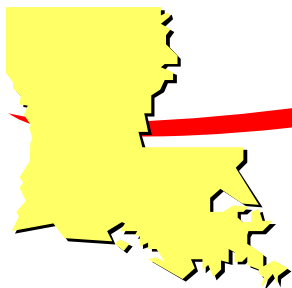


# LOUISIANA PREMISES LIABILITY UPDATE

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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## LIABILITY OF DOG OWNER

**McBride v. XYZ Insurance, 935 So.2d 326, 41,129 (La. App. 2 Cir. 06/28/06)**

The defendant owned a large dog that was always tied up in a fenced back yard, which had signs posted. The defendant's adult daughter stopped by when her mother was not home and invited a friend and her two small children. The children initially ran to the swing set in the backyard, which was out of the dog's reach, then went over to pet the dog, who bit one of them. The plaintiff ran to her child and hit the dog with her shoe, and it bit her as well. At trial, the court awarded damages for the child's injuries, but denied the mother's claims, finding that she should have noticed the warning signs, and that she provoked the dog. Citing Civil Code Article 2321 and Pepper v. Triplet, the appellate court held that the defendant's liability as owner of the dog arose solely from her legal relationship to the animal, and the duty was nondelegable. The court then reversed the trial court's factual findings that the dog did not present an unreasonable risk of harm and that the owner's actions were not negligent. The court found that while the defendant took some precautions by fencing and tying the dog, her daughter invited others into the yard, negating that protection. As the owner, her liability for the dog could not be delegated to her daughter, and the court determined that the defendant should have instructed her daughter not to allow children near the dog. The court also concluded that the mother did not provoke the dog, but simply reacted to seeing the dog bite her child, and therefore, the defendant was also liable for her injuries.

# SLIP AND FALL - INSIDE

## Bagley v. Albertsons, Inc., 2006 WL 2052127 (W.D.La. 07/20/06)

The plaintiff shopped at the defendant's store for thirty to forty minutes before she slipped and fell on a clear substance. She acknowledged that she did not see the substance before her fall, did not know how it came to be there, or how long it had been on the floor prior to her fall. She estimated that the spill was the size of a dinner plate, and it felt greasy on her pants. A nearby customer came to her assistance, and he testified that he had no knowledge about the spill, but that it was slippery. The manager on duty did not know what the substance was, but speculated that it was chicken blood that had leaked from another customer's package. The store closed a few months after the accident, and all records were sent to the home office, which could not locate any video or logs for the relevant time period. The plaintiff opposed the store's summary judgment on the ground that the condition was created by a store employee who either failed to properly package the meat or fail to check the package for leaks. The court disagreed and found that the manager's belief as to what the substance might be was not competent summary judgment evidence and did not satisfy the plaintiff's burden of proof. Plaintiff tried to satisfy the constructive notice requirement through an affidavit stating that during her time shopping, she did not see any employees sweeping or inspecting the aisle and pointed to the size of the spill. The court, however, held that simply because she did not see an inspection take place did not constitute positive evidence that the substance had been on the floor for some time, and plaintiff did not provide any information that the substance was of a type that would spread slowly. Without evidence regarding the origin and mechanics of the spill, the court would not infer a correlation between the spill's size and the length of time it existed and granted the store's summary judgment.

## Davenport v. Autozone, Inc., 2006 WL 2604669 (W.D.La. 09/11/06)

The defendant store had constructed a display consisting of three stacked cardboard boxes containing plastic bottles of motor oil. The display was located approximately ten to twelve feet from the entrance, and most customers would walk through the area after entering the store. The plaintiff claimed he slipped on some oil as he walked by the display, but admitted that he did not know how long the oil had been there when he slipped. He submitted an affidavit, however, that there was oil on the floor, and that the bottom cardboard box was soaked with oil, although he did not see oil dripping onto the floor. The court also noted that there was a twenty-three second gap on one of the security camera videos, which skipped past when the accident would have occurred, and the court found that gap "curious." The court concluded that the plaintiff had raised issues of material fact regarding the store's constructive notice of the spill and denied summary judgment.

## **SLIP AND FALL - INSIDE cont.**

### **Courville v. Target Corporation of Minnesota, 2006 WL 2356004 (W.D.La. 08/11/06)**

As plaintiff was leaving the defendant's store, she slipped and fell on a small amount of clear liquid. One of the employees who assisted her stated that she had recently inspected the area and found nothing. The other employee stated that she found none of the "tell-tale" signs that the liquid had been on the floor for any length of time. In opposition to the store's summary judgment, plaintiff submitted the deposition of a cashier who testified that from the checkout area, the cashier who assisted the plaintiff would have been able to see any liquid on the floor. The plaintiff claimed that she would have deposed the cashier who assisted her but that the defendant had not identified that employee or turned over video of the accident scene. The court rejected those arguments, finding that if the plaintiff believed additional discovery was necessary, she should have submitted an affidavit pursuant to Rule 56(f). Plaintiff attempted to raise an issue of material fact by attacking the testimony of the employees who inspected the area prior to the fall. One employee could not recall the exact checkout lane in which she was stationed, but the court found that inability did not affect her statement about the inspection. Plaintiff also claimed that one of the employees apologized and accepted responsibility while helping her, and her statement established constructive notice. The court concluded that, even assuming the employee made such statements, the situation was not one in which an employee knew of a specific potential hazard and failed to undertake precautions for that hazard. An employee apology was simply one fact to consider, and given the totality of the circumstances, the court held that the apology alone was not sufficient circumstantial evidence of constructive notice and granted summary judgment.

### **Hardie v. Target Corporation of Minnesota, 2006 WL 2356019 (W.D.La. 08/11/06)**

Plaintiff slipped and fell in laundry detergent leaking from a bottle at the end of one of the store's aisles. In support of its motion for summary judgment, the store submitted an affidavit from the manager on duty that he had inspected the area three times that day before the spill and affidavits from two other employees who had walked by the site ten to fifteen minutes before the fall. Plaintiff attempted to raise issues of material fact by claiming there were inconsistencies between the employees' depositions and affidavits. Plaintiff pointed out that the manager could not recall where he was thirty minutes before the accident, but the court did not find that statement inconsistent with his statement about the three inspections. Similarly, one of the employees could not recall the exact time she walked by the accident site and the other could not recall her exact location at the time of the accident. The court found those memory lapses did not create an inconsistencies regarding the inspections and granted summary judgment.

# TRIP AND FALL - INSIDE

## Wing v. Wal-Mart Stores, Inc., 2006 WL 2178688 (E.D.La. 07/31/06)

As plaintiff was walking into the defendant's store, her foot caught on the wheel of another customer's shopping cart, causing her to fall. Plaintiff argued that because store employees were handing out carts near the entrance and were using the carts to collect returned items, the store created an unreasonable risk of harm. The court held that even if carts in that area constituted an unreasonable risk of harm, the plaintiff still could not satisfy her burden of proof because the cart she tripped on was in possession of another customer, and the court specifically found that a shopping cart in the immediate presence and control of another customer did not present an unreasonable risk of harm or create a hazardous condition.

## CONSTRUCTIVE NOTICE

### Johnson v. City of Bastrop, 2006 WL 2129773, 41,240 (La. App. 2 Cir. 08/01/06)

Plaintiff was injured and her car damaged when a rear tire went into a manhole whose cover had become dislodged. Plaintiff argued that the City had constructive notice of the situation because it knew that the older manhole covers, which were lighter in weight, could become dislodged by heavy rain water, or when driven over by a large vehicle. One of the city employees responsible for repairing loose manhole covers testified that he had personally repaired twenty to forty of them in the past three years, but did not know how many others had been repaired. The City presented testimony that there had been no prior complaints for the street where the accident occurred, and no City workers had moved that manhole cover. The appellate court affirmed judgment for the City, holding that the mere fact that manhole covers had been dislodged in another part of the City did not impute knowledge that a particular manhole cover presented a dangerous condition.

## UNREASONABLE RISK OF HARM

Waller v. Shelter Mutual Insurance Co., 935 So. 2d 288, 41,215 ( La. App. 2 Cir. 06/28/06)

The defendant hired his son (the plaintiff) to repair a motor home on his property. To gain access to the trailer, the defendant had placed a wooden block in front of the door approximately seven to eight inches high, and the top was approximately one foot below the trailer's floor. Plaintiff acknowledged that he had used the block to enter or exit the trailer between sixty to eighty times before his accident. As he left the trailer, it was dark and had started to sprinkle. He stepped onto the block with his left foot, and the block rolled, causing him to fall and sustain serious injuries. The trial court granted summary judgment, but the appellate court reversed. Plaintiff testified that he was being careful at the time of the accident and always placed his foot on the center of the block, which had never shifted before. Although plaintiff admitted that he had gone in and out of the trailer numerous times, the defendants failed to present any evidence as to whether he had done so after dark and under the low lighting conditions present at the time of the accident. The court found that whether the block presented an unreasonable risk of harm under the conditions at the time of the accident was an issue of material fact precluding summary judgment.

# UNREASONABLE RISK OF HARM - cont.

## **Heflin v. American Home Wildwood Estates, 2006 WL 1898450, 41,073 (La. App. 2 Cir. 07/12/06)**

After walking her son to the school bus stop, plaintiff tripped and fell over a speed bump located on the street in front of her home. She sued the owners of the mobile home park where she lived, claiming there was inadequate lighting and that the owners had failed to paint or mark the speed bump in any way. Plaintiff acknowledged that she had been living in the trailer for a couple of months before the accident and was aware of the speed bump. The court found that whether the matter was analyzed under article 2695 or 2317.1, the plaintiff still had to establish that the speed bump presented an unreasonable risk of harm. The court noted that there were cases establishing that speed bumps were not unreasonably dangerous and because they had social utility, the plaintiff had to show more than a mere hazard in order to establish that the speed bump was unreasonably dangerous. The court determined that the speed bump at issue appeared to be handmade, and was not uniform in height or width. Although it was not painted, it was a darker color than the road so that it was “quite obvious” during daylight. There was conflicting testimony as to the speed bump’s visibility when it was dark, as it was on the morning of the accident. The court found that while more light, reflectors, and/or brightly colored paint would have made the speed bump easier to see, it was not the presence of a hazard *per se* that gave rise to liability, but the presence of either an unreasonably dangerous condition or a condition that would reasonably expect to cause injury to a person using ordinary care under the circumstances. The appellate court found no manifest error in the trial court’s conclusion that the speed bump presented no unreasonable risk of harm.

## **Buchignani v. Lafayette Insurance Co., 2006 WL 2422899, 41,384 (La App 2 Cir. 08/23/06)**

The 66-year old plaintiff, whose left hand was in a cast, tripped over an expansion joint located just in front of a flight of steps leading down to the defendant’s parking lot. Photographs showed the height variance to be 1 ½ inches, which the court noted was higher than in those cases in which the expansion joint was found not to be an unreasonable risk of harm. The court acknowledged the utility of expansion joints, the lack of prior accidents or complaints at that site, the presence of hand rails, and a ramp that could be used as an alternate route, but focused on the location of the joint at the top of a flight of concrete steps. The court determined that the enhanced danger of the height variance at that specific spot outweighed the utility and the absence of prior accidents. The court assessed thirty percent fault to the plaintiff, however, finding that she was not wearing her glasses, did not choose to use the ramp, and approached the steps so that her hand in the cast was nearest the rail, and the appellate court affirmed.

# LIABILITY OF AN OWNER

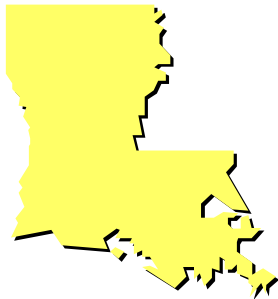
**Joseph v. Crossing II, L.L.C., 934 So. 2d. 875, 06-0010 (La App 5 Cir. 06/28/06)**

Plaintiff was a mail carrier delivering mail to the defendants' apartment complex when a group of mailboxes fell on her. The court granted the defendants' motion for summary judgment, and the appellate court affirmed. The plaintiff argued that she had been delivering mail to the complex for two years and never noticed a problem, but based on the doctrine of *res ipsa loquitur*, the defendants were liable. The court found that in order to impose liability under *res ipsa*, the plaintiff had the burden to show that the mail boxes were in the exclusive control of the defendants, and there was no such evidence. Moreover, even under the doctrine of strict liability, the plaintiff had to demonstrate constructive knowledge of a defect, and the managers of the complex testified that they inspected the area on a daily basis and found no problems. Accordingly, the plaintiff did not meet her burden of proof, and summary judgment was affirmed.

# LIABILITY FOR REPAIRS

**Linneer v. CenterPoint Energy Entex/Reliant Energy, 2006 WL 2193082, 41,171 (La. App. 2 Cir. 08/04/06)**

After a gas leak, the defendants installed a new gas line on the property. To do so, the crew dug a trench measuring four inches wide and eighteen inches deep that ran eighty to ninety feet in length from the back of the house to the street in front, and approximately two to three feet from the driveway. Although the crew backfilled the trench, they did not replace sod or asphalt in the area. After rain approximately a week later, the plaintiff's right foot sank into the ground as she walked to her car, causing her to fall forward. The jury rejected the plaintiff's claim, but the judge did not include an instruction on *res ipsa loquitur*. On appeal, the Second Circuit reversed and concluded that the trial court erred in not instructing the jury on *res ipsa* because the matter turned on circumstantial evidence which, under the circumstances, required such an instruction. The court then conducted a *de novo* review and found that there had never been such an accident in the yard, and none occurred after the defendant returned to refill the trench. The court noted there were no holes in the ground prior to the accident and that someone's foot simply did not sink deeply into the ground in an area that had been walked on for several years for no reason. Although there was no direct evidence of negligence on the part of the defendant's crew, the court concluded that more probably than not, the defendant was negligent, and the accident would not have occurred but for that negligence.



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