but later realized upon reading them that, in fact, she did not. In light of the plain language of OCGA § 9-11-30(e) permitting, without limitation, changes to form and substance, we decline to adopt Harvey's strained interpretation of OCGA § 9-11-32(d)(3)(B).

Applying these principles to the instant case, we find that Reddick was entitled to make the changes to her deposition testimony. She reserved her right to read and sign her deposition transcript, apparently submitted her errata sheet in a timely manner, and provided explanations for the changes. See OCGA § 9-11-30(e). Although her changes substantively alter her original deposition testimony, they do not clearly contradict it and therefore do not require application of the Prophecy rule described above.[7] Under these circumstances, the trial court did not err in denying Harvey's motion to strike and objections.

Judgment affirmed.

JOHNSON, C.J., McMURRAY, P.J., POPE, P.J., SMITH and ELDRIDGE, JJ., concur.

ANDREWS, P.J., dissents.

ANDREWS, Presiding Judge, dissenting.

J.H. Harvey Company (Harvey) was entitled to summary judgment because there is an absence of evidence to support Reddick's claim that Harvey had actual or constructive knowledge of the hazard.

In order for Reddick to prevail on her claim against Harvey she was required to prove that Harvey had actual or constructive knowledge of the hazard which she claims caused her slip and fall. Robinson v. Kroger Co., 268 Ga. 735, 748-749, 493 S.E.2d 403 (1997); Alterman Foods v. Ligon, 246 Ga. 620, 622-623, 272 S.E.2d 327 (1980). Since there was no evidence that Harvey had actual knowledge of the hazard prior to the slip and fall, the issue is whether Harvey had constructive knowledge. There being no evidence that any Harvey employee was in the immediate area of the hazard and could have easily seen and removed it prior to the fall, this method of proving constructive knowledge was not available to Reddick. Moreover, there was no evidence as to how long the hazard at issue had been on the floor before Reddick apparently slipped on it and fell, or how it got there. As set forth in the majority opinion, the critical issue on these facts is whether Harvey had constructive knowledge of the hazard because it had remained on the floor for such a length of time that the hazard should have been discovered and removed by Harvey in the exercise of ordinarily diligent inspection and cleaning procedures. Brown v. Piggly Wiggly Southern, 228 Ga.App. 629, 631, 493 S.E.2d 196 (1997).

On these facts it is a matter of pure speculation as to whether the hazard may have been placed on the floor a minute or two before Reddick slipped on it, or whether it may have been placed on the floor shortly after Harvey inspected and swept the area some one hour and forty-two minutes prior to Reddick's slip and fall. Clearly, if the hazard

[522 S.E.2d 757]

was placed on the floor only a minute or two before Reddick's slip and fall, no reasonable trier of fact could conclude that the hazard should have been discovered and removed by Harvey in the exercise of ordinarily diligent inspection procedures. On the other hand, even if Harvey had no actual knowledge of the hazard on the floor, if the hazard had been on the floor since shortly after the last floor inspection for almost one hour and forty-two minutes prior to Reddick's slip and fall, a reasonable trier of fact could conclude that it had been there long enough so that a reasonable inspection procedure would have discovered it, and thus constructive knowledge of it should be imputed to Harvey. In other words, a reasonable trier of fact could conclude under the circumstances that ordinary diligence required Harvey to inspect the floor for hazards more often than every one hour and forty-two minutes, but no reasonable trier of fact could conclude that ordinary diligence required Harvey to inspect the floor every minute or two. As this Court has repeatedly held for decades:

> To sustain plaintiff's cause of action in the failure to inspect case it is necessary that she prove a period of time the dangerous condition has been allowed to exist. Without such proof, it would not be possible to determine whether the defendant had been afforded a reasonable time within which to inspect and remove the hazard. Banks v. Colonial Stores, 117 Ga.App. 581, 161 S.E.2d 366 (1968). Winn-Dixie Stores, Inc. v. Hardy, [138 Ga.App. 342, 345, 226 S.E.2d 142 (1976)].

(Punctuation omitted.) Kroger Co. v. Brooks, 231 Ga.App. 650, 654(1)(b), 500 S.E.2d 391 (1998). Similarly, our Supreme Court has held:

> [Although] the proprietor may be liable if he fails to exercise reasonable care in inspecting and keeping the premises in safe condition[,] [t]o sustain a cause of action in [this] type case the plaintiff must show that the

> foreign substance was on the floor for a length of time sufficient for knowledge of it to be imputed to the defendant. The length of time which must exist to show that the defendant had an opportunity to discover the defect will vary with the circumstances of each case[,] the nature of the business, the size of the store, the number of customers, the nature of the dangerous condition and the store's location.

(Citations and punctuation omitted.) Alterman Foods, 246 Ga. at 622-623, 272 S.E.2d 327.

It follows that, if there is no evidence as to how long the hazard had been on the floor before Reddick slipped and fell on it, neither a judge nor a jury as the trier of fact could conclude, without speculating, that the hazard had been there long enough so that it should have been discovered by Harvey had reasonable inspections been performed. It also follows that, if the hazard had not been on the floor long enough to have been discovered by a reasonable inspection, then any failure by Harvey to conduct a reasonable inspection was not the cause of Reddick's slip and fall. Rather, if the hazard had been on the floor, for example, only a minute or two before Reddick slipped and fell on it, the sole cause of the slip and fall was the negligence of the unknown party who placed the hazard on the floor. In the absence of any evidence as to how long the hazard had been on the floor before Reddick slipped and fell, the trier of fact would be left to speculate as to how long it had been there and whose negligence caused the slip and fall.

A verdict finding that a defendant's negligence caused the plaintiff's injury cannot be sustained on the basis of speculation or conjecture.

> On the issue of the fact of causation, as on other issues essential to the cause of action for negligence, the plaintiff, in general, has the burden of proof. The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.

(Citations and punctuation omitted.) Nelson v. Polk County Historical Society, 216 Ga. App. 756, 757, 456 S.E.2d 93 (1995). Thus, a determination as to how long the hazard was

[522 S.E.2d 758]

on the floor prior to the slip and fall is essential to Reddick's claim that Harvey had constructive knowledge of the hazard because it had been on the floor long enough to have been discovered by a reasonable inspection. Alterman Foods, 246 Ga. at 623, 272 S.E.2d 327; Colonial Stores, 117 Ga.App. at 581, 161 S.E.2d 366; Brooks, 231 Ga.App. at 654, 500 S.E.2d 391. Since the trier of fact in the present case cannot be allowed to speculate as to whether the hazard had been on the floor for as little as a minute or for as much as one hour and forty-two minutes, Harvey would be entitled to a directed verdict at any trial where Reddick sought to prove that Harvey's negligent failure to conduct reasonable inspections caused her slip and fall. Nelson, 216 Ga.App. at 757, 456 S.E.2d 93.

One would logically assume that any case whose evidentiary posture would entitle the defendant to a directed verdict at trial would also entitle the defendant to pre-trial summary judgment so as to avoid the expense of an unwinnable trial. This was the clear message

sent by our Supreme Court when in Lau's Corp. v. Haskins, 261 Ga. 491, 405 S.E.2d 474 (1991), it adopted what had long been the summary judgment rule in federal courts:

> 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 pointing out 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 pleadings, but rather must point to specific evidence giving rise to a triable issue. OCGA § 9-11-56(e).

Id. Although Harvey had the burden on its motion for summary judgment of showing that there is no material issue of fact, Harvey's defense that it lacked constructive knowledge of the hazard is not an affirmative defense, and the evidentiary burden at trial on this issue rests with Reddick. Sharfuddin v. Drug Emporium, 230 Ga.App. 679, 685, 498 S.E.2d 748 (1998); Robinson, 268 Ga. at 748-749, 493 S.E.2d 403. Since Harvey has no burden to produce evidence at trial in support of its lack of constructive knowledge defense, under Lau's Corp., Harvey has no burden on summary judgment to affirmatively produce evidence to disprove Reddick's claim that it had constructive knowledge of the hazard; rather it can point to the absence of evidence to support a triable issue on constructive knowledge. Id. at 491, 405 S.E.2d 474.

Nevertheless, the majority opinion, and the recent decision of this Court upon which it relies, requires Harvey to do precisely what Lau's Corp. says it is not required to do. Citing this Court's opinion in Straughter v. J.H. Harvey Co., 232 Ga.App. 29, 30, 500 S.E.2d 353 (1998), the majority opinion holds that, when a slip and fall defendant moves for summary judgment asserting lack of constructive knowledge of the hazard, it cannot discharge its burden by pointing to the absence of evidence as to how long the hazard had been on the floor until it first affirmatively produces evidence to disprove the plaintiff's case by showing that it had in place and followed reasonable inspection procedures at the time of the slip and fall. See Division 1(b) of the majority. The line of cases relied upon in Straughter to support this holding traces its authority back to two 1988 decisions, Food Giant v. Cooke, 186 Ga.App. 253, 366 S.E.2d 781 (1988) and Winn-Dixie of Greenville v. Ramey, 186 Ga. App. 257, 366 S.E.2d 785 (1988). Cooke and Ramey held that, because the defendant proprietor failed to produce evidence that it conducted a reasonable inspection of the premises, it failed to carry its initial evidentiary burden as the movant for summary judgment to show that the plaintiff's claim that the defendant had constructive knowledge of the hazard was not viable, and thus the burden did not shift to the plaintiff to produce evidence of how long the hazard had been on the floor. Ramey, 186 Ga.App. at 258-259, 366 S.E.2d 785; Cooke, 186 Ga.App. at 254-256, 366 S.E.2d 781. Both Cooke and Ramey concluded that the defendant was not entitled to summary judgment because the "[defendant's] evidence did not negate the possibility that, under the existing circumstances, its failure to have discovered the presence of the [hazard on the floor] was the result of its failure to exercise reasonable

[522 S.E.2d 759]

care in inspecting its premises. See [Ramey]." Cooke, 186 Ga.App. at 256, 366 S.E.2d 781.

The 1991 Supreme Court decision in Lau's Corp., which specifically overruled anything to the contrary, held that a defendant moving for summary judgment, which does not have the burden of proof at trial, has no burden to produce evidence in order to disprove the plaintiff's case or to shift the evidentiary burden back to the plaintiff. Id. at 491, 405 S.E.2d 474. Accordingly, Lau's Corp. specifically overruled

the contrary holdings in Cooke and Ramey upon which Straughter and the majority opinion rely. See Straughter, 232 Ga.App. at 36-40, 500 S.E.2d 353 (Andrews, C.J., dissenting); Hartley v. Macon Bacon Tune, 234 Ga.App. 815, 822-824, 507 S.E.2d 259 (1998) (Andrews, C.J., dissenting); Blake v. Kroger Co., 224 Ga.App. 140, 147-151, 480 S.E.2d 199 (1996) (Andrews, C.J., concurring specially). As I pointed out in my dissent in Straughter, the holding there and the holding by the present majority fly in the face of the Supreme Court's decision in Lau's Corp. Moreover, these holdings are directly contrary to numerous other slip and fall decisions of this Court which hold in accord with Lau's Corp. that a slip and fall defendant moving for summary judgment and asserting lack of constructive knowledge of the hazard is not required to produce evidence of compliance with reasonable inspection procedures before it can rely on the absence of evidence as to how long the hazard had been on the floor. Sharfuddin, 230 Ga.App. at 686, 498 S.E.2d 748; Blake, 224 Ga.App. at 142-150, 480 S.E.2d 199; Johnson v. Autozone, 219 Ga. App. 390, 393, 465 S.E.2d 463 (1995); Moore v. Kroger Co., 221 Ga.App. 520, 521, 471 S.E.2d 916 (1996); Haskins v. Piggly Wiggly Southern, 230 Ga.App. 350, 351, 496 S.E.2d 471 (1998).

Without evidence as to whether the hazard had been on the floor for as little as a minute or for as long as one hour and forty-two minutes, there is no basis for a reasonable trier of fact to conclude, without engaging in pure speculation or conjecture, that it had been there long enough to have been discovered by a reasonable inspection. Harvey would therefore be entitled to a directed verdict at trial, because it would be impossible for a trier of fact to conclude that a negligent failure by Harvey to conduct a reasonable inspection caused Reddick's slip and fall. Alterman Foods, 246 Ga. at 623, 272 S.E.2d 327; Brooks, 231 Ga.App. at 654, 500 S.E.2d 391; Nelson, 216 Ga.App. at 757, 456 S.E.2d 93. Where the evidence before the trial court on summary judgment would not be sufficient to withstand a motion by Harvey for a directed verdict at trial, the clear message of Lau's Corp. is that Harvey is entitled to rely on the absence of such evidence and is entitled to summary judgment. Id. at 491, 405 S.E.2d 474; see also Porter v. Felker, 261 Ga. 421, 405 S.E.2d 31 (1991) (summary judgment appropriate on evidence that would compel a directed verdict); Eiberger v. West, 247 Ga. 767, 769, 281 S.E.2d 148 (1981) (same); NeSmith v. Ellerbee, 203 Ga.App. 65, 68-69, 416 S.E.2d 364 (1992) (when directed verdict at trial is inevitable, summary judgment is appropriate).

In continuing to dissent to the decisions of this Court on the above issue, I am aware that the principle of stare decisis ordinarily compels a judge of this Court to follow the decisions issued by this Court. Since it is my opinion, however, that the decisions to which I continue to dissent clearly conflict with the Supreme Court's decision in Lau's Corp., 261 Ga. at 491, 405 S.E.2d 474, I do not believe stare decisis compels me to concur. "The decisions of the Court of Appeals insofar as not in conflict with those of the Supreme Court shall bind all courts except the Supreme Court as precedents." Art. VI, Sec. V, Par. III, Ga. Const. of 1983. Accordingly, I continue to dissent on this issue as long as I find clear support for my position in Supreme Court precedent. Moreover, I point out that the majority opinion, and the opinion in Straughter upon which it relies, fails to acknowledge a contrary line of decisions relying on Lau's Corp. issued by this Court which takes the exact opposite position. As I have urged in previous dissents, this Court should forthrightly address the conflict in these decisions.

For these reasons, I respectfully dissent.

Notes:

1. Indeed, McRae admitted that with only two exceptions in over two years since the divorce, he got all of the visitation required by the custody order. On those two occasions, the parties disagreed about the

meaning of the custody order with regard to three specific days. McRae also testified that he had spoken with the boys on the telephone almost every day since the divorce.

2. During her deposition, Reddick referred to the fruits she saw as plums, but in a subsequent affidavit, Reddick stated that she has since learned that they are called scuppernongs, which are large grapes. See Webster's New Intl. Dictionary (2nd ed.), p. 2252.

3. Reddick contends that the sweep card is inadmissible hearsay that does not meet the requirements of the business records exception. We disagree. Jones testified that the sweep card for the week ending September 7, 1996, was kept in the ordinary course of business and included all entries for the day of Reddick's fall. Satterfield testified that he personally swept the floor twice that day, as reflected by the entries on the sweep card initialed by him. This evidence satisfies the foundational requirements of OCGA § 24-3-14(b). See Mealor v. State, 233 Ga.App. 193, 194(2), 504 S.E.2d 29 (1998) (explaining requirements); Peachtree North Apts. v. Arkhora Assoc., 140 Ga.App. 20, 21(2), 230 S.E.2d 83 (1976) (testimony of corporate officer that time sheets were kept in normal course of business established admissibility).

4. For purposes of ruling on Reddick's motion for summary judgment, we have considered only the original deposition transcript and not the errata sheet. Nevertheless, we address this issue in the event that the parties seek to make use of Reddick's deposition on remand.

5. In Young v. YMCA of Metro. Atlanta, 204 Ga. App. 224, 419 S.E.2d 97 (1992), a slip-and-fall plaintiff testified at her deposition that she fell on a step because of the presence of soapy water, but later changed her testimony to indicate that she fell because the step was oversized. Although we noted in passing that the plaintiff's errata sheet "is authorized by OCGA § 9-11-30(e)," the central issue in Young was not the scope of the change, but whether the plaintiff properly submitted the errata sheet. Id. at 225, 419 S.E.2d 97.

6. Because Georgia's Civil Practice Act is modeled on the Federal Rules of Civil Procedure, decisions of the federal courts interpreting the federal rules are persuasive authority. Ambler v. Archer, 230 Ga. 281, 287(1), 196 S.E.2d 858 (1973).

7. In any event, Harvey does not seek to apply the Prophecy rule here, but only challenges Reddick's right to make substantive changes to her deposition.
