

Success in Slip and Fall Cases Depends on Discovery and Presentation

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Technology Trap. Because slip (or trip) and fall cases are notoriously challenging to prove for both the defense and the plaintiff, it is imperative to learn as soon as possible if the case is worth pursuing. Arguments invariably center on advancing or dispelling the notion that people fall due to their own negligence. If one relies entirely on proving or disproving that the walking surface was unreasonably slippery, then testimony soon becomes a technical morass. This is because winning the argument depends upon educating the jury about such topics as the meaning of coefficient of friction, the definition of slippery, the mechanics of walking, and the test to determine coefficient of friction. Any of these subjects is likely to lull all but the hardiest technophile to sleep.

Surface Slipperiness is Difficult to Prove/Disprove. By contrast, successful slip/trip and fall cases treat the issue surface slipperiness as one of several issues in the case. This approach has some practical basis:

- 1) it is difficult to explain physics (or genetics, or chemistry, or anything technical) to laymen,
- 2) it is difficult to recreate the precise conditions under which the plaintiff fell,
- 3) industries whose fortunes depend on the ability to produce a slip-resistant surface offer well-practiced defenses,
- 4) the words “coefficient of friction” do not easily roll off the tongue, and
- 5) other issues are easier to explain and understand.

Building Code Violations and Improper Construction Strengthen a Plaintiff Case.

A building code violation or improper construction technique at the scene of the incident significantly strengthens the plaintiff’s position in a slip/trip and fall case. Although construction is also technical in nature, most people can grasp the concept of code compliance and proper construction. Identifying, isolating, and simplifying the applicable code minimize the complexity of building codes. The argument simplifies to: “The code says do this. The building was built/constructed like this. And, this construction does not comply with the code’s requirements.”

Actual Case I: The Ramp Violates the Building Code. The plaintiff attorney summarized his case thus: “The ramp is too steep, the ramp is too slippery, and without a handrail it violates the building code.” In court, the defense relied on the testimony of a chemist who worked for the company that made the floor-care product. The chemist stated that the only *proper* way to determine coefficient of friction is to prepare a sample of the floor wax applied to a standard tile in accordance with ASTM D 4103. He went on to say that the prepared tile should be tested in accordance with ASTM D 2047 using a James machine kept in a hermetically sealed room. He also stated, and correctly so, that the *industry* (that is, the *floor-care* industry) does not recognize the use of portable machines. We argued that our field tests were done according to recommended and

accepted procedures. Using the results of our tests, we showed that the coefficient of friction of the ramp surface failed to meet not only the industry-accepted standard but also the requirements of the Texas Accessibility Standard. However, the real strength of the case was the ramp's violation of applicable code (the code in effect at the time of its construction). The building code required ramps that rise at (or greater than) a rate of 1 foot in 10 feet of run to have a handrail. This ramp had a slope of 1 foot in 10 feet. On the day the plaintiff fell, the ramp should have had a handrail, but lacked one. The jury found in favor of the plaintiff.

Actual Case II: An Improperly Constructed Shower Causes a Fall. The plaintiff, an employee, fell on the walkway within the detention area of a penal institution. Coefficient of friction was not the issue here. The construction of the inmates' shower was. This was a single-person shower enclosed in a small, elongated rectangular room with a door at one end and the showerhead at the other. The showerhead directed water toward the door. Its configuration, the lack of proper slope to the floor, and the absence of a water dam at the door, caused water to spill out onto the walkway where the guard fell. During discovery, we found very little technical documentation about constructing the shower: no contract documents, no change orders, no memos. The architectural drawings lacked the customary detailing and sections needed to instruct the contractor about the shower construction. During deposition, the defense attorney discovered that his full-scale model only illustrated that the shower failed to comply with either the plumbing code or the plans. Actually, the model could never be built according to the plans, because, the architectural and structural plans disagreed with one another. Lack of design and planning of the shower and poor documentation moved this case to a favorable settlement for the plaintiff.

Actual Case III: Water Runs Downhill. Building codes and construction techniques are not just the plaintiff's tools. The plaintiff claimed to have slipped on liquid that collected on the floor in a grocery. The plaintiff claimed the liquid drained from a nearby portable freezer used to display meats. No one witnessed the fall; no one could find a source for the water. Since no floor is perfectly level or flat, discovery focused on defining how much the floor varied from level. An elevation survey discovered that the location of the fall occurred at a high point in the floor where water would not collect. There was no drain on the portable freezer either. Armed with this information, the attorney was able to set aside the claim.

The Code Applies Where the Building Begins. Under most conditions, the authority of a building code ends at the perimeter of a building. Incidents that occur outside that envelope cannot rely on the authority of the building code. When an incident occurs at or just beyond the building envelope, the case often focuses on defining the perimeter of the building.

Which Code Applies? Your technical expert's first challenge is to identify the relevant codes and standards. Nothing weakens a case like referencing a code that has no

relevance or jurisdiction, or much worse, conflicts with codes or standards that *do* have jurisdiction. Once the relevant codes and standards have been identified, applying that information to the case is relatively straightforward.

The profusion of model building codes and standards complicates this effort. The Uniform Building Code, the Building Officials Code of America, and the Southern Standard Building Code are the most prevalent model codes. In addition to the model codes are the acts and standards: the Occupational Safety and Health Administration standard, the Americans with Disabilities Act Accessibility Guidelines, and the standards published by the National Fire Protection Association. The specialty codes associated with the model codes (such as the Uniform Plumbing Code, or the BOCA Mechanical Code) are a significant resource (as in Case II discussed above). The model codes are updated on a three-year cycle. Modification and addenda added to the model codes by the municipalities before adoption delays adoption of the latest edition of a code by a year or two. Construction must adhere to the code promulgated at the time of construction. But, if the code changes during construction should the building comply with the code in effect when the building permit or certificate of occupancy was issued? The answer is: It depends. Usually, the building must adhere to the code under which the building permit was issued, however significant changes made to the building design during construction can confuse this issue.

Drebelbis Engineering's Approach to Slip and Fall Cases. Slip/trip and fall cases are not impossible to resolve; they are just challenging. They are technical by nature, as are most cases that involve buildings and construction. However, sound technical information reduces many of the inherent unknowns. The success of these cases, just as any project involving a technical issue, depends upon the capability of the technical expert and the litigation team's ability to tame technology. Drebelbis Engineering knows that attorneys engage our services when the case is driven by the need to demystify technology. We appreciate the timely nature of this situation. We offer findings that are thorough, prompt, and relevant. Then, you can determine your best legal strategy. You need an unbiased assessment of the facts in the case: its strengths, its weaknesses. Armed with tamed technology, the litigation team can determine the best way to move the project forward.

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Drebelbis Engineering specializes in investigation and testimony that involve slip/trip and fall, construction, building codes, building technology and forensic engineering. Contact us in Dallas, Texas at (214) 468-8118. Send a fax to (214) 951-0267. Or visit our web page at <http://www.drebelbisengineering.com>.