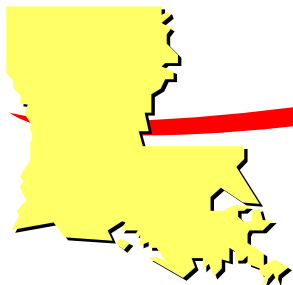


LOUISIANA PREMISES LIABILITY UPDATE

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.

SLIP AND FALL-INSIDE

Morrison v. Brookshire Grocery Company, Inc., 2008 WL 2042815, 08-0016 (La. App. 3 Cir. 05/14/08)

Plaintiff alleged that she had been shopping in defendant's store for ten to fifteen minutes with her two children when she slipped and fell. She acknowledged that she did not see anything on the floor prior to her fall, but afterward saw some "droplets" and small puddles of what she believed to be chicken blood. The store filed a motion for summary judgment supported by an affidavit from the assistant manager that she had inspected the area approximately fifteen minutes earlier but did not see anything on the floor. Plaintiff argued that this testimony created an issue of fact as to constructive notice, but the court found that there was no evidence that the substance had been there for an unreasonable period of time and granted the motion.

SLIP AND FALL-INSIDE (continued)

Guillory v. Boyd Louisiana Racing, Inc., 2008 WL 597199, 07-1222 (La. App. 3 Cir. 03/05/08)

While patronizing the defendant's buffet, plaintiff walked from the carpeted area onto the tiled floor and slipped on what she claimed was a greasy substance. Plaintiff filed a motion for summary judgment, which she supported by the deposition of a witness who observed the plaintiff slip, but also testified that he had reported the existence of the greasy substance to an employee ten to fifteen minutes earlier. The spill was not cleaned, however, although an employee placed a yellow cone in the general vicinity, but not in the specific location of the spill. The defendant opposed the motion and submitted videotapes of the buffet area at the time of the accident. The court noted that the videotape was of poor quality, did not establish plaintiff's position with respect to the cone, nor did it depict the slipping incident. The court acknowledged that the plaintiff had given different versions of the mechanics of her fall, but stated that this did not create an issue of fact since there was no dispute about the accident itself. The court concluded that the defendant had actual notice of the condition for a sufficient period of time prior to the accident, but failed to exercise reasonable care and affirmed the granting of summary judgment.

Mack v. Shoney's, Inc., 2008 WL 651629, 07-0922 (La. App. 5 Cir. 03/11/08)

Plaintiff and her son went to the defendant's restaurant, and while walking to their table, plaintiff slipped as she stepped from the carpet onto the tile. Both she and her son acknowledged that they did not see any foreign substance on the floor in the area, but plaintiff stated that her pants were wet around the knee after her fall. Defendant file a motion for summary judgment, and plaintiff argued that since her pants were wet, and the floor felt damp, the condition had been caused by mopping or condensation, but there were no warning signs or cones in the area. The court found that even assuming that the floor was wet, plaintiff had not submitted any evidence of actual or constructive notice and affirmed the granted of summary judgment.

SLIP AND FALL-INSIDE (continued)

Neuman v. Brookshire Grocery Co., 2008 WL 728652 (W.D. La. 03/18/08)

While shopping in the defendant's store, plaintiff slipped and fell approximately three feet from a checkout counter. After the fall, he determined that his fall was caused by a grape, but admitted that he did not know how long it had been on the floor. There were, however, several employees in the area prior to the fall, and he argued that since it was the "central thoroughfare" for the store, the defendant either knew or should have known of the grape's presence on the floor. The court disagreed, finding such inferences and assumptions were insufficient as a matter of law to satisfy the plaintiff's burden of proof on the issue of constructive notice. The fact that an employee in the area could have noticed the condition was not the positive evidence required under the law. Plaintiffs argued that the burden of proof set forth in the statute applied only at trial, and that a different standard should be applied in the context of summary judgment. The court disagreed, finding no support for differing burdens of proof in either the statute or the jurisprudence and granted summary judgment.

Edwards v. Walmart Stores, Inc., 2008 WL 2205269, 07-2073 (La. App. 1 Cir. 05/28/08)

While plaintiff was shopping, accompanied by her son, she slipped and fell in a white milky substance on the floor near the front of the store, adjacent to the women's clothing department. She acknowledged that she did not see the substance prior to her fall, but that it was "stretched out" and looked like either milk or melted vanilla ice cream. In his deposition, her son acknowledged that although he got on his knees and looked at the substance, he could not tell how long it had been there, and it looked as though it had come from a shopping basket since there was a trail, but could not determine its direction because his mother's basket had smeared it. Plaintiff also attached photographs of the area taken by the store after the fall, but the court noted that they were of such poor quality that they provided no information regarding the condition of the substance or the length of time it had been present. Plaintiff also submitted an affidavit from her son in which he contradicted his earlier deposition testimony and stated that the area of the spill was dried around the edges. He offered no real explanation for the change in testimony, only that the question by defendant's counsel was not specific. Because the affidavit contained contradictory information, the trial court declined to consider it in connection with the motion, and the appellate court agreed, affirming summary judgment.

UNREASONABLE RISK OF HARM

Crisler v. Paige One, Inc., 974 So.2d 125, 42,563 (La. App. 2 Cir. 01/09/08)

As plaintiff was exiting the defendant's fast food restaurant, she walked down a sidewalk, then stepped down from a curb into a traffic lane used by vehicles entering the restaurant's drive-thru lane. As she approached the traffic lane, plaintiff was looking for oncoming cars and failed to observe the curb and fell. At trial, the jury found the condition presented an unreasonable risk of harm and assessed 60% fault to the restaurant and 40% to the plaintiff. The restaurant's manager testified that she had expressed concern about the configuration and had suggested installation of speed bumps. She had also personally seen four patrons stumble in the same area. Defendant's expert responded that the configuration was typical for that restaurant throughout the country, there was good visibility, and there was a contrast in color between the sidewalk and the curb. After the incident, the restaurant installed a rail in the area, which took only one afternoon and cost less than \$100. The defendant argued that evidence of the installation should be excluded as a subsequent remedial measure, but the trial court disagreed, and instructed the jury that it could be used as proof of feasibility, and the appellate court agreed. The court also found that the installation of the rail was a factor in the balancing test in which cost of repair was a factor and affirmed the trial court's decision.

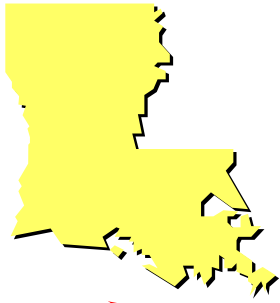
Godwin v. City of Alexandria, 2008 WL 2192800, 07-1576 (La. App. 3 Cir. 05/28/08)

As plaintiff went for her daily walk, she tripped on an uneven portion of a city sidewalk, sustaining a serious injury to her left knee. Photographs indicated that there was an elevation change that varied from one to two inches, but was clearly visible. The defendant had no reports of any other falls at the site, and plaintiff agreed that the sun was out and there was nothing to block her vision of the defect. She also acknowledged that she was walking quickly for exercise and was looking straight ahead rather than down at the sidewalk at the time of her fall. Plaintiff argued that it was a well known problem in the city that trees planted in the medians had grown to the point that their root systems were impacting sidewalks and streets which caused the defect. The court found, however, that the cause of the defect was irrelevant because the change in elevation was open and obvious, the plaintiff simply was not watching where she was going, and the defect did not present an unreasonable risk of harm.

LIABILITY OF AN OWNER

Yokum v. 615 Bourbon Street, L.L.C., 977 So.2d 859, 07-1785 (La. 02/2608)

The defendant owned property in the French Quarter, which it leased to another entity, that operated a bar on the premises. The plaintiffs made numerous complaints about the noise at the bar and finally filed suit against the owner, claiming that the tenant's activity constituted a nuisance in violation of Articles 667 and 669 of the Louisiana Civil Code. The defendant responded with a motion for summary judgment claiming that as a lessor, it had no liability to its neighbors for the use of the premises by a lessee who was operating with the proper City permits. The trial court granted summary judgment, and the Fourth Circuit affirmed, reasoning that no other case had imposed liability on a lessor under similar circumstances. The Louisiana Supreme Court granted writs, holding that its review of long-standing Louisiana law mandated a different conclusion, and reversed the granting of summary judgment. The Court found that the 1996 amendments to Art. 667 changed the standard to one of negligence, but did not alter the rule that the "proprietor" of the property could not exercise his rights in such a way as to cause damage to his neighbors. The Court determined that the rule's parameters included not only the proprietor's activities, but those of his agents and representatives. Additionally, the meaning of the term "work" had been judicially expanded over time, and the Court specifically found that the allegedly excessive noise coming from the leased premises fell within the concept of "work," in that it was an activity that could be harmful to neighboring properties. Simply because a proprietor/landowner leased his property to another did not eliminate his responsibilities with respect to his obligations to neighbors. The reasoning of the court of appeal would have virtually immunized landowners, allowing them to avoid any liability for damages arising out of the ownership of property simply by entering into a lease. The Court then found that the defendant/owner had merely alleged that it did not operate the bar, but did not demonstrate how that fact negated its responsibilities under Art. 667, and therefore, summary judgment was not appropriate.



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