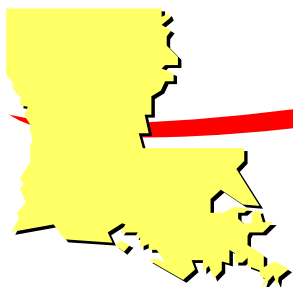


LOUISIANA PREMISES LIABILITY UPDATE

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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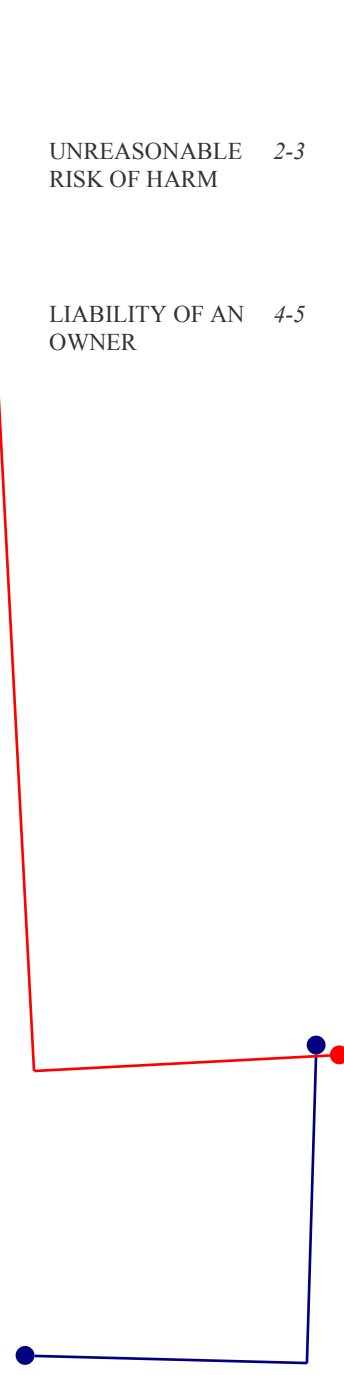
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SLIP AND FALL — INSIDE

Hampton v. Fred's Stores of Louisiana, 2008 WL 2883638 (W.D. La. 07/28/08)

As plaintiff was pushing her cart toward the checkout line, she slipped and fell on what she described as a “dirty, tracked banana.” She argued that the condition of the banana, which had marks where other patrons had walked on it, had obviously been on the floor for such a period of time that the store should have seen it. The store filed a motion for summary judgment supported by the affidavit of the manager who stated that the store was swept and mopped nightly and stocking personnel as well as the manager had responsibility for walking through the store to ensure that there were no foreign substances on the floor. She also stated that she had personally walked the floor several times prior to the plaintiff’s fall and had not seen any foreign substances. The plaintiff responded with the deposition of an employee who stated that the store’s policy was to sweep the floors only at night after the store had closed. The court determined that summary judgment was proper because plaintiff had not produced any “probative evidence” to satisfy the temporal element or that any employee caused the condition or had actual knowledge of it prior to her fall. The plaintiff acknowledged that she did not see the banana prior to her fall, and the court specifically held that the testimony of the employee was not sufficient to satisfy the notice requirement.



UNREASONABLE RISK OF HARM

Mason v. Monroe City School Board, 2008 WL 4225955, 43,595 (La. App. 2 Cir. 09/17/08)

While attending a pee-wee football game at a local high school, the plaintiff's minor child fell down the steps of the bleachers and through the rail at the bottom. In their suit, the plaintiffs alleged that the bleachers lacked adequate traction guards as well as proper safety rails to prevent people from falling through. The School Board filed a motion for summary judgment supported by affidavits from the building's supervisor and principal that neither was aware of any defects in the steps or guardrails, and no similar falls had occurred either before or after the accident at issue. The plaintiffs responded with two affidavits from women attending the game, who stated that there was no type of safety tape on the steps, and plaintiffs argued that if there had been such tape, it would have prevented the fall. Moreover, the fact that the child fell through the rail at the bottom of the bleachers was evidence of a defect, precluding summary judgment. The plaintiffs also argued that there was a dispute over whether the child was running at the time she fell, which also made summary judgment inappropriate. The court disagreed, finding whether the accident happened while the child was running or walking down the steps was not relevant to the issue of a defect, since falls could occur at any time and for reasons other than the lack of traction on a surface. The court noted that the plaintiffs had not submitted any evidence regarding whether the bleachers were constructed from metal or wood, whether steps in other parts of the bleachers contained tape, or how the guardrails were positioned. There was also no evidence that the School Board failed to maintain the bleachers or failed to discover some defective condition. The absence of traction tape alone was not evidence of a defect, and the plaintiff submitted no expert testimony to demonstrate that the bleachers were improperly designed, constructed or maintained. In the absence of such evidence, the trial court granted summary judgment, and the appellate court affirmed.

UNREASONABLE RISK OF HARM (continued)

McCloud v. Housing Authority of New Orleans, 987 So.2d 360, 08-0094 (La. 4 Cir. 06/11/08)

Plaintiff was a resident of the St. Bernard Housing Development, which was undergoing renovation and construction performed by defendants Boh Brothers and JLJ Construction (“JLJ”). The work had been ongoing for six months, when the plaintiff stepped into a muddy hole in a common courtyard and filed suit for her injuries. The defendants filed a motion for summary judgment arguing that the plaintiff had been traversing the area every day for the past six months and should have been aware of the obvious condition. The trial court granted summary judgment, and on appeal the court noted that regardless of whether the plaintiff was basing her suit on negligence or strict liability, she had the burden of proof to establish that the condition presented an unreasonable risk of harm and was a cause-in-fact of her injuries. The defendants acknowledged that they had custody of the construction site, but had no duty to the plaintiff because, under the circumstances, the condition did not present an unreasonable risk of harm. The court found that unlike a passerby or visitor, the plaintiff was aware of the construction since it had been going on outside her back door for the past six months. The court determined that the plaintiff had not established that the probability or magnitude of the risk of harm posed by the hole was great, while the social utility of the new construction was very high. Additionally, she could have used her front door, but chose to use the back door, requiring her to traverse directly through the construction site which was marked by barricades. Because the hole was an open and obvious hazard that the plaintiff should have observed, the defendants had no duty to her, and the summary judgment was affirmed.

Swanson v. Applebees of Slidell, 2008 WL 2066286, 07-2476 (La. 1 Cir. 05/02/08)

The seventy one year old plaintiff had gone with her family to the defendant’s restaurant, where she was a first-time patron. When she went to the restroom, she saw a sign indicating that the restroom was on a lower level and that the handicap ramp was blocked at the bottom by a gate. Plaintiff claimed that it was too dark for her to precisely identify the obstruction and kept walking, then fell down a set of steps. The stairs were flanked by light colored paneling with black handrails on both sides, and she acknowledged that she simply did not see them. At trial, the plaintiff submitted expert testimony that the tread depth of the steps was one eighth of an inch short of code requirements and that there was a minor deficiency in the handrails. There was also testimony that there had been no prior complaints about the steps or other accidents. The trial court determined that the minimal deficiencies were not the cause of the claimant’s fall, and the sign clearly indicated that the restrooms were on a lower level. The cause of her fall was not the condition of the steps, but her failure to notice them, and the appellate court affirmed the trial court’s judgment in favor of the defendant.

LIABILITY OF AN OWNER

Zapalowski v. Campbell, 988 So.2d 772, 08-0055 (La. App. 5 Cir. 06/19/08)

Plaintiffs filed suit when their minor son was injured after a brick wall located on a neighbor's property collapsed, injuring him. At trial, the neighbor testified that he disposed of the bricks after the accident but there was no subsidence around the wall. There was, however, subsidence directly behind the wall, on which a prior owner had placed cement, but the brick wall was not leaning, he had no problems closing the gate in the wall, and it appeared to be stable. The plaintiff testified that approximately one year before the accident she had observed that the walkway behind the brick wall appeared to be broken and uneven and, the ground dipped in front of the wall. Her husband also testified about the broken walkway and that there appeared to be cracks in the wall's masonry. The plaintiffs argued that based on the doctrine of *res ipsa loquitur* the wall would not have fallen in the absence of negligence on the part of the defendants. The court agreed that the collapse of the wall indicated that there was a defect, but that the plaintiffs had failed to produce any evidence that the defendants knew or should have known of the defect. Although there was evidence that there were cracks, and the wall may have tilted slightly, there was no evidence that the foundation under the wall was defective or that the cracked walkway behind the wall had any effect on the wall itself. The court concluded that *res ipsa* was inapplicable, and the appellate court affirmed the decision in favor of the defendants.

Knically v. XYZ Insurance Co., 2008 WL 4225957, 43,250 (La. App. 2 Cir. 09/17/08)

The defendant, a car dealership, left the keys in a vehicle, although it had a policy of locking vehicles and securing keys at the close of the business day. The vehicle was stolen, and the thief was involved a vehicular collision that killed the plaintiff's mother. The plaintiff opposed the defendant's motion for summary judgment, with evidence that there had been prior thefts at the dealership, inadequate key control procedures and lax security measures, which made the accident foreseeable. The court rejected a negligence per se argument based on La. R. S. 32:145, which required anyone "in charge" of a motor vehicle to lock it and remove the key when it was unattended. The court found that the purpose of the law was to protect the owner and/or police officers, but not third parties from thieves. Moreover, the scope of protection for locking a vehicle did not include the actions of a thief, and since the vehicle was not on a public street, the application of the statute was questionable. Moreover, no court had ever imposed on an owner the duty to remove a key from a car on private property, and the defendant's duty could not be expanded to prevent every risk of harm that might be encountered in connection with a vehicle on its property. The court found that the plaintiff's injuries were caused by the thief's reckless actions and that any duty on the part of the defendant to lock the vehicle did not extend to include the injuries sustained by the decedent.

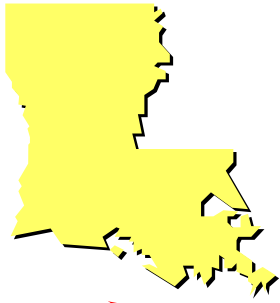
LIABILITY OF AN OWNER (continued)

Holland v. Teague, 2008 WL 4225904, 43,496 (La. App. 2 Cir. 09/17/08)

The defendant and his family had been feeding a stray dog that roamed the neighborhood. The plaintiff's decedent struck the dog while riding his motorcycle, and his adult children filed a wrongful death action, arguing that the dog was in the defendants' custody and control, and that under the strict liability standard of Articles 2317 and 2321 they were responsible for the dog. It was undisputed that the defendants did not own the dog. The court reviewed the jurisprudence interpreting both Articles and found that with respect to third parties, the possessor of an animal could be a provisional owner once possession was established. The test for possession was similar to that required for *garde* or custody, and therefore, the possessors of an animal could be strictly liable. The court found, however, that the defendants' mere feeding of the animal was not sufficient, since there was nothing to show that they detained the animal, particularly in the rural setting in which the accident occurred. Additionally, there was no program in that parish to impound stray animals and no general duty on the part of the defendants to report the animal to the parish, and the court refused to impose a duty on the defendants under the circumstances presented.

Thibodeaux v. Krouse, 2008 WL 2329740, 07-2557 (La. App. 1 Cir. 06/06/08)

The defendant contracted with the plaintiff's employer to construct a metal RV cover in his backyard. The defendant had a dog and testified that he had instructed the owner of the company that no one could enter the yard unless he or his wife was present so that the dog could be chained before work began. Although there was conflicting testimony regarding the time work was to start on the day of the accident, the trial court determined that the defendant knew work would be done that day, but he made no effort to chain the dog prior to the workers' arrival, and the defendant acknowledged that he usually did not do so until after visitors had arrived. On arriving at the house, the plaintiff did not notify the owners of her arrival, but walked straight to the back yard, opened the gate and was bitten. Plaintiff testified that she did not provoke the dog in any way, although there was information in her medical records that she may have stepped on the dog's foot. The dog had been tied on her prior visits, and she had observed a co-worker petting it. The court found the defendant knew the employees would be arriving that morning, but he had not instructed the employees to stay away from the dog or warned them about it. The court determined that while a fenced backyard should not be invaded in disregard of an individual's ownership and privacy interests, the plaintiff was present as an invitee and was unaware of any danger presented by the dog, particularly in light of her past experience with it. The court concluded that the plaintiff's injury could have been prevented by the defendants, and based on Article 2321, they were strictly liable for her injuries.



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