Winning Big Money in Fall Cases

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While a lot of lawyers do not like "slip and fall" or "trip and fall" cases, I really find them challenging and enjoyable. Almost every piece of evidence in a fall case can be a "double-edged sword." For example:

- if the hazard was obvious to the defendant, then shouldn't it also be obvious to the plaintiff as she approached it?
- if a defendant employee should have seen the hazard when inspecting the premises, doesn't this also show that plaintiff should have seen the hazard while approaching it?
- if the plaintiff has no idea what the substance is or where it came from, how is the defendant supposed to know?
- if the defendant should have known condensation sometimes leaks from a cooler onto the floor, shouldn't the plaintiff also know this?

In addition to the above issues, Georgia case law is full of many conflicting appellate court opinions. Thus, trying fall cases can be very challenging. In spite of these challenges, if a fall case is presented properly, the jury verdicts can be substantial. I have been successful in obtaining several multi-million dollar recoveries in fall cases, along with many high six figure ones. ***In fact, every time we have tried a fall case to a jury, my client has received a jury verdict that was several times higher than the best offer***. It is for this reason that I believe insurance companies & corporate defendants routinely undervalue the potential jury verdicts in a fall case.

Trial Technique # 1: Use the Defendant's 30(b)(6) Representative's Testimony to Prove a Hazard Existed.

Proving the hazard sounds elementary and essential. However, it is one of the easiest issues to overlook at trial. For instance, it is tempting to take for granted that "everyone will know water on a floor is a slipping hazard" or that "an unpainted elevation change presents a tripping hazard." Even though the jury may know this to be true, there is great value in presenting proof of the hazard. Simply stated, it makes your case much more compelling.

One of the most effective means of "proving the hazard" is through the use of a Rule 30(b)(6) deposition of the corporate representative of the defendant. I usually like to notice a 30(b)(6) depo after I have taken all the fact witnesses. Then, it is helpful to start with the very basic questions about the case and pin down the representative on these issues. ***This will help limit the scope of what you have to prove at trial and make the case more compelling.*** I have broken down these questions into several subcategories below, in the order that I like to address them in the deposition:

A. Get the corp. rep. to admit that they are speaking on behalf of the Defendant.

- Go through each catagory of knowledge listed on the 30(b)(6) Notice of Depo.
- Attach it to the deposition as Exhibit "A."
- Have them acknowledge that they are the appointed representative with

corporate knowledge to speak on each catagory. This keeps the defendant from "wiggling free" from any admissions the deponent may make in the deposition.

B. Identify the cause of the fall.

- "Do you agree my client slipped on water near the freezer (or insert whatever hazard is specific to your case)?"
  If yes– Pin them down that there was no other known cause of the fall.
  If no– What evidence do you have that anything else caused her to fall?

C. Have the corp. rep. admit that the cause of the fall presents a slipping/tripping hazard for customers.

This is a section of questions that can be easily overlooked, but that is vitally important. I typically like to start with the employee training/safety training manual (if one exists.) In any event, the representative is usually very anxious to admit that employees are trained to look for foreign items, spills, etc. on the floor (and if they won't, then it likely gives you an inadequate training claim). The corporate representative is usually very anxious to tell you that everyone is adequately trained to look for such issues on the floor, and even have a plan to clean them up if and when they are found. Once this is established, then move to the line of questioning that qualifies the cause of the fall as something they would have identified and cleaned up pursuant to their safety training. Once this is established, then move into the reasons for having these policies – to protect customers from falling hazards — and get them to admit the cause of the fall in your case could constitute a slip/trip hazard to a customer. A typical line of question looks as follows:

- Identify the safety training manual and the section on keeping the premises free from any hazards.
- Admit that the policy was in force on date of fall.
- "Pursuant to this safety policy, you and your employees are trained to look for foreign items, water, spills, etc. on the floor, right?"
- "And if an employee finds a substance on the floor, what is the proper procedure to follow per the safety policy ?"
- "Pursuant to your safety training, if you or an employee had seen the water/spill/etc. before my client fell, would you have followed your safety policy and cleaned it up or put out a sign?"
  There is really no good answer to this question. <u>If they say no</u>, they are admitting they would leave a hazard on the floor (in violation of their own safety policy) and don't really care about customer safety. <u>If they say yes,</u> then they are admitting it was a hazard. In my experience, they will usually go for the latter and say they would have cleaned it up/put out a sign, etc. per the safety policy.
- "And one of the reasons that you would clean it up/put out a sign is that the foreign substance/water/spill could present a slipping danger to customers, right?"
  Again, there is really no good answer to this question. <u>If they say no</u>, they just

look stupid. Follow up with "then there is really no reason for the safety training/policy of removing foreign substances, right?" If they say yes, they are admitting that what my client fell on was a slipping hazard.

- "So you agree that the water/spill/etc. could present a slipping hazard to customers on the day my client was on your premises shopping?" Pin them down on this.
- "That is one of the reasons you would have cleaned it up/put out sign had you discovered it?"

D. Once you have established the foreign substance is a hazard, have the defendant *describe how it could cause a fall*.

These questions are great not only for trial, but also to oppose a summary judgment motion. Once the court reads the defendants own testimony describing how the hazard could have caused a fall, it goes a long way towards surviving summary judgment. I like to make the defendant's representative tell me how the substance is slippery or could otherwise cause a customer's foot to slip. If they begin to waffle on these questions, go back to the fact that they have already admitted it was a hazard and they would have cleaned it up pursuant to their safety policy. Get them to admit that the reason they have the safety policy is to prevent customers from falling. (Again, this seems elementary and essential, but it makes great testimony for the jury.0 So, the question is, how could this cause a customer to fall? A typical line of questioning on this issue would look as follows:

- You just told me the water/spill/etc. on the floor could present a slipping danger to customers, and that you would have identified it as such and removed it pursuant to your safety policy?
- Now, please describe for me how it (water, spill, raised elevation, etc..) could cause a customer to fall?
- Can liquid on a tile floor cause it to become slick or slippery?
- What about liquid or water on the floor makes it slick? How does that work?
- Could it make a customer's foot slip out from under them?
- Can a raised elevation present a tripping hazard? How so?
- How could a customer trip on the unpainted edge? (Get them to explain the very basics of how it could catch their toe and cause them to stumble and fall, etc...)

- Is the floor a hard tile floor?
- If a customer did slip and fall on the hard tile floor, could they injure themselves?
  Again, there is no good answer to this question. If they say no, they look stupid. If they say yes, they are admitting my client could have been injured in the manner he claimed.
- "If you strike your elbow on the hard, tile floor, could it fracture your elbow joint, etc. (*adjust to facts of your case*)?"

You can take this line of questioning as far as you want to go with it, depending on your facts. You can use this line of questioning to help with causation, etc. There are really no good answers for these questions, and they make for great cross-examination at trial.

Trial Technique # 2: Have Defendant Admit that It WANTED My Client (*Bad Knees, Poor Vision and all*) to Come onto Its Property and Spend Money.

This is another very basic but often overlooked areas where it is easy to score points with the jury. It is a basic concept that everyone knows to be true, but it is very helpful to articulate it and have the jury hear ***the Defendant admit that it WANTED my client to come onto its premises and spend his/her money***. Have them admit ***that is THE REASON they are in business*** – so that my client and any other members of the general public can come in to their store/hotel/etc and ***spend money buying their stuff***. Have them admit they are a "for profit" business, and ***their intention is to make money from customers*** coming onto their property and shopping with them.

This leads to a great way to rebut a Defendant who is pointing to a client's physical problems for the cause of the fall – like bad knees, poor vision, advanced age, etc... Go the next step and have the corporate representative admit that it opens its store to **all members of the public (*old and young, good knees and bad knees, good vision and poor vision, good health and bad health, those wearing flip flops and those wearing tennis shoes,etc...***). Importantly, get them to admit that:

- they WANTED my client's presence in the store that day,
- they WANT him and others like him to come and spend their money in their store,
- they WANT their store to be a safe place for anyone looking to spend money there, and
- they WANT customers to believe it is safe for them to come inside and spend money.

These questions can be adjusted to the facts of your case, but a typical line of questioning goes as follows:

- You agree that my client was present to shop at your store on the date of the fall?
  If no, do you have any evidence that he/she was there for some other reason? If so, what is it?
  If not, then you don't have any evidence he/she was there for any reason except to shop and spend money at your store?
- And you agree that GIANT BOX STORE wants members of the general public, like my client, to come in and shop and spend money at its store?
- GIANT BOX STORE opens its store to everyone?
- This includes the young and the elderly?
- The strong and the feable?
- Those with good knees and those with bad knees? *(Adjust to facts of case)*

- Those with walkers and those without?
- The handicapped and the able bodied?
- Those with good vision and those with bad vision?
- Those wearing flip flops and those wearing tennis shoes?
- I mean, GIANT BOX STORE would not and has not ever refused to take anyone's money because they were (wearing flip flops, too old, poor vision etc..) right?
- No signs saying "Don't wear flip flops" etc....?
- GIANT BOX STORE is in business to get customers inside the store so it can make a profit, right?
- GIANT BOX STORE wants as many customers as possible, etc.....

- And GIANT BOX STORE wants its premises to be safe for all members of the public?
- GIANT BOX STORE wants its premises to be safe for the young as well as the old? For those with physical ailments and those without?
- so GIANT BOX STORE knows customers with all types of physical ailments, including...(plug in here any ailments specific to your client) will be coming onto its premises to spend their money?
- so GIANT BOX STORE knows it has to keep its premises safe for young and the old, those with good vision/bad vision, etc...
- And there are some things that may not present a tripping hazard for a young, able bodied (good vision, etc....) person but that could present a hazard for an elderly (poor vision, etc...) person?
- GIANT BOX STORE seeks to keep its premises safe for all, right?
- GIANT BOX STORE wants its customers to think and feel like its premises are safe for them to come inside and spend money?

I try to avoid using the word "duty" in my questions because it usually draws an objection for "legal conclusion." Depending on your circumstances, you may or may not want to use the word "duty."

Trial Technique #3: Simplify Liability Arguments in Closing Through the Use of Two Blow-Ups

As everyone knows, the case law concerning slip and fall cases can be very confusing and sometimes conflicting. It is unreasonable to expect a jury to clearly understand decades of case law that can be confusing to most lawyers. Jury charges are a challenge even for the lawyers. Therefore, I like to boil it down to very simple arguments through the use of the following two blow-ups:

A. O.C.G.A.§51-3-1 — boils down the law to one sentence and 4 basic elements.

Of the four elements listed below, usually only the last one is in dispute. This puts the jury's focus exactly where you want it – on the Defendant's failure to keep the premises safe.

O.C.G.A. §51-3-1: Four Things Needed for Liability

"Where an owner or occupier of land, by express or implied invitation, induces or leads others to come upon his premises for any lawful purpose, he is liable in damages to such persons for injuries caused by his failure to exercise ordinary care in keeping the premises and approaches safe."

Did Mrs. Smith Provide Evidence of All Four Things

1. Did Def. Own or Occupy the Store? * Yes.

   *Def. admits this. No evidence required.

2. Did Def. invite, induce or lead Mrs. Smith to Come Upon its Premises? * Yes.

   * Def. admits it ***WANTED*** Mrs. Jones there to spend her money.
   * Def. admits it ***WANTED*** all members of public there to spend money.

3. Was Mrs. Jones injured? * Yes

   * Xrays/MRI shows a picture of the fractures and plates/screws.
   * Dr. Smith testimony describes shattered bones he found.

4. Did Def. fail to use care to keep its premises safe for its customers? *Yes

   *washed stairs with laundry detergent which created slick, soapy residue
   *Def. admits this created a slipping hazard
   *failed to warn customers or correct the problem

B. Safe Choices Blow Up

I use this blow up immediately after the first one. It is helpful to brainstorm to come up with multiple ways Defendant could have prevented the fall. The simpler and cheaper the better. The more safe options that are available, the more likely the jury will be critical of Defendant for not doing one of them. Also, invite and empower the jury to come up with its own options.

EASY, SAFE CHOICES AVAILABLE TO HOTEL:

1. Warn Customers Upon Check In
2. Put Up "Slippery" Signs/Cones
3. Close Stairs – Use Other Stair Case
4. Power Wash the Stairs – Like the Hotel Did **AFTER** the Fall
5. Put Mats Down Like They Used in Other Areas

Trial Technique #4: Admitting Subsequent Remedial Measures

Many lawyers do not pursue the admissibility of subsequent remedial measures under the belief that they are not admissible. In my experience, they are almost always admissible under one of several exceptions in a fall case. In order to find out about subsequent remedial measures, **it is imperative to do a visitation to the accident scene.** I normally notify the defense lawyer and let them know (and have them let their client know) that I am coming out to take a look at the scene. Most of the time, the defense lawyer doesn't even bother to show up. This is a great time to find out all sorts of subsequent remedial measures, such as:

- Anti-slip mats that are now covering the area of the fall
- Warning signs
- An opportunity to take photographs showing the glare on the floor (these can be great cross-examination for trial if the defendants claim there is no glare on a glossy, tile floor)

There are two cases that you need to have in your arsenal for the admissibility of subsequent remedial measures:

*Chastain v. Fuqua Industries, 156 Ga. App. 710 (1980); and
*Royals v. Ga. Peace Office Standards and Training Counsel, 222 Ga. App. 400 (1996).

These cases basically show that subsequent remedial measures are admissible under the following five exceptions to the general rule:

1. If the subsequent remedial measure "tends to prove some fact of the case on trial (other than the belated awareness of negligence.)"
2. To show contemporary knowledge of a defect.
3. To show causation.
4. To rebut a defense that it was impossible for the accident to happen in the manner claimed.
5. For impeachment or rebuttal.

I have been able to admit evidence that the defendant was pressure washing the area of the fall the day following the fall, that defendant put up signs cautioning customers of a slippery area after the fall, and other subsequent remedial measures under the exceptions above. In these cases, the defendant typically claims the area was not slippery or that the fall did not occur in the manner that plaintiff claimed it did. The fact that they cleaned the area/put down mats is inconsistent with a defense that the area was not slippery. Thus, the SRM is admissible for the limited purpose of showing that the area was in fact slippery, and the fall could have happened just as plaintiff claims. Of course, once the jury hears the evidence, the horse is out of the barn and it is generally very helpful to the plaintiff's case.

Trial Technique #5: Cross-Examination Concerning Video Surveillance of the Scene

Most of the time, stores have surveillance cameras that would have captured the area of plaintiff's alleged fall. It is amazing to me how rarely the defendants actually preserve the tape of my client falling. Something always seems to happen to the tape. Either the defendants claim the camera did not quite cover the area where my client fell or the tape simply was not preserved. Of course, the defendant always claims the tape was inadvertently destroyed, as opposed to intentionally destroyed. There are two ways to combat this defense:

A. Always ask about other crimes/robberies that have occurred on the property.

Most places of business have been the subject of some type of crime, whether it be robbery, shoplifting, employee theft, etc. In almost every case, the defendant was careful to preserve the surveillance tape of this event (IN ORDER TO PROTECT THEIR MONEY!!) This questioning helps because it shows that Defendant does have the ability to preserve the tape when they feel it benefits them to do so. This sets up a great argument at trial as to why it was not preserved in this case.

B. Do an onsite review of the surveillance room.

This is important because many times it will show that the store has one or more cameras covering the area of the fall (even though they may claim their cameras didn't capture it.) If the defendant's representative testifies under oath during deposition that the surveillance cameras do not cover the area of the fall, but then you get evidence of one or more cameras covering that area, this makes incredible impeachment evidence at trial.

Trial Technique #6: Obtaining Other Similar Incidents (OSIs)

Before Suit is Filed:

Before suit is filed a great way to find out about other falls at a specific location is to send an open records request for all the 911 calls coming from that location in the previous few years. Usually, the 911 calls will have both a basic description of the incident as well as the name and phone number of the person who reported it.

After Suit is Filed:

Use the traditional methods of discovery, but fight like hell to get the priors. In my experience, most corporate defendants will fight any request for these and try to act is if it is too burdensome to collect the data.

One great way to combat this stall tactic is to notice the depo of a corp. rep. with knowledge of how Defendant stores, collects, indexes, maintains and searches information relating to prior incidents. This provides a great way to educate yourself about the information systems used by the Defendant, and will usually let you know if they are playing games.