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Managing Slips and Falls: A Legal Perspective

Reference: Balek, W.C., **"Managing Slips and Falls: A Legal Perspective,"** *Technology of Floor Maintenance and Current Trends, ASTM STP 1448,* W.J. Schalitz, Ed., ASTM International, West Conshohocken, PA, 2003.

Abstract: Annually slip and fall incidents exact a substantial toll in terms of death, personal injury, personal suffering, workers compensation, loss in productivity and civil liability. The cause of slip and fall incidents and resultant damages are multiple and include unclean/unsafe floors, physiological characteristics of individuals, lack of training, inappropriate footwear and even fraud. A clear understanding of the underlying causes of slip and falls provides us with the framework for identifying those factors we can control and thus minimize and otherwise reduce one's potential liability.

Numerous parties may be responsible and therefore potentially liable for a slip and fall incident depending on the particular circumstances of a given situation. Parties that may be liable in a slip and fall incident include owners or operators of retail and other commercial facilities, and distributors and manufacturers of floor care products, flooring and footwear.

This paper outlines various proactive measures that individuals and companies can implement and which will help to eliminate or substantially reduce the incidence of slip and fall injuries, and any potential liability.

Keywords: Slip and fall; Liability

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Managing Slip and Fall Liability: A Legal Perspective

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I INTRODUCTION

A. Overview. This presentation will review those practices and procedures that companies can implement for the purpose of reducing their potential slip and fall liability as it relates to falls on same level surfaces. We will first define the problem by reviewing the various burdens imposed by slip and fall incidents as well as the major causes of such events. Legal theories of liability will then be briefly explored followed by prophylactic measures companies can employ to prevent such incidents from occurring in the first place.

B. Statement of Problem. Slip and fall incidents continue to impose substantial costs each year upon employers, owners/operators of commercial establishments, individuals, and society in general. The following statistics reflect the gravity of the situation:

1. Employers.

- Liberty Mutual has concluded that falls are the second leading cause of disabling workplace injuries resulting in employees missing 5 or more days of work in 1999 resulting in 11.5% of total direct costs associated with workplace injuries or $4.6 billion. Indirect costs associated with non-fatal workplace falls are estimated to be $9.2 to $23 billion.[1]

- According to the Bureau of Labor Statistics, falls accounted for 12.4% of all workplace fatalities (733 work related deaths).[2]

- It is estimated that slip and fall incidents account for almost 30% of all workers compensation claims.[3]

- Slips and falls are the leading cause of employee injury in the foodservice industry.[4]

- According to the 2002 Liberty Mutual Workplace Safety Index, amongst employers there exists a significant gap between perception and reality resulting in a misallocation of resources. For example employers reported "falls on the same level" as the 7th most important cause of workplace injuries, while it was actually ranked as the 2nd most costly injury cause. This survey data indicates employers may tend to place less priority on injury causes that actually have a greater potential impact on workplace safety.

2. General.

- Falls were the second leading cause of deaths that occurred at work, home, commercial and other locales in 1998, resulting in 16,274 deaths.[5]

- Falls took the lives of 9,300 people at home, the majority of them over the age of 65.[6]

- The total direct cost of all fall injuries for people age 65 and older in 1994 was $20.2 billion. By 2020, the cost of fall injuries is expected to reach $32.4 billion.[7]

- Falls account for over 8 million hospital emergency room visits, representing the leading cause of visits (21.3%). Slips and falls account for over 1 million visits, or 12% of total falls.[8]

II MAJOR CAUSES OF SLIP AND FALL INCIDENTS

There are numerous causes of slip and fall incidents that occur on same level surfaces, some of which are controllable and others that are not. While there is some disagreement about how much a particular cause contributes to the problem, most experts agree that the major causes of slip and fall incidents are as follows:

- Unsafe, Unclean Floors
- Inappropriate Footwear
- Fraud
- Inadequate Hazard Identification
- Insufficient Training
- Physiological Characteristics (age, disability, etc.)
- Inappropriate, Non-Compliant Floor Care Product

Certain factors, such as the physiological characteristics of the "walker", are not within our control. However, many of the causes are factors that can be controlled, such as unclean floors, appropriate floor care products, and training. In managing or minimizing potential liability, we must focus on instituting a comprehensive approach that addresses those factors that we can manipulate and otherwise control. But before we discuss prophylactic measures, it is helpful to have a general understanding of the basis of civil liability.

III GENERAL DISCUSSION OF LIABILITY

When a slip and fall incident occurs, determining who is responsible can be a complicated matter. In the first place, multiple parties are involved in floor safety: owner/operator of the establishment, employer, manufacturer/supplier of floor care products, flooring or footwear, and the injured party. Furthermore, responsibility and legal liability depend upon the unique circumstances of each situation. However, a brief

discussion of the basis of civil liability under our legal system is helpful in understanding where responsibility lies and what measures we can take to minimize liability.

Please be advised that the following discussion is based on generalizations. You should be aware that the legal basis of liability varies from state to state.

A. Potentially Liable Parties in a Slip and Fall Incident

- Owner/Operator of a Facility
- Employer
- Supplier/Manufacturer of Floor Care Products
- Supplier/Manufacturer of Footwear
- Supplier/Manufacturer of Flooring

B. Basis of Liability—Owner/Operator of Facility

1. Duty. The business owner/operator owes the public the duty of exercising ***reasonable care*** in maintaining the premises in a reasonably safe condition.

- Proper maintenance of floors
- Inspecting floors
- Removing objects on the floor

2. Reasonable Care. In the management of the property, did the owner/operator act as a reasonable person in view of the probability of injury to others given the circumstances of the particular situation. The standard of reasonable care can be established by evidence of:

- Industry Custom or Practice
- Government Regulations
  - OSHA
  - ADA
  - Building Codes
- Voluntary Standards

3. Breach of Duty. The business owner/operator can be found liable if the plaintiff can demonstrate that the owner/operator failed to exercise reasonable care and that was the "proximate cause" of the injury (i.e., had it not been for the breach of duty, the individual would not have fallen).

4. Burden of Proof. Generally, the plaintiff has the burden of proving that the owner/operator did not exercise reasonable care.

If an individual is **injured by slipping on a foreign substance placed or left on the premises by the proprietor or its agent**, the business owner can be liable whether it knows of the dangerous condition or not. In this situation, the plaintiff

must prove that the foreign material was related to the defendant's business, and produce some evidence that makes it more likely than not that the defendant was responsible for its existence.

If the offending substance was on the premises through acts of a third person, or if there is no showing of how it got there, the business will generally only be liable if it had actual or constructive knowledge of its presence (i.e., the substance was there for a sufficient length of time so that in the exercise of ordinary care its presence should have been discovered.)

Please note that in establishing constructive knowledge, the burden of proof is generally on the plaintiff. However, a **growing number of jurisdictions such as California and Florida have relieved the plaintiff's burden of proving constructive knowledge.** In general these jurisdictions state that the plaintiff may be relieved of the burden of proving how long a substance was on the floor if he or she can demonstrate that the site had not been inspected within a reasonable time.

C. Basis of Liability—Manufacturer of Floor Care Products

1. Negligence

2. Strict Liability

3. Breach of Warranty

D. Basis of Liability—Distributor

1. Negligence (private label distributor—limited jurisdictions)

2. Strict Liability

3. Altered Product

IV GOVERNMENT REGULATIONS AND VOLUNTARY STANDARDS

In regard to maintaining safe walking/working areas, at a minimum, companies must comply with relevant government regulations. Failure to comply with such regulations establishes a company's negligence. However, regulations establish minimum standards of care, while companies and other potential defendants are held accountable for exercising "reasonable care" which is often a higher standard of care than that established by mere regulation.

Consequently, companies should also be cognizant of voluntary industry consensus standards that are relevant and appropriate for the particular circumstances. These standards are often viewed as establishing what the courts consider to be the standard of reasonable care to which a defendant will be held accountable. Moreover, companies and

others must view their circumstances and implement other prudent measures designed to reduce the potential for individuals slipping and falling.

This section will address some of the more pertinent regulations and standards and recommend measures that can be taken to minimize potential slip and fall liability.

A. OSHA. OSHA regulations address workplace safety and are directly relevant to matters involving employees. Additionally, in those situations not involving employees, OSHA regulations may be used as evidence of industry custom or practice. The following is an overview of those OSHA regulations that relate to "walking-working surfaces."

1. Coefficient of Friction. OSHA recommends that walking surfaces have a static coefficient of friction of 0.5.

2. General Requirements (29 CFR 1910.22).

- All places of employment, passageways, storerooms, and service rooms shall be kept clean and orderly and in a sanitary condition.
- The floor of every workroom shall be maintained in a clean and, so far as possible, a dry condition. Where wet processes are used, drainage shall be maintained and gratings, mats, or raised platforms shall be provided.
- Every floor, working place and passageway shall be kept free from protruding nails, splinters, holes, or loose boards.
- Aisles and passageways shall be kept clear and in good repair with no obstruction across or in aisles that could create a hazard.
- Permanent aisles and passageways shall be appropriately marked.
- Where mechanical handling equipment is used, aisles shall be sufficiently wide. Improper aisle widths coupled with poor housekeeping and vehicle traffic can cause injury to employees, damage the equipment and material, and can limit egress in emergencies.

3. Guarding Floor and Wall Openings and Holes (1910.23)

4. Fixed Industrial Stairs (1910.24)

5. Portable Ladders (1910.25, 1910.26).

6. Fixed Ladders (1910.27)

7. Scaffolding (1910.28)

8. Manually Propelled Mobile Ladder Stands and Scaffolds (Towers) (1910.29)

B. Americans with Disabilities Act (ADA). Regulations and guidelines issued pursuant to the ADA also address walking surfaces. In general the ADA guidelines state that ground and floor surfaces along accessible routes, including floors, walks, ramps, stairs, and curb ramps, shall be stable, firm and slip resistant.

In regard to slip resistance, the ADA guidelines recommend a static coefficient of friction of 0.6 for accessible routes and 0.8 for ramps.

C. ANSI Standard for the Provision of Slip Resistance on Walking/Working Surfaces (ANSI A1264.2-2001). The American Society of Safety Engineers acted as the secretariat for the development of this standard which addresses the concept of "slip resistance" and also sets forth common and accepted practices for providing reasonably safe walking/working surfaces.

1. Scope. The standard is intended to apply primarily to industrial and workplace situations and is not intended to apply to construction or residential occupancies, or other occupancies such as retail or office facilities where the general public is admitted.

2. Footwear. In situations where footwear selection can reasonably be controlled, consideration shall be given to slip resistance of footwear to maximize traction, including the required use of special shoes or overshoes when wet conditions are anticipated.

- Foreseeable conditions in the walking/working environment shall be considered in selection of appropriate footwear (i.e., type of flooring, type of tasks to be performed, potential contaminating substances, etc.)
- Footwear traction shall be considered for the foreseeable walking/working tasks to be performed in the workplace. (See Shoe & Allied Trade Research Association Recommendations.) Selection qualities should include:
    - Slip resistance
    - Tread design
    - Tread hardness
    - Shape of sole and heel
    - Abrasion resistance
    - Oil resistance
    - Chemical resistance
    - Heat resistance

3. Mats and Runners. Mats or runners shall be considered for use when walking surfaces do not meet the slip resistance guidelines established by the

standard. Mats or runners may be required during wet or inclement weather conditions.

- Mats and runners shall be in areas where it is reasonably foreseeable that operations may encounter slippery contaminants or foreign materials on floor surfaces.

- Mats and runners shall be adequately secured against movement.

- Mats shall be safely installed so that they do not create tripping hazards (they shall have a beveled or flat edge or other appropriate treatment to help reduce the possibility of tripping).

4. Housekeeping. A housekeeping program shall be implemented to maintain a safe walking/working surface. The standard recommends a written program to ensure consistency. The program should describe materials, equipment, scheduling, methods, and training of those conducting housekeeping.

- The written housekeeping procedures should specify cleaning and maintenance procedures including inspection, immediate response, routine operations, remedial measures and reporting requirements.
- All housekeeping staff, contractors, and others with responsibility for maintaining floors shall be trained regarding the housekeeping procedures including recordkeeping and reporting relating to housekeeping and maintenance.
- Monitoring of areas shall be conducted on a regular basis and shall include: inspection of all working surfaces; notification of persons responsible for clean up; and placement of signage, barriers, etc. until clean up is complete.

5. Warnings. A warning shall be provided whenever a slip/fall hazard has been identified until appropriate corrections can be affected. Depending upon the circumstances, a warning sign, barricade, or even the placement of personnel may be called for.

6. Controlled Access. Where an inherently slippery environment exists due to the nature of a product being processed, or otherwise handled, a satisfactory combination of the barricades, containment of spillage and restricted entry shall be utilized.

7. Selection and/or Treatment of Flooring. Flooring materials should be selected consistent with ASTM F802-83 (1997), A Standard Guide for Selection of Certain Walking Surfaces When Considering Footwear Traction. Consideration should be given to replacing the flooring with a material having more pronounced surface asperities. Textured surface coatings shall be

considered a viable selection alternative. The material selection should be determined based upon physical testing of the surface with appropriate slip testing devices.

- Where it is not practical to replace flooring, etching, scoring, grooving, brushing, appliqués, coatings, and other such techniques shall be used to provide acceptable slip resistance under foreseeable conditions.

- Occasional testing of surfaces should be performed to monitor slip resistance on walking/working surfaces because some treatments, coatings, etc. deteriorate over time.

8. Testing Equipment. All surface testing shall be conducted in accordance with the appropriate ASTM standard test method.

- Examples of methods currently recognized by ASTM and ANSI for testing dry conditions are:

  - ASTM Standard Test Method (F-489-96) for Using a James Machine
  - In addition, ASTM and ANSI also recognize the following test methods for field testing under dry conditions: Standard Test Method (F-609-96) for Using a Horizontal Pull Slipmeter; ASTM Standard Test Method (F-1677-96) for Using a Portable Inclinable Articulated Strut Slip Tester; ASTM Test Method (F-1678-96) for Using a Portable Articulated Strut Slip Tester; and ASTM Standard Test Method (F-1679-00) for Using a Variable Incidence Tribometer

- Examples of methods currently recognized by ASTM and ANSI for testing wet conditions in the laboratory or field are: ASTM Standard Test Method (F-1677-96) for Using a Portable Inclinable Articulated Strut Slip Tester; and ASTM Standard Test Method (F1679-00) for Using a Variable Incidence Tribometer.

9. Slip Resistance. Walking surfaces should be monitored for their slip resistance characteristics. The standard recommends a slip resistance guideline of 0.5 for walking surfaces in the workplace under dry conditions.

D. Other Relevant Standards. There are a number of other relevant voluntary industry consensus standards including: (1) ASTM F695-96 Standard Practice for Evaluation of Test Data Obtained for Measurement of Slip Resistance of Footwear Sole, Heel or Related Materials; (2) ASTM F1240-89 Guide for Categorizing Results of Footwear Slip Resistance Measurements on Walkway Surfaces with an Interface of Foreign Substances; (3) ASTM F802-83 (1997) Standard Guide for Selection of Certain Walking Surfaces

when Considering Footwear Traction; (4) ASTM F1637-95 Standard Practice for Safe Walking Surfaces.

V MANAGING LIABILITY

Now that we have a general understanding of the causes and basis of liability in slip and fall incidents, we can discuss prophylactic measures that are designed to manage or minimize potential liability.

A. Minimizing Liability of Owner/Operator/Employer. Business owners, operators and employers experience the brunt of liability in slip and fall incidents, and thus have much to gain by taking proactive steps to enhance floor safety and reduce the incidence of slip and fall accidents. The following proactive measures are largely excerpted from a checklist developed by the National Floor Safety Institute located in Bedford, TX, entitled "OSHA Self-Inspection Checklist—Walking and Working Surface Requirements."

1. Housekeeping.

- Establish written procedures
- Keep all work environment, passageways, storerooms, and service rooms clean, sanitary and orderly.
- Keep workroom floors clean and dry. Where wet processes are used, provide drainage, false floors, platforms, mats, etc.
- Keep floors, working areas, and passageways free of protruding nails, splinters, holes, loose boards, or tiles.
- Periodically inspect the walking areas to check for foreign objects, water, and other items that may create falling hazards. Maintain records of your inspection activities including the area inspected, conditions observed, who conducted the inspection, and the time.
- Practice sound recordkeeping by maintaining a cleaning log, including products used, surfaces cleaned, when and by whom tasks are performed, and cleaning procedures.

2. Employee Training.

- Train employees about established safety procedures, cleaning operations, and inspection procedures.
- Provide employees with appropriate product usage training.
- Post written slip and fall prevention and accident handling policies in conspicuous places.

- Keep records of all employee training including individuals trained, subject matter covered, training materials, and date of training.
- Consider a reward system for employees who promote positive safety procedures.

3. Flooring and Stairs.

- Select appropriate flooring materials for the anticipated conditions of use. Select flooring with a SCOF of greater than 0.5 for "high risk" areas.
- Periodic monitoring of slip resistance.
- Inspect flooring surfaces for holes, chips or other trip hazards and make necessary repairs.
- Use non-slip stair treads and landings with abrasive stair nosing.

4. Matting.

- Use absorbent walk-off mats at all doorways that lead to the outside and in other areas where it is foreseeable that slippery conditions exist.
- Use low profile, highly abrasive matting in areas where grease and oil are present.
- Thick mats should be constructed with beveled edges to minimize tripping.
- Use mats with a non-slip backing on wet surfaces.
- Adequately secured against movement.

5. Cleaning Chemicals.

- Maintain "high-risk" areas using a traction enhancing cleaner.
- Select a floor cleaner that enhances slip-resistance and does not leave a slippery soap residue. Rinse thoroughly with clean water after use.
- Select a commercial floor polish with SCOF of 0.5 or higher. Select higher SCOF products for "high risk" areas.

6. Footwear.

- Provide employees with access to slip-resistant footwear and make it a job requirement, when appropriate (ASTM F695).

- Consider foreseeable conditions in the walking/working environment
- Footwear traction
    - Tread design
    - Tread hardness
    - Oil resistance
    - Chemical resistance
    - Heat resistance
    - Shape of sole/heel

7. Hazard Identification.

- Once hazards are identified (i.e., a spill on the floor), post caution signs or barriers preventing access to the spill.
- Post caution signs while mopping.
- Periodically inspect entryways and mop up tracked in rain, snow and debris.
- Eliminate chronic hazards by implementing design changes and conducting frequent equipment inspection and servicing.
- Barricade doors of single entrance rooms when wet mopping.

B. Minimizing Liability of Manufacturer/Distributor

1. Quality Control

- Ensure product integrity, consistency and quality so that product is appropriate and safe for its intended use.
- Product testing.
- Maintain records demonstrating product quality.

2. Education and Training

- Educate and train end user.
- Proper product application.
- General floor safety program.

3. Warranty. Do not warrant the product to be safe and appropriate for uses inconsistent with its intended use.

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