

DAILY REPORT

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Latest slip-and-fall verdict costs Kroger \$15K, not millions

STORE'S NEW DEFENSE LAWYER brings in expert to contest the cause for \$78,000 in plaintiff's medical bills

KATHERYN HAYES TUCKER |
ktucker@alm.com

AFTER A LOSING STREAK on slip-and-fall cases last year resulting in Georgia verdicts of \$750,000, \$2.3 million and \$2.79 million, the Kroger Co. hired a new defense attorney this year. The company achieved a different result in the first trial of 2013: a \$15,000 verdict, despite being sanctioned for spoliation and having to admit the plaintiff's account of an accident.

A Gwinnett County State Court jury on Feb. 15 awarded plaintiff Kathy Smith \$15,000 following a four-day trial before Judge John Doran Jr.

Smith slipped on grapes in the frozen food section of a Kroger store in Woodstock while shop-

ping for ice cream about 6:30 p.m. Nov. 13, 2009. She was knocked unconscious, according to her complaint. When she awoke, she brushed grapes off her jacket. Dazed, she refused the store manager's offer to call for an ambulance or bring her a wheelchair. Instead, she called for her husband, waiting in the parking lot, to take her to an urgent care center for treatment of a swollen ankle.

The next evening, the couple returned to the store together to finish shopping. The manager approached them and apologized for the fall, telling them a security video showed a child had dropped the grapes from a cart before Smith fell on them. The video also showed that Smith's small shopping cart turned over and landed on top of her. Other customers



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Matthew Moffett said hospital bills were for pre-existing condition.

came to her aid and lifted the cart off her while she was unconscious. Later, when she requested a copy of the video, she was told it had accidentally been destroyed.

The judge sanctioned Kroger for spoliation of evidence, precluding the grocer from disputing the plaintiff's version of the fall. The

judge already had limited the trial to damages only and approved a pre-trial order before Kroger replaced its long-time defense counsel, Tyrone solo Douglas Wilde, with Matthew G. Moffett of Gray, Rust, St. Amand, Moffett & Brieske.

Moffett requested an amendment to the pre-trial order to bring in a medical expert, Dr. John Horney, to contest the plaintiff's claim of \$78,000 in medical bills, \$76,000 of which was for a single hospitalization following the fall for treatment of a bowel obstruction. The plaintiff contended the intestinal problem was caused by medications prescribed for the pain from the fall. But the medical expert reviewed the plaintiff's prior medical history and testified that the problem was caused by pre-existing conditions for which Smith had already made extensive use of pain medications.

The plaintiff's treating physicians had suggested her intestinal problems were linked to her change in medications following the fall. Plaintiff's attorney Larry Stewart of Lawrenceville said the defense used his client's 20-year history of health problems against her.

"Congratulations. They were able to beat her up and make her unlikable enough that the jury didn't give her much," Stewart said.

Stewart added that he was using

the phrase "beat her up" in a figurative sense, and that Moffett's questions of his client were "respectful." Stewart said he faced challenges because his case was largely about his client's long-term irritable bowel syndrome, which he said changed from diarrhea to constipation after the Kroger fall. "It's a distasteful subject for a jury," he said.

The \$15,000 judgment has been paid, both attorneys said.

The plaintiff's attorney admitted to being surprised by the verdict, particularly in light of Kroger's recent litigation history. Last year, Georgia verdicts against the company reported by the *Daily Report* included: \$2.3 million in January for a back injury from a fall on a banana, \$2.79 million in August for a wrist injury from a fall on water near the flower aisle, and \$750,000 in November from a back injury following a fall on pineapple ice cream topping. The first two cases were defended by Wilde. The third was defended by Foy Devine of Taylor English Duma.

In the recent trial, Moffett was assisted by associate Jennifer Guerra.

"Kroger immediately reached out to this shopper after her incident, and offered to pay her related medical bills and otherwise compensate her reasonably. When our offer was rejected, it became necessary to defend this case at



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Larry Stewart said details of his client's long-term medical condition were "distasteful" to the jury.

trial," Moffett said.

"The jury agreed with Kroger's position and handling of the claim, as reflected in its verdict. The jurors specifically told us after the trial that they compensated the plaintiff within the exact case value range we had recommended in our closing argument."

Moffett said he plans to continue representing Kroger and is "prepared to defend any case if fair and reasonable resolution offers are rejected."

The case is *Smith v. Kroger*, No. 10C-16329-6. 