IN THE SUPERIOR COURT OF TATTNALL COUNTY
STATE OF GEORGIA

LOIS D. SCOTT,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL ACTION NO. 2003-V-480
	)	
PIGGLY WIGGLY CAROLINA COMPANY, INC. and WAYNE DURRENCE,	)	
	)	
Defendants.	)	

DEFENDANT PIGGLY WIGGLY CAROLINA COMPANY'S BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

COMES NOW, Piggly Wiggly Carolina Company (hereinafter "Piggly Wiggly"), by and through counsel, and files its brief in support of its motion for summary judgment and shows the Court the following:

STATEMENT OF FACTS

On November 1, 2001, Plaintiff was exiting Piggly Wiggly Carolina Company Store No. 104 located at 312 South Main Street, Glennville, Georgia. Plaintiff had been shopping in the Piggly Wiggly store but had concluded her shopping and had exited the store when she "tripped and fell over a water drain grid" in the shopping center. See Complaint, paragraph 8. Plaintiff alleges that she suffered personal injuries as a result of this fall. See Complaint.

ARGUMENT AND CITATION OF AUTHORITY

I. PIGGLY WIGGLY IS ENTITLED TO SUMMARY JUDGMENT BECAUSE IT HAD NO SUPERIOR KNOWLEDGE OF THE ALLEGED DEFECT PLAINTIFF MAINTAINS CAUSED HER FALL.

"In order to recover from injuries sustained in a slip and fall action an invitee must prove (1) that the Defendant had actual or constructive knowledge of the hazards; and (2) that the Plaintiff lacked knowledge of the hazard despite the exercise of ordinary care due to actions or conditions within the control of the owner/occupier". See Robinson v. Kroger Co., 268 Ga. 735, 749 (1997).

The true basis for a proprietor's liability for a personal injury to an invitee is the proprietor's superior knowledge of a condition that may expose the invitee to unreasonable risk of harm. See Parks-Mietzold v. J.C. Penney ,227 Ga. 724, 726 (1997). Recovery is allowed only when the proprietor had knowledge, which the invitee did not. See id.; see also Dickman v. South City Management, 229 Ga. 289 (1997).

There is no evidence of record that Piggly Wiggly had actual or constructive knowledge of the alleged hazard. In order to find a landowner liable for an injury to an invitee upon his property, a court must find that the landowner had superior knowledge of the existence of a condition that may subject the invitee to an unreasonable risk of harm. See Hannah, 234 Ga. 392 (1998). Because Plaintiff cannot prove that Piggly Wiggly had superior knowledge of a hazardous or dangerous condition on the property, she is barred from recovery.

II. THE WATER DRAIN GRID WAS AN OPEN AND OBVIOUS STATIC CONDITION.

The water drain grid was a static condition. Such a condition is not dangerous unless someone fails to observe it and steps into it. See Poythress v. Savannah Airport Commission, 229 Ga. 303, 306 (1997). (citing Marta v. Fife, 220 Ga. 298, 300, (1996). When nothing obstructs the invitee's ability to see the static condition, the proprietor may safely assume that the invitee will see it and will realize any associated risks. See id. at 306. When a person has negotiated an alleged dangerous condition on a previous occasion without incident, that person is presumed to have knowledge of it and cannot recover for a subsequent injury resulting therefrom. See Val D'Aosta Company v. Cross, 241 Ga. 583 (1999). See also Hannah v. Hampton Auto Parts, 234 Ga. 392 (1998) (stating that a plaintiff who fell down the steps of an auto parts store could not recover for alleged injuries as he and other patrons had successfully traversed the steps without injury many times before).

Even when the invitee has not previously traversed the area, if he or she knows of the static condition the proprietor has no duty to warn the invitee and no liability for resulting injury as the invitee knows as much as the proprietor does. See Poythress supra, 306 (stating that summary judgment was proper where there was no evidence that the handicapped access ramp on which Plaintiff fell was defective, and Plaintiff's decision to use the ramp demonstrated her equal knowledge of an open and obvious condition).

Further, in Warnke v. Pace Membership Warehouse, 215 Ga. 33 (1994), Plaintiff contended that as she was walking towards a sidewalk, she tripped and fell as her foot hit the edge of the curb. In affirming summary judgment for the Defendant proprietor, the court held that even if the curb sidewalk was hazardous, as the plaintiff contended, the condition was open and obvious, and thus, could have been avoided in the exercise of ordinary care.

III. PLAINTIFF IS BARRED FROM RECOVERY BY THE PLAIN VIEW DOCTRINE

The "plain view doctrine" is a civil concept that holds that an invitee is under a duty to look where she is walking and to see obvious, "large objects in plain view which are at a location where they are customarily placed and expected to be." See Robinson v. Kroger Co., 268 Ga. 735 (1997). Failure to perform this duty may amount to a failure to exercise ordinary care for one's safety and would bar recovery from resulting injuries. See Walmart Stores v. Hester, 201 Ga. 478, 479 (1991). In the instant case, photographs reveal that the drainage grid was in a customary location. See photographs, attached to the Deposition of Lois Scott. Moreover, the grid was in plain view and clearly visible to any patron entering or exiting the Piggly Wiggly. See photographs.

IV. THE AREA WHERE PLAINTIFF FELL WAS OUTSIDE THE CONTROL OF PIGGLY WIGGLY.

Plaintiff fell in the common area of the shopping center in which Piggly Wiggly is located. The area where she allegedly fell is a least ten feet from the exit door of the Piggly Wiggly, and approximately three feet from the entrance of another business in the shopping area. See Affidavit of Jimmy Johnson, attached hereto as Exhibit A. Further, Plaintiff testified that she was on her way to the Dollar Store, another merchant in the shopping center, when she fell. See Deposition of Lois Scott, page 61, line 24- 62, line 14.

V. THERE IS NO EVIDENCE OF RECORD THAT THE DRAINAGE GRATE ON WHICH PLAINTIFF FELL POSED A HAZARD .

In her deposition, Plaintiff testified that she did not know why she fell. See Deposition of Lois Scott, page 28, line 8. Further, Plaintiff later testified that there was a hole in the drainage grate, but she did not know whether the hole existed before she stepped on the grate. See

Deposition of Lois Scott, page 32, lines 9-14. Plaintiff did not talk to anyone at Piggly Wiggly about the alleged defect. See Deposition of Lois Scott, page 41, lines 15-21. Finally, Plaintiff testified that she was wearing slip-on shoes that got caught in the grate. See Deposition of Lois Scott, page 38, line 23 through page 39, line 13.

CONCLUSION

For the foregoing reasons, Piggly Wiggly respectfully requests that its motion for summary judgment be granted.

This _____ day of _____, 2004.

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