Retailer Liability in Louisiana

Issues and Answers

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LOUISIANA SEMINAR

Issues and Answers for Retailers in Louisiana

A. Slip/Trip and Fall Liability

1. From McCardie v. Wal-Mart to White v. Wal-Mart: A History of the Jurisprudence

In 1987, the Louisiana Supreme Court ruled, in McCardie v. Wal-Mart Stores, Inc., 511 So.2d 1134 (La. 1987), that Wal-Mart was liable to a patron who had slipped and fallen on a foreign substance in one of its stores. Wal-Mart defended the claim by putting forth testimony from its employees that it maintained a "safety sweep" whereby an employee inspected the store's aisles before and after lunch; he was required to punch a time clock showing when these inspections took place. The time card on the date in question was incomplete.

The Supreme Court reviewed the prior case law of Louisiana and held that Wal-Mart had failed to exculpate itself from liability. The Court held that, once the plaintiff proved that she had an accident as a result of a foreign substance, the burden of proof shifted to the retailer to show that it was not at fault. The Court stated: "The burden of proof shifts to the owner of the store to exculpate itself from the presumption that it was negligent. The result of this shift in the burden of proof is to relieve the plaintiff of his burden to show the defendant's actual or constructive knowledge of the spill." Id. at 1136. The Court went on: "The store operator is required to prove that his employees did not cause the hazard and that he exercised such a degree of care that he would have known under most circumstances of a hazard caused by customers."

As expressed in many of these types of cases, the reason that the courts offered for "shifting" the burden of proof to the merchant was that the merchant usually erected displays and signs to distract a patron's attention from the floor so that the merchant should have the heavier burden of

proof. See Broussard v. Wal-Mart Stores, Inc., 741 So.2d 65 (La. App. 3rd Cir. 1999) (customer's duty to use reasonable care and to avoid obvious hazards is diminished if shelved merchandise distracts the customer). However, the McCardie decision caught the attention of the Louisiana Legislature, which enacted Louisiana Revised Statute 9:2800.6 the following year, to legislatively overrule the "burden shifting" of the McCardie decision; however, the eventual version of the statute would evolve in light of court decisions.

La. R. S. 9:2800.6, as it now exists and which is still the applicable law for accidents occurring on a retailer's premises, provides as follows:

> A. A merchant owes a duty to persons who use his premises to exercise reasonable care to keep his aisles, passageways, and floors in a reasonably safe condition. This duty includes a reasonable effort to keep the premises free of any hazardous conditions which reasonably might give rise to damage.
>
> B. In a negligence claim brought against a merchant by a person lawfully on the merchant's premises for damages as a result of an injury, death, or loss sustained because of a fall due to a condition existing in or on a merchant's premises, the claimant shall have the burden of proving, in addition to all other elements of his cause of action, all of the following:
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> (1) The condition presented an unreasonable risk of harm to the claimant and that risk of harm was reasonably foreseeable.
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> (2) The merchant either created or had actual or constructive notice of the condition which caused the damage, prior to the occurrence.
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> (3) The merchant failed to exercise reasonable care. In determining reasonable care, the absence of a written or verbal uniform cleanup or safety procedure is insufficient, alone, to prove failure to exercise reasonable care.

C. Definitions:

(1) "Constructive notice" means the claimant has proven that the condition existed for such a period of time that it would have been discovered if the merchant had exercised reasonable care. The presence of an employee of the merchant in the vicinity in which the condition exists does not, alone, constitute constructive notice, unless it is shown that the employee knew, or in the exercise of reasonable care should have known, of the condition.

(2) "Merchant" means one whose business is to sell goods, foods, wares, or merchandise at a fixed place of business. For purposes of this Section, a merchant includes an innkeeper with respect to those areas or aspects of the premises which are similar to those of a merchant, including but not limited to shops, restaurants, and lobby areas of or within the hotel, motel, or inn.

D. Nothing herein shall affect any liability which a merchant may have under Civil Code Arts. 660, 667, 669, 2317, 2322, or 2695.

A law review article written shortly after the passage of R. S. 9:2800.6, referred to the coming era, in the wake of the passage of this statute, as the "end of the reign of the plaintiff in slip and fall cases against merchants," and while that might have been overly optimistic, the Supreme Court would soon interpret the statute and make it very difficult for a plaintiff to prevail in a slip and fall case. "White v. Wal-Mart Stores, Inc.: The Louisiana Supreme Court ends the reign of the plaintiff in slip and fall cases against merchants." 44 Loy.L.Rev. 193 (1998). Thus, the pendulum had pretty much swung from one extreme (the burden shifting to the merchant to exonerate itself) to the other extreme (the plaintiff having the burden of proof on every element of proof).

Although the Louisiana Legislature had clearly expressed its intentions on the issue of retailer liability in the State, the courts set about to judicially erode what the legislative branch had tried to etch in stone. In Welch v. Winn Dixie Stores, Inc., 655 So.2d 309 (La. 1995), the Supreme Court tried to re-write the statute. There, the plaintiff claimed that she had slipped and fallen in cooking

oil on the floor of the store. The trier of fact found in her favor and awarded damages, but the Court of Appeal reversed the lower court and held that the plaintiff had failed to carry her burden of proving that the merchant had actual or constructive notice of the hazard. The Supreme Court, reversed, though, and ruled in favor of the patron. The Supreme Court looked at several cases decided since the passage of the statute and stated the following:

> To date, this Court has not addressed plaintiff's required burden of proof set out in La.R.S. 9:2800.6 as amended in 1990. However, several Louisiana appellate courts have expressed opinions on the issue. In Oalmann v. K-Mart Corp., 630 So.2d 911 (La.App. 4th Cir.1993), the Fourth Circuit Court of Appeal affirmed a judgment for plaintiff who fell at a K-Mart when she slipped in a puddle of water inside the store on a rainy day. K-Mart's Accident Report noted the weather as "rainy", which was sufficient for the court to conclude that K-Mart had knowledge of the weather conditions on the day of the accident and should have known that the floor would become slippery, presenting a dangerous condition. The court specifically noted that there was no evidence establishing precisely how long the floor was wet prior to plaintiff's fall. However, the dangerous condition created by the water was still foreseeable by the defendant because of the volume of business and the constant influx of customers. Even in the absence of precise evidence, the Court concluded that the accumulation of water at the entrance existed for such a period of time that K-Mart should have discovered the danger, and thus, K-Mart had the requisite constructive knowledge. Oalmann, 630 So.2d 911, 912.
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> In Parker v. Winn-Dixie Louisiana, Inc., 615 So.2d 378 (La.App. 5th Cir.1993), the Fifth Circuit Court of Appeal found Winn-Dixie liable for plaintiff's slip and fall on a clear liquid substance. There was testimony that no one had inspected the aisle five to ten minutes before the accident occurred and that defendant had no knowledge of the last time the aisle had been inspected prior to the accident. After the accident, a bottle of hydrogen peroxide was found with the top on but the safety seal punctured. The court concluded that Winn-Dixie had constructive notice of the liquid spill on the floor. In Saucier v. Kugler, Inc., 628 So.2d 1309 (La.App. 3rd Cir.1993), plaintiff slipped on a lemon in a grocery store and the Third Circuit Court of Appeal affirmed the trial court's judgment for the plaintiff. The Court of Appeal noted that there was no store policy regarding how inspections were to be conducted. This directly

> affected whether the merchant exercised reasonable care, as required by La.R.S. 9:2800.6, to keep his aisles in a reasonably safe condition and free of hazardous conditions. Whether the merchant's protective measures were reasonable must be determined in light of the circumstances of each case, along with the risk involved, the merchant's type and volume of merchandise, the type of display, the floor space utilized for customer service, the volume of business, the time of day, the section of the store, and other such considerations.

The Supreme Court then looked at the facts of this case in comparison to La. R. S. 9:2800.6 and found that "there were no established, written or consistent inspection procedures. Further, Ross' and Quave's [employees'] testimony that everyone was responsible to notice dangerous spills is tantamount in reality to no one being individually responsible." Id. at 318. The Court further stated: "the failure of Winn-Dixie to have in place a uniform, mandatory, non-discretionary, clean-up and safety procedure revealed a lack of the statutorily required reasonable care on its part. The length of time a foreign substance is on the floor diminishes in relevance if the defendant merchant has no mechanism in place to discover such a hazard." Id.

As a result of this decision, there were now "loopholes" that the Supreme Court had created, making it easier to prevail in premises liability claims. By merely showing the absence of a written maintenance procedure, liability could be established by a plaintiff. The Supreme Court would have another opportunity to re-visit the statute, though, in a case that some have referred to as the "death knell" of slip and fall cases in Louisiana in White v. Wal-Mart Stores, Inc., 699 So.2d 1081, 97-0393 (La. 9/9/97). This case pretty much resoundingly ended the judicial tinkering with R.S. 9:2800.6 and made it difficult, though not impossible, to prevail in a slip and fall or trip and fall case occurring on a retailer's premises; the change in judicial direction was due, in large part, to a re-alignment of the Supreme Court toward a more conservative tilt.

In White, the plaintiff slipped and fell on a liquid as she entered the store. The trial court

found for the plaintiff despite the fact that she had not presented evidence that the merchant had actual or constructive notice or that the merchant had actually created the spill. As to the issue of notice, the plaintiff had presented no evidence as to how long the spill had been present prior to the accident. The Court of Appeal affirmed relying on the Welch decision, but the Supreme Court, in a strongly worded opinion said that courts were not free to "re-write" clear expressions of legislative intent. In this regard, the Supreme Court looked to R. S. 9:2800.6 which spoke of the "mandatory" language of the statute in terms of the burden of proof on all elements clearly resting on the plaintiff. Thus, the plaintiff is required to make, most importantly, "a positive showing of the existence of the condition prior to the fall. A defendant merchant does not have to make a positive showing of the absence of the existence of the condition prior to the fall. Notwithstanding that such would require proving a negative, the statute simply does not provide for a shifting of the burden." White at 1084.

The fallout of the White decision was that the courts of the State now knew, from this decision, that judicial re-interpretation of the statute would not be favorably looked upon and that a plaintiff who claims to have slipped and fallen or tripped and fallen on a retailer's premises must show that the hazard which caused the accident existed for some period of time before the accident (unless the retailer caused the hazard); this means that the plaintiff must show an approximate or exact time period that the spill existed on the floor before the accident in order to prevail. Thus, while the burden of proof is clearly placed on the plaintiff, it is still of critical importance for the retailer to counter the expected proof on this point with its own investigation and estimate as to the last time that the area of the accident was inspected.

2. La. R.S. 9:2800.6

There are various elements of proof that a plaintiff must show in order to prevail in a claim against a merchant. These elements are broken down below with a few cases cited in order to

illustrate the issue.

a. Unreasonable Risk of Harm and Foreseeability

1. Evidence in customer's slip-and-fall action against grocery store supported finding that damp floor created "unreasonable risk of harm"; although store clerk mopped up water, floor remained wet, store utility clerk and manager acknowledged that area was still damp fifteen minutes later when plaintiff fell, and wet spot was not visible to plaintiff. Myles v. Brookshires Grocery Co., App. 2 Cir.1997, 687 So.2d 668, 29,100 (La.App. 2 Cir. 1/22/97).

2. Existence of broken egg, which is extremely slippery, on floor in grocery store presents unreasonable risk of harm, for purposes of statutory duty owed by merchant. Stewart v. Winn Dixie Louisiana, Inc., App. 5 Cir.1996, 686 So.2d 907, 96-599 (La.App. 5 Cir. 12/11/96).

3. Patron established that foreign substance on store floor presented an unreasonable risk of harm to customers, as required to maintain negligence action against store owner; accident report stated that area between mats and carts was wet from carts dripping, evidence showed that store owner, more probably than not, created hazard by having employees bring carts into store, dripping wet, and leaving them to "drip dry" in area where patron fell, and owner also had actual knowledge that while "drip drying," water would leak and settle onto tile floor. It was reasonably foreseeable, then, that if wet shopping carts were brought into the store that water might accumulate on the floor. Burnett v. M & E Food Mart, Inc. No. 2, App. 3 Cir.2000, 772 So.2d 393, 2000-350 (La.App. 3 Cir. 11/15/00).

4. Determination that presence of two or three hand-held shopping baskets in the checkout aisle of store rose to the level of a hazard, allowing recovery in slip and fall action in which patron was injured when she fell after stepping into a basket, was not clearly wrong. Broussard v. Family Dollar Store, 918 So.2d 1148 (La. App. 3 Cir.,2005).

b. Actual Notice

1. Supermarket did not have either actual or constructive notice of broken baby food jar which patron claimed to have slipped on, where patron testified at her deposition that she did not know how the jar got on the floor, that she did not see the baby food on the floor until after she started to slip, that it looked like someone had just dropped the jar, and that the baby food looked to be fresh. Rhea v. Winn Dixie Market Place Store, App. 4 Cir.2003, 849 So.2d 759, 2002-2181 (La.App. 4 Cir. 6/4/03).

2. Evidence supported finding that grocery store had actual notice of the hazard of liquid on floor; more than one store employee had actual knowledge of liquid spill that had occurred

in area of customer's slip and fall, utility clerk who mopped up spill acknowledged that the area was still wet some 15 to 30 minutes later when customer fell, and utility clerk testified that he was well aware that liquid could seep under the mats and "squish out" when people stepped on them. Jones v. Super One Foods/Brookshires Grocery Co., App. 2 Cir.2000, 774 So.2d 200, 33,683 (La.App. 2 Cir. 8/23/00).

c. Constructive Notice

1. Presence of a merchant's employee near the condition does not, in and of itself, constitute constructive notice of the unsafe condition under merchant liability statute; that being said, the presence or absence of such employee in the vicinity of an unsafe condition is certainly a significant factor to be considered in determining whether a merchant had constructive notice of unsafe condition. Blackman v. Brookshire Grocery Co., App. 3 Cir.2007, 966 So.2d 1185, 2007-348 (La.App. 3 Cir. 10/3/07).

2. Pet store did not have actual or constructive notice of any condition on floor that would have caused patron to slip and fall when she stepped off mat onto floor at entry, as required for patron to recovery for injuries sustained; patron entered store during period of heavy rain, patron admitted seeing nothing on floor, and store manager testified that floor was not wet prior to patron's slip and fall. Boeshans v. Petsmart, Inc., App. 5 Cir.2007, 951 So.2d 414, 06-606 (La.App. 5 Cir. 1/16/07).

3. Grocery store employees did not have constructive notice of puddle on store floor as puddle had not been on floor for such period of time that employees would have discovered it by exercise of ordinary care, and thus, store was not liable to patron who slipped and fell in puddle; although cause of puddle was determined, there was no proof as to any footprint or buggy tracks in water, water was described as clear and clean by all witnesses who observed it, and size of puddle was less than size of baking pan. Roberts v. Hartford Fire Ins. Co., App. 3 Cir.2006, 926 So.2d 121, 2005-1178 (La.App. 3 Cir. 4/5/06).

4. Grocery store had constructive notice of puddle of water in store aisle, as required to impose liability on store for shopper's personal injuries in slip-and-fall; surveillance videotape showed that puddle was on floor and grew in size over period of at least 24 minutes before store employee came to area and that customers were avoiding water, spill was in close proximity to private area of store where employees would be expected to notice it in ordinary course of business. Nelson v. Southeast Food, Inc., App. 2 Cir.2005, 892 So.2d 790, 39,157 (La.App. 2 Cir. 1/28/05).

5. Patron who slipped on puddle of blue liquid that had spilled on aisle of store failed to prove that substance remained on floor for such a period of time to allow inference that merchant had constructive notice of spill, even though patron testified that the puddle was rather large, precluding patron's recovery on premises liability claim, where patron did not present any witnesses or other physical evidence to indicate that spill had existed for any period of time; in the absence of additional evidence concerning the origin and mechanics of spill, length of

time spill existed prior to incident could not be inferred from size of spill. Howard v. Family Dollar Store No. 5006, 914 So.2d 118 (La. App. 2 Cir. 2005).

d. Unreasonableness of Policies and Procedures

1. Whether merchant's protective measures to keep premises free from hazards were reasonable must be determined in light of the circumstances of each case, along with risk involved, merchant's type and volume of merchandise, type of display, floor space utilized for customer service, volume of business, time of day, section of store, and other such considerations. White v. Wal-Mart Stores, Inc., App. 5 Cir.1997, 96-617 (La.App. 5 Cir. 1/15/97), 688 So.2d 100, writ granted 97-0393 (La. 3/7/97), 690 So.2d 2; Billiot v. Cline, App. 2 Cir.1995, 27,396 (La.App. 2 Cir. 9/27/95), 661 So.2d 537, writ denied 95- 2595 (La. 1/5/96), 666 So.2d 293; Thompson v. Stalnaker's Restaurant Inc., App. 3 Cir.1994, 93-1447 (La.App. 3 Cir. 6/1/94), 640 So.2d 733, writ denied 94-1799 (La. 10/14/94), 643 So.2d 165; Saucier v. Kugler, Inc., App. 3 Cir.1993, 628 So.2d 1309.

2. Merchants are required to exercise reasonable care to protect those who enter their store, and this duty extends to keeping the premises safe from unreasonable risks of harm and warning persons of known dangers. Pena v. Delchamps, Inc., App. 1 Cir.2007, 960 So.2d 988, 2006-0364 (La.App. 1 Cir. 3/28/07), writ denied 959 So.2d 498, 2007-0875 (La. 6/22/07).

3. Duty of store owner to protect customers from foreign substances is one of reasonable care under the circumstances; reasonable protective measures, including periodic inspections, must be taken to keep aisles and floors free from substances or objects that could cause customers to fall. Sims v. Winn Dixie Louisiana, Inc., App. 3 Cir.1994, 638 So.2d 716, 1993-1411 (La.App. 3 Cir. 6/22/94), writ denied 644 So.2d 1062, 1994-1983 (La. 11/4/94).

4. Although evidence of adequate inspection procedures may be part of merchant's burden to disprove negligence in falling merchandise case, evidence of inadequate or neglected inspection methods is relevant to prove negligence. King v. Toys "R" Us-Delaware, Inc., App. 2 Cir.2002, 806 So.2d 969, 35,461 (La.App. 2 Cir. 1/23/02).

3. Affirmative Defenses

Generally, all affirmative defenses are available in the defense of an accident which occurs on a retailer's premises. However, these defenses must be affirmatively plead in the Answer and must be based upon a good faith investigation of the facts surrounding the accident. Thus,

development of defenses in the investigative phase is critical so that when the claim enters the litigation phase, the defense attorney may, in good faith, plead all of the affirmative defenses which are applicable.

a. Comparative Fault

In the context of a slip and fall (or trip and fall) case occurring on a retailer's premises, the courts place a heavier burden on the retailer, vis-a-vis the customer, as the retailer knowingly attempts to divert the customer's attention away from the floor and toward bright displays, signs, and the shelved merchandise. Thus, the customer will always have a lessened duty to observe his or her pathway in a store. The idea in this scenario is to encourage the retailer to keep its aisles and passageways in a clean and clear condition. Some cases are cited as examples of comparative fault.

1. Store owners, however, are not required to ensure against all accidents that occur on the premises. They are not absolutely liable whenever an accident happens. A shopper has the duty of exercising reasonable care for his own safety and for the safety of those under his care and control. A shopper who sees a potentially dangerous condition and fails to take reasonable precautions to avoid the danger may be found to have contributed to his own injuries. Brungart v. K Mart Corp., 668 So.2d 1335 (La. App. 1 Cir.,1996).

2. Defendant merchant in slip-and-fall case bears burden to establish, by preponderance of evidence, that plaintiff was comparatively negligent and that such negligence was a cause of any injuries and subsequent damages she sustained. Myles v. Brookshires Grocery Co., App. 2 Cir.1997, 687 So.2d 668, 29,100 (La.App. 2 Cir. 1/22/97).

3. Evidence was insufficient to justify assignment of comparative fault to store patron whose dishwashing liquid allegedly spilled in store, in lawsuit against store by patron who was injured after slipping on spill; although store took position, on basis of its general policy requiring customers to bag their groceries, that patron caused spill when she placed bottle in her cart upside down, there was no evidence that patron even placed a bottle of dishwashing liquid in her cart. Brown v. Brookshire's Grocery Co., App. 2 Cir.2004, 868 So.2d 297, 38,216 (La.App. 2 Cir. 3/12/04).

4. Evidence supported finding that customer was 25% at fault for injuries she sustained at store when merchandise fell on her; customer saw that items were stacked in somewhat precarious position and should have used more care for her own safety. Lapeyrouse v. Wal-Mart Stores, Inc., App. 5 Cir.1998, 725 So.2d 61, 98-547 (La.App. 5 Cir. 12/16/98), writ denied 739

So.2d 209, 1999-0140 (La. 3/12/99).

5. Invitee and grocery store were 15% and 85% at fault, respectively, for injuries invitee suffered in grocery store after she slipped and fell on wet green leaflet that store distributed for in-store advertisement; invitee was not pushing shopping cart, which could have obstructed floor area immediately in front of her, leaflet may not have been as visible as it would have been had floor been solid color, "flyers" were implemented by store's management because of its desire to boost sales and encourage customer impulse buying, and store was in superior position to remedy hazardous condition. Kedia v. Brookshire Grocery Co., App. 2 Cir.1999, 752 So.2d 944, 32,324 (La.App. 2 Cir. 12/15/99), writ denied 757 So.2d 640, 2000-0139 (La. 3/17/00).

6. Jury finding that store patron was 85% at fault for injuries she sustained when she slipped and fell in store was not manifestly erroneous; jury could have reasonably believed testimony of store assistant manager that he placed hazard sign over banana on floor, and that such action constituted a reasonable effort to ensure safety of customers; moreover, store patron was clearly negligent in not paying attention to and tripping over large sign designed to alert her to fact there was a hazard in the area. Broussard v. Delchamps, Inc., App. 3 Cir.1990, 571 So.2d 855, writ denied 575 So.2d 370.

b. Third Party Fault

While third party fault is an affirmative defense in Louisiana, there are not many reported cases that have dealt with a merchant successfully defending a premises liability claim (other than a falling merchandise case, which will be discussed below) on the basis of this defense. Even if a third party created a hazard, the retailer still has the duty of reasonable care set forth in R. S. 9:2800.6 and must detect and remedy such hazards. In Cooper v. Wal-Mart Stores, Inc., 725 So.2d 51 (La. App. 1 Cir.,1998), the plaintiff tripped on a rock that was on the floor of Wal Mart. The rock had obviously been tracked in by another customer, but the court still analyzed the case in terms of whether the plaintiff had established notice of the rock on the part of Wal Mart and whether its policies and procedures were reasonable.

c. Trespass/Non-business Invitee

R. S. 9:2800.6 extends a cause of action only to "a person lawfully on the merchant's premises." Therefore, any person not on the premises with any lawful cause, is not protected by the

statute, and while there are few cases, if any, that deal specifically with R. S. 9:2800.6 and non-invitees, the law of Louisiana is well settled that the owner of property owes no duty to a trespasser except to refrain from wilfully or wantonly injuring him, and as to a licensee, there is no duty except to refrain from injuring him wilfully, wantonly or through active negligence. Salter v. Zoder, (La.App., 2 Cir., 1948), 37 So.2d 464, annulled on other grounds, 216 La. 769, 44 So.2d 862; Alexander v. General Accident Fire & Life Assurance Corp., (La.App., 1 Cir., 1957), 98 So.2d 730, writs denied, February 10, 1958; Taylor v. Baton Rouge Sash & Door Works, (La.App., 1 Cir., 1953), 68 So.2d 159.

4. Applicability of Strict Liability

As set forth in R.S. 9:2800.6, the creation of this specific statute applicable to accidents which occur on a merchant's premises, did not affect the applicability of Louisiana strict liability claims to such accidents. These theories of recovery are set forth in Civil Code Arts. 660, 667, 669, 2317, 2322, or 2695. This previously would have meant a substantial difference in the theories of recovery inasmuch as strict liability used to be known as "liability without fault;" in other words, the plaintiff asserting a strict liability theory of recovery need only show the existence of a hazardous condition in the care or custody of the merchant, irrespective of any actual or constructive notice to the merchant. However, the strict liability articles of the Civil Code were amended by the Legislature to require such proof of notice. Thus, a plaintiff asserting a claim in strict liability must additionally prove notice.

The main difference in a claim under strict liability and one that arises under La. R. S. 9:2800.6 will be the factual scenario in that a strict liability claim usually involves a "collapse, ruin or inherent defect" in the premises or some other object in the custody of the merchant.

In Williams v. Rouse's Enterprises, Inc., 693 So.2d 1298 (La. App. 1 Cir.,1997), the plaintiff

slipped and fell on a ball bearing which had allegedly come from the wheel of a shopping basket, and the plaintiff asserted claims under strict liability and R. S. 9:2800.6. The plaintiff claimed that the shopping basket was defective since a ball bearing had come dislodged from a broken wheel. However, the plaintiff failed to produce proof of this alleged defect. The trier of fact also rejected the claim under R. S. 9:2800.6 since the claimant had failed to prove the length of time that the ball bearing was on the floor prior to the accident, as required by the statute.

The most likely scenario involving the application of strict liability will be where a roof of a building collapses onto a patron or a shelf, which is not designed or fastened properly, falls into a patron. In any of those cases, the plaintiff can alleged alternative theories of liability, and as a practical matter, while there is not really a difference in the two theories of liability, the term "strict liability" does have more appeal to a jury.

B. Falling Merchandise Liability

1. From Smith v. Toys-R-Us to Davis v. Wal-Mart: A History of the Jurisprudence and the Applicability of R. S. 9:2800.6

After the Louisiana Legislature enacted R. S. 9:2800.6, the courts struggled to determine whether this statute would apply to a category of cases known as "falling merchandise" cases. At first blush, the statute appeared to have been written with "fall-type" cases in mind.

In Smith v. Toys "R" Us, Inc., 754 So.2d 209 (La.,1999), the Louisiana Supreme Court addressed a falling merchandise case for the first time, in the context of R. S. 9:2800.6. The Supreme Court held that the statute did, indeed, apply to such cases in that the statute set forth that a merchant had a duty of reasonable care to its patrons to keep the shelving in a safe condition as well. However, the Supreme Court "read into" the statute that the merchant would have the burden of exonerating itself from liability upon a prima facie showing of an accident from falling merchandise by the store

customer. The merchant would then have the burden of proof as there were only three possibilities as to how the accident occurred: "(1) Mrs. Smith knocked the toy from the shelf; (2) another customer in the area knocked the toy from the shelf; or (3) a store employee or another customer, at some time before Mrs. Smith entered the aisle, placed the toy in an unsafe position on the shelf or otherwise caused the toy to be in such a precarious position that the toy eventually fell." Id. at 214. In this case, since the plaintiff made out a prima facie case, and Toys-R-Us failed to show that the merchandise fell because of a third person, the plaintiff was entitled to prevail.

However, this victory for the plaintiff's bar was short-lived. In Davis v. Wal-Mart Stores, Inc., 774 So.2d 84 (La.,2000), the Supreme Court held:

> To prevail in a falling merchandise case, the customer must demonstrate that (1) he or she did not cause the merchandise to fall, (2) that another customer in the aisle at that moment did not cause the merchandise to fall, and (3) that the merchant's negligence was the cause of the accident: the customer must show that either a store employee or another customer placed the merchandise in an unsafe position on the shelf or otherwise caused the merchandise to be in such a precarious position that eventually, it does fall. Only when the customer has negated the first two possibilities and demonstrated the last will he or she have proved the existence of an "unreasonably dangerous" condition on the merchant's premises. Id.

The Supreme Court, by virtue of this decision, had essentially placed the burden of proof entirely back on the plaintiff. However, the Court did note that the absence of inspection procedures could assist in proving the third element of the burden of proof.

The following are some examples of these types of cases.

1. Parents, whose child was struck in head by 18-pound easel that fell from store shelf, established prima facie case that premises hazard existed; child's grandmother testified that no other customers or store employees were in immediate vicinity when accident occurred, easels were placed on upper shelf that slanted toward customers at adult's eye level with only narrow guard or fence along shelf's edge, and child's act of allegedly grabbing shelf should not have caused easel to topple over if it had been securely placed on shelf. King

v. Toys "R" Us-Delaware, Inc., App. 2 Cir.2002, 806 So.2d 969, 35,461 (La. App. 2 Cir. 1/23/02).

2. The evidence did not establish a ladder, which fell on the plaintiff in a Family Dollar Store, was a premise hazard, nor were there grounds for any inference that the defendant caused the ladder to fall and injure the plaintiff, rather, the trial court found that the plaintiff or her companion had caused the ladder to fall. Jupiter v. Family Dollar Stores of Louisiana, Inc., 742 So.2d 1065 (La. App. 5 Cir.,1999).

3. Store patron filed action against store seeking damages for injuries sustained when weight rolled off shelf onto foot. In affirming the judgment for the patron, the court ruled that a merchant has a duty to safely shelve or display its merchandise to include the foreseeable removal and replacement of the goods by its customers and the responsibility to check shelves periodically to ensure that merchandise remained in safe condition. Stepherson v. Wal-Mart Stores, Inc., 785 So.2d 950 (La. App. 2 Cir.,2001).

C. Liability for Criminal Conduct on the Retailer's Premises/Duty to Provide Security

Generally, a merchant does not have the duty to protect its patrons for the unforeseeable criminal acts of a third party on the merchant's premises. In Posecai v. Wal-Mart Stores, Inc., 752 So.2d 762, 766 (La.,1999), the Supreme Court re-affirmed this rule in the context of a case against a retailer. There, the Supreme Court held that while "business owners are not the insurers of their patrons' safety, they do have a duty to implement reasonable measures to protect their patrons from criminal acts when those acts are foreseeable. We emphasize, however, that there is generally no duty to protect others from the criminal activities of third persons. *See* Harris v. Pizza Hut of Louisiana, Inc., 455 So.2d 1364, 1371 (La.1984). This duty only arises under limited circumstances, when the criminal act in question was reasonably foreseeable to the owner of the business. Determining when a crime is foreseeable is therefore a critical inquiry."

In determining the foreseeability for a merchant, the Supreme Court announced the following

rule of law:

> We adopt the following balancing test to be used in deciding whether a business owes a duty of care to protect its customers from the criminal acts of third parties. The foreseeability of the crime risk on the defendant's property and the gravity of the risk determine the existence and the extent of the defendant's duty. The greater the foreseeability and gravity of the harm, the greater the duty of care that will be imposed on the business. A very high degree of foreseeability is required to give rise to a duty to post security guards, but a lower degree of foreseeability may support a duty to implement lesser security measures such as using surveillance cameras, installing improved lighting or fencing, or trimming shrubbery. The plaintiff has the burden of establishing the duty the defendant owed under the circumstances.
>
> The foreseeability and gravity of the harm are to be determined by the facts and circumstances of the case. The most important factor to be considered is the existence, frequency and similarity of prior incidents of crime on the premises, but the location, nature and condition of the property should also be taken into account. It is highly unlikely that a crime risk will be sufficiently foreseeable for the imposition of a duty to provide security guards if there have not been previous instances of crime on the business' premises. Id. at 768.

These types of cases, though, are distinct from the situation where a merchant takes on the duty to provide security against criminal conduct where the duty might not normally exist. In the case of "assumed duty," the merchant must discharge that duty with "due care." Harris v. Pizza Hut of Louisiana, Inc, 455 So.2d 1364 (La.,1984).

D. False Arrest/Shoplifting Liability

In Louisiana, a merchant is afforded a "privilege" to detain a customer suspected of shoplifting under Louisiana Code of Criminal Procedure Article 215. That article provides as follows:

> A. A peace officer, merchant, or a specifically authorized employee of a merchant, may use reasonable force to detain a person for questioning on the merchant's premises, for a length of time not to exceed sixty minutes, when he has reasonable cause to believe that the person has committed a theft of goods held for sale by the merchant, regardless of the actual value of the goods. The detention shall not constitute an arrest..A peace officer may, without a warrant, arrest a person when he has reasonable grounds to believe the person has committed a theft of goods held for sale by a merchant, regardless of the actual value of the goods. A complaint made to

a peace officer by a merchant or a merchant's employee shall constitute reasonable cause for the officer making the arrest.

B. If a merchant utilizes electronic devices which are designed to detect the unauthorized removal of marked merchandise from the store, and if sufficient notice has been posted to advise the patrons that such a device is being utilized, a signal from the device to the merchant or his employee indicating the removal of specially marked merchandise shall constitute a sufficient basis for reasonable cause to detain the person.

Thus, the statute, in essence, affords a retailer civil immunity from liability for detaining a customer reasonably suspected of shoplifting. The components of the privilege bear review, though.

1. Reasonable Suspicion

In order to enjoy civil immunity from a lawsuit for false arrest, the person who detains the suspected shoplifter must have "reasonable suspicion" that a patron has committed a theft of the store's good, regardless of the value. This test has been defined as much less than the "probable cause" which is discussed in a criminal context in order to secure an arrest warrant. In Vaughn v. Wal-Mart Stores, Inc., App. 5 Cir.1999, 734 So.2d 156, 98-1215 (La. App. 5 Cir. 4/27/99), the court stated that " 'reasonable cause'" [is defined as enough] to believe that the suspect committed a theft of goods, immunizing merchant from liability for false imprisonment, [and] is defined as something less than probable cause and requires that the detaining officer have articulable knowledge of particular facts sufficiently reasonable to suspect the detained person of criminal activity."

Thus, in practical application, a store employee must observe a patron secrete or conceal merchandise or discard some merchandise after concealment and avoid any intention to make payment. The typical case will involve detention of the suspect after he or she has passed the registers with the merchandise still hidden on the person. There are cases reported, though, where

the patron was not observed concealing merchandise, but rather in discarding of the container in order to facilitate concealment. These cases are somewhat more difficult to defend, though, especially if the merchandise is not subsequently located on the person of the patron. See Smith v. K-Mart Corp., 712 So.2d 1042, 1997-1728 (La.App. 4 Cir. 5/20/98).

2. Length of Detention

The codal article affords the merchant a presumption that the detention is reasonable if not more than one hour. However, the article also contemplates other situations where the detention may last longer than one hour, as long as there is reasonable explanation for the longer detention, such as a delay by the law enforcement in arriving at the scene in order to take over the investigation. However, the merchant should have conducted questioning of the suspect prior to the time that the police arrive on the scene. Derouen v. Miller, App. 3 Cir.1993, 614 So.2d 1304.

3. Reasonable Force

The merchant may only use reasonable force in effecting an "arrest" within the scope of Article 215. As an example of what force is permitted, the case of State v. Hudgins, Sup.1981, 400 So.2d 889, is instructive as the "extreme example." There, a store detective, observed that a store security guard, on the leaving store, was carrying a very full shopping bag. The detective escorted the suspect back into store after he refused to allow inspection of the bag. The court held that the employee-detective was justified in using force when the suspect made an attempt to leave and the detective wrested the bag from the suspect and it fell to the floor, exposing the merchandise.

In most cases, though, the type of force employed to detain the suspected shoplifter will be in direct relation to the amount of resistance put up by the suspect. The normal case, though, will involve simply asking the customer to proceed to a private area of the store where the suspect can be questioned further outside the presence of other customers and store employees. Much more than

this will probably give rise to liability despite the privilege.
