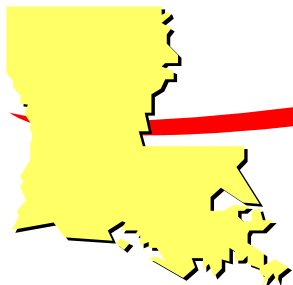


LOUISIANA PREMISES LIABILITY UPDATE

TAYLOR, WELLONS,
POLITZ & DUHE, APLC



NEW ORLEANS ♦ BATON ROUGE

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INTRODUCTION

This newsletter, which is published quarterly, is designed to provide you with a brief synopsis of recent cases that analyze issues of interest to our clients with potential premises liability concerns. For your convenience, we have organized the cases based on the type of claim. If you need more information, please contact us.

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DUTY TO WARN

Bullock v. The Rapides Foundation, 941 So.2d 170, 06-0026 (La. App. 3 Cir. 10/11/06)

The 80-year old plaintiff accompanied her daughter to the emergency room. While waiting in the examination room, she attempted to sit on a rolling physician's stool, but it moved, and she fell, striking her head on a cabinet as she did so. In the three years preceding the accident, there were eight similar incidents involving the stools, and there were four afterward. Plaintiff acknowledged that she had used similar stools in the past without incident, and there was no warning label on it. At trial, the court held that the hospital had a duty to either warn about the stools or place a wheel-locking mechanism on them, but assessed 50% fault to the plaintiff. On appeal, the hospital argued that the trial court committed legal error in holding that the hospital had a duty to warn because the stool was in good condition and did not contain a defect. The court held that based on the prior accidents, the hospital had superior knowledge of the stool's propensity to roll, and that even though the plaintiff had used a similar stool in the past, she did not fully appreciate the danger it posed. The court determined that it was this superior knowledge on the part of the hospital that created the duty to warn, and by failing to do so the hospital breached that duty.

SLIP AND FALL - INSIDE

Tone v United States Department of the Army, 2006 WL 3455954 (5th Cir.(La) 11/30/06)

While the plaintiff was at a fast food restaurant located at Fort Polk, several trays stacked on top of a trash can fell. She was unable to avoid the trays, stepped on them and fell, sustaining injury. The plaintiff claimed there was an employee in the area who must have done something to cause the trays to fall. The defendant filed a motion for summary judgment, which the district court granted, but the Fifth Circuit reversed. The district court held that the defendant was not liable pursuant to La.R.S. 9:2800.6, but the Fifth Circuit disagreed, finding that the statute was not the exclusive remedy for a plaintiff injured on a merchant's premises. The court specifically held that when the accident was "allegedly the result of a specific act on the part of a merchant, and not solely the result of a condition found on the premises, ordinary negligence principles apply." Because the plaintiff was seeking to impose liability due to an employee's actions, her claim did not involve a condition of the premises and therefore ordinary negligence principles applied. Because the district court had used the wrong legal standard, the court remanded for further proceedings. (This case was not selected for publication.)

SLIP AND FALL - OUTSIDE

Foster v. Henshaw, 939 So.2d 625, 06-0414 (La. App. 3 Cir. 09/27/06)

Plaintiff was employed as a sitter for the defendant, the home's owner and her daughter, both of whom suffered from Alzheimer's. While retrieving the newspaper, she slipped and fell on damp leaves and debris located on the concrete floor of the home's carport. Plaintiff testified in her deposition that she believed a car was coming up the driveway, and in her haste to get inside, she slipped and fell on the leaves. She also admitted that she knew that leaves were often in that area of the carport. The defendant filed a motion for summary judgment supported by an affidavit from another daughter, who testified that both her mother and sister were mentally incompetent and were physically and mentally incapable of identifying or understanding any condition outside the home. The trial court granted summary judgment and the appellate court affirmed. The court ordered that the presence of leaves on a concrete floor did not create an unreasonably dangerous condition, and since the plaintiff had traveled over the same path to retrieve the newspaper, she was certainly aware of the leaves. Moreover, the plaintiff could not prove that the owner had actual or constructive knowledge of the allegedly dangerous condition due to her medical condition, and had not proved two elements of her claim.

SLIP AND FALL - OUTSIDE continued

Gauthier v City of New Iberia, 940 So.2d 915, 06-0341 (La. App. 3 Cir. 09/27/06)

Plaintiff filed suit after she slipped and fell on a city sidewalk, which she alleged was uneven and excessively sloped. At trial, the court granted an involuntary dismissal in favor of the defendants, which was affirmed. The plaintiff's expert testified that the slope of the sidewalk was between 38 and 45 degrees, while the standard under the Americans with Disabilities Act standard was 4.76 degrees. The City's Director Public Works testified that the sidewalk had been in existence for approximately 75 years, and there were no reports of any difficulties or problems in that area and that it was in substantially the same condition as those in the rest of the City. The court determined that the ADA did not establish a duty to protect anyone, but to provide access, and there was no requirement that the sidewalks be retrofitted. Moreover, the plaintiff did not cite any other standard regarding the slope of the sidewalk. The court also noted that the plaintiff was in good health, did not use a wheelchair and that the slope of the sidewalk was apparent to any pedestrian. The plaintiff argued that the fact that she fell proved there was a defect, but the court disagreed and concluded that she had not met her burden of proof.

TRIP AND FALL - OUTSIDE

Butkiewicz v. Evans, 943 So.2d 509, 06-0236 (La. App. 5 Cir. 09/26/06)

While walking on a public sidewalk in October 2003, the plaintiff tripped over a three inch vertical elevation and sustained severe injuries. The evidence established that the sidewalks had been in that condition since at least 1999 when the first complaints were recorded and that the adjacent homeowners had made numerous requests for repair. Although the homeowners agreed to be responsible for paying for the repair, nothing was done. The defendant, the Department of Public Works for the City of Kenner, submitted evidence that there were numerous areas of uneven sidewalks in the neighborhood and that there were no other reports of injury at that location. The court concluded that the three inch differential was an unreasonable risk of harm and rejected the defendant's argument that simply because there were other areas that were in worse condition, the area did not constitute an unreasonable risk of harm. The defendant also argued that because the defect was caused by subsidence, it was not responsible, but the trial court rejected that argument as well. The court also found that simply because this was the first reported injury, did not relieve the defendant of liability.

TRIP AND FALL - OUTSIDE - continued

Davis v. American Legion Hospital, 941 So.2d 712, 06-0608 (La. App. 3 Cir. 11/02/06)

The plaintiff went to the hospital to visit his daughter and newborn granddaughter, but the main entrance was locked when he arrived between 9:30-10:00 p.m. He elected to take a short cut through a grassy area to get to a side door near the emergency room, and tripped on a storm drain. A hospital administrator submitted an affidavit that the area was not a pedestrian walkway, he had never received a report of injury in the area, and was unaware of anyone using the area as a walkway in the past. Moreover, there was a lighted sidewalk between the two entrances that went directly to a second entrance. He also inspected the drain cover after the accident and found that it was not broken or dislodged. In opposition to the defendant's motion for summary judgment, the plaintiff introduced photographs of the area, which he alleged raised an issue of material fact as to whether the area around the storm drain was uneven. Reviewing the photographs, the court found that the sidewalk was free from obstructions or defects and that the shortcut saved the plaintiff only one or two steps. The photographs revealed a slope around the drain, which the administrator testified was necessary to divert storm water from the building into the underground drainage system, which the court found established the utility of the drain. Because the plaintiff did not establish that the drain presented an unreasonable risk of harm, the appellate court affirmed the summary judgment.

THIRD PARTY CRIMINAL ACT

Mackey v. Jong's Super Value 2, 940 So.2d 118, 41,440 (La. App. 2 Cir. 09/27/06)

While in the defendant's grocery store, the decedent was confronted by her boyfriend, and a fight ensued which was broken up by a store employee. Upon being notified of the altercation, the manager told an assistant to call the police and proceeded to that area of the store. He encountered the boyfriend as he was exiting through the front door, who told him that the incident was "nothing," and that he was "gone." The manager then asked the decedent whether she would like to press charges, but she ran to the front of the store and began yelling derogatory comments and slurs at her boyfriend. He then obtained a gun, ran back into the store and shot and killed her. The trial court found that while there were discrepancies in the timeline, they were not material and that the store fulfilled its duty when one of the employees called the police as soon as they became aware of the potential danger. The plaintiff also argued that the store had a duty to provide security since it was located in a high crime area, and there had been six to seven murders in the surrounding neighborhood. The court disagreed, however, finding that in the preceding five years, there were no criminal offenses committed on the store's premises and that the shooting occurred at 9:00 a.m., which even the plaintiff's expert conceded was not a "high crime time of day." The court concluded that even though the area may have been a high crime area, the foreseeability of harm at the store at that time of the morning was minimal, and the store did not owe a duty to provide security. Based on that reasoning, the Second Circuit affirmed the granting of the defendant's summary judgment.

LIABILITY OF AN OWNER

Beck v. Schrum, 942 So.2d 669, 41,647(La. App. 2 Cir. 11/01/06)

Defendant Schrum lived with his girlfriend defendant Newsom in her home, and while living there he acquired muzzle-load black powder gun, which he sometimes displayed to visitors. While Newsom was at work, the plaintiff came over, and Schrum took the gun out. Believing that it was not loaded, he pointed it at the plaintiff and fired. The gun was loaded, however, and the plaintiff was severely injured. He filed suit against Schrum, Newsom and her homeowner's insurer. The plaintiff argued that Newsom was liable to him because she knew or should have known that Schrum played with the gun around the house, thus exposing visitors at her home to potential injury. Newsom and her insurer filed a motion for summary judgment, arguing that Schrum did not meet the definition of an insured, and that Newsom had no duty to the plaintiff. The plaintiff submitted affidavits from several individuals claiming that they observed the gun lying on the floor of the home and that Newsom was aware that Schrum played with the gun and had displayed it to visitors on several occasions. The court found that in order for a duty to exist, however, there had to be a special relationship between Newsom and Schrum. He was, however, simply an adult living in her home, and there was no special relationship; therefore Newsom had no duty to control or protect against his actions toward third parties. The court also found that the cause-in-fact of the plaintiff's injuries was not that Newsom allowed Schrum to have a gun in the home; the injury was caused by Schrum's actions in pointing a loaded weapon at the plaintiff and pulling the trigger. Moreover, the gun belonged to Schrum, not Newsom, and was under his control. Thus, the duty of extraordinary care associated with a loaded gun was his, not Newsom's. She had no responsibility for Schrum's negligent actions, and the appellate court held that the trial court had correctly granted summary judgment.



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