STATE OF LOUISIANA
RETAIL COMPENDIUM OF LAW

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# Retail, Restaurant, and Hospitality Guide to Louisiana Premises Liability

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This outline is intended to provide a general overview of Louisiana retail law. The volume of discussion on any particular topic is not necessarily an indication of the amount of litigation related to that area of Louisiana retail law. Much of Louisiana law is governed by Louisiana’s Civil Code and Revised Statutes, with case law serving as interpretations of the codal and statutory provisions.

I. THE LOUISIANA MERCHANT LIABILITY STATUTE

The Louisiana Merchant Liability Statute, La. R.S. 9:2800.6, applies to a large portion of retail claims. La. R.S. 9:2800.6 provides:

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:

(1) The condition presented an unreasonable risk of harm to the claimant and that risk of harm was reasonably foreseeable.

(2) The merchant either created or had actual or constructive notice of the condition which caused the damage, prior to the occurrence.

(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.

Pursuant to this statute, when a plaintiff brings a claim for injuries as a result of an injury “due to a condition existing in or on a merchant’s premises,” the plaintiff must prove that: 1) the condition presented an unreasonable risk of harm; 2) the risk of harm was reasonably foreseeable; 3) the merchant either created or had actual or constructive notice of the condition which caused the damage, prior to the occurrence; and 4) the merchant failed to exercise reasonable care.

A. The “Constructive Notice” Element

1. Constructive Notice Defined

Oftentimes the issue is whether the merchant created or had actual or constructive notice of the condition that caused plaintiff’s harm. Section 2800.6 provides that constructive notice is established if the plaintiff proves that the “condition existed for such a period of time that it would have been discovered if the merchant had exercised reasonable care.” The issue of “constructive notice” has been a popular topic among Louisiana Courts. In White v. Wal-Mart Stores, Inc., the Louisiana Supreme Court held that in order to prove “constructive notice,” the plaintiff must produce “positive evidence” to prove that the injury-causing condition existed “for some period of time” sufficient to place the merchant on notice as to its existence. 699 So.2d 1081 (La. 1997).

Louisiana jurisprudence shows trends in the manner in which plaintiffs in slip and fall cases have attempted to prove “constructive notice” on the part of the merchant-defendant. In Allen v. Wal-Mart Stores, Inc., the court suggested that a plaintiff could overcome summary judgment on the constructive notice element by presenting evidence as to the condition of the liquid after the fact that would suggest that it had been there for some period of time, such as evidence that some areas of the spill had dried, that the liquid had shopping cart tracks or footprints it, or that the liquid was dirty. 37,352 (La. App. 2 Cir. 6/25/03); 850 So.2d 895.

In Woods v. Wal-Mart, LLC, the court found that a plaintiff met his burden of overcoming summary judgment on the constructive notice element of his claim by pointing out that the store manager claimed to have seen dirty footprints around the puddle/liquid as well as presenting witness testimony that there were dirty shopping cart wheel marks through the puddle and branching out in different directions. 2011 WL 4729015 (E.D. La. 10/5/11).
Likewise, in *Pellegrin v. Winn Dixie Montgomery, LLC*, the court found that a plaintiff met his burden of overcoming summary judgment on the constructive notice element of his claim when the store manager claimed to have seen dirty footprints around the puddle/liquid and another witness claimed to have seen dirty shopping cart wheel marks through the puddle and branching out in different directions. 2011 WL 4729015 (E.D. La. 10/5/11).

In *Beninate v. Wal-Mart Stores, Inc.*, the court found that the store had constructive notice of a hazardous condition created by a french fry on the floor of the store based on plaintiff’s testimony that the area around the french fry was black as though carts had been pushed around it, by evidence that the food and beverage items were regularly carried onto the merchandise floor, and by testimony of an investigator that on numerous occasions he observed foreign debris on the store floor near the area of the fall. 704 So.2d 851 (La. App. 5 Cir. 12/10/97), *writ denied*, 713 So.2d 470 (La. 3/13/98).

2. Presence of an Employee and Constructive Notice

Section 2800.6 specifically provides that 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.” In spite of this clear language, plaintiffs have been somewhat successful in overcoming summary judgment by arguing that there is an issue of fact regarding constructive notice by relying solely on the presence of an employee in the vicinity of the accident.

For example, in *Williams v. Winn-Dixie Montgomery, LLC*, the trial court denied a motion for summary judgment based solely on the plaintiff’s testimony that as she was falling, she saw an employee at the end of the aisle stacking products on the shelves out of the corner of her eye. 11-1542, (La. 4 Cir. 1/12/22). The plaintiff could not say whether or not the employee knew that there was a liquid on the floor prior to the plaintiff falling, even though common sense dictates that had the employee known, he would have cleaned it up. The plaintiff was unable to describe the employee or even state a name, but she described a uniform that she believed the employee was wearing. The trial court denied the summary judgment motion, finding a genuine issue of fact existed as to whether or not the employee, and defendant, knew or should have known of the hazardous condition due to the proximity of the employee to the site of the fall. Defendant appealed the trial court decision and the appellate court affirmed without giving reasons.
Likewise, in another case, a trial court found that a cafeteria owner had constructive notice of a greasy substance on a concrete walkway outside doorway based solely on the plaintiff/customer’s testimony that there were two cafeteria employees who were standing outside the doorway, near the area where the plaintiff fell. *Wilson v. Piccadilly Cafeterias, Inc.*, 97-2646 (La. App. 1 Cir. 11/6/98); 739 So.2d 802, *writ denied*, 98-3038 (La. 2/5/99); 738 So.2d 3.

3. Use of Video Surveillance to Create an Issue of Fact with “Constructive Notice” on Summary Judgment

With the advent of retail establishments installing surveillance cameras in stores, a hot issue is whether or not surveillance video may be used to prove constructive notice against the merchant. Plaintiffs often are attempting to use surveillance video to create a genuine issue of fact to defeat the merchant’s summary judgment. Specifically, after a defendant-merchant files a motion for summary judgment, the plaintiff will request surveillance video in an effort to show that a sufficient period of time elapsed so as to prove that the defendant knew or should have known of the hazardous condition and failed to clean it up. Alternatively, the plaintiff will argue that had the defendant secured more video tape of the scene, plaintiff could prove the temporal element and establish constructive notice of the condition.

In *Price v. Wal-Mart Stores, Inc.*, the plaintiff argued that there was a genuine issue of material fact regarding “constructive notice” based on a surveillance video of the store which showed nothing was spilled onto the floor for at least 40 minutes prior to the incident. 2008 WL 341375 (W.D. La. 2/5/08). Based on this video, plaintiff argued that the spill must have been on the floor prior to the videotape recording so as to establish the temporal element of constructive notice. *Id.* The court agreed with this argument and denied the defendant’s motion for summary judgment even though the videotape was not conclusive on the presence or absence of the spill or when the spill occurred. *Id.*

However, in *Taylor v. Wal-Mart*, the United States Fifth Circuit Court of Appeals held that surveillance video that does not show the condition of the floor or the source of the spill is insufficient to create an issue of fact as to constructive notice element of plaintiff’s claim. 11-30742 (5th Cir. 2012); 464 Fed. Appx. 337. In *Taylor*, the Fifth Circuit reviewed the Eastern District’s grant of Summary Judgment in favor of the defendant in a slip-and-fall case. *Id.* The *Taylor* Plaintiff argued on appeal that the surveillance video established a genuine issue of material fact with respect to the constructive notice element of her claim. *Id.* The video in *Taylor* captured an hour of footage leading up to the incident, and the alleged wet substance was not visible at any time in the video. *Id.* at 338. The Fifth Circuit rejected the plaintiff’s argument and affirmed the district court’s finding that the plaintiff failed to establish a genuine issue of fact concerning the constructive notice element of her claim. *Id.* at 339. It reasoned that
surveillance video that does not show the condition on the floor or the source of the condition is insufficient to create an issue of fact with respect to the constructive notice.

Louisiana courts often require authentication of the videotape surveillance before admitting it as evidence either at a hearing on a motion for summary or at trial. For example, in *Scheffie v. Wal-Mart Louisiana, LLC*, the court held that a department store surveillance video that was not offered or introduced at the hearing on a motion for summary judgment and which was not submitted with plaintiff’s opposition to the store’s motion for summary judgment was not competent summary judgment evidence that the trial court could consider in determining summary judgment on the issue of constructive notice. 92 So.2d 625 (La. App. 5 Cir. 5/31/12).

**B. The “Reasonable Care” Element**

Under the Louisiana Merchant Liability Statute, plaintiff must prove that the merchant failed to exercise reasonable care. The statute clearly provides that this is a separate element of plaintiff’s claim from constructive notice. That said, Louisiana trial courts often couple this element with the constructive notice element and find that if a plaintiff proves constructive notice, then she has also met her burden of proving that the merchant failed to exercise reasonable care.

The Louisiana Merchant Liability Statute specifically provides that 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. However, this statute does not preclude courts from finding that the merchant exercised reasonable care when it submitted evidence of maintenance and safety sweeps. *Valley v. Specialty Restaurant Corp.*, 98-0438 (La. App. 4 Cir. 1/19/99); 726 So.2d 1028, *writ denied* 99-0478 (La. 1/4/99); 742 So.2d 560 (merchant exercised reasonable care where evidence of maintenance procedures and “safety sweeps” of floors); *Leblanc v. Schwegmann Giant Supermarkets*, 615 So.2d 443 (La. App. 4 Cir. 1993) (merchant exercised reasonable care based on testimony that porter inspected area 36 minutes before the accident and that the chief of security inspected the area 10 minutes before the accident).

Furthermore, Louisiana courts have found that the merchant exercised reasonable care when there are wet floor signs in the area of the injury-causing condition. *Melancon v. Popeye’s Famous Friend Chicken*, 10-1109 (La. App. 3 Cir. 3/16/11); 59 So.3d 513 (merchant exercised reasonable care by placing two “wet floor” signs in the area to alert customers that the floor had been moped).
II. CRIMINAL ACTIVITY AND SHOPLIFTING ON PREMISES

A. Louisiana Code of Criminal Procedure Article 215—Immunity to Store Merchants and Their Agents

Louisiana Code of Criminal Procedure article 215(A) permits a merchant or authorized employee or agent to stop a customer who is suspected of shoplifting for questioning or verification of payment and subsequently hold such customer for arrest. The article gives quasi-police powers to merchants and their agents and gives them immunity from civil and criminal liability when such merchant has reasonable cause to believe that a theft of goods has occurred on the premises. La. C.Cr.P. art. 215, cmt. (e); Vaughn v. Wal-Mart Stores, Inc., 98-1215 (La. App. 5 Cir. 4/27/99); 734 So.2d 156, 159 citing McNeely v. Nat’l Tea Co., 94-392 (La. App 5 Cir. 3/28/95); 653 So.2d 1231, writ denied, 95-1531 (La. 9/29/95); 660 So.2d 880.

La. C.Cr.P. art. 215(A) provides:

A. (1) A peace officer, merchant, or a specifically authorized employee or agent 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, unless it is reasonable under the circumstances that the person be detained longer, 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 merchant or his employee or agent may also detain such a person for arrest by a peace officer. The detention shall not constitute an arrest.

Therefore, for a merchant to be afforded immunity under La. C.Cr.P. art. 215 in connection with the detention of a person suspected of shoplifting for questioning the following is required: (1) the person effecting the detention must be a peace officer, a merchant, or a specifically authorized employee of the merchant; (2) the party making the detention must have a reasonable cause to believe the detained person has committed theft of goods held for sale by the merchant; (3) unreasonable force may not be used in detaining the suspect for interrogation; (4) the detention must occur on the merchant’s premises; and (5) the detention may not last longer than sixty minutes, unless it is reasonable under the circumstances that the person be detained longer. La. C.Cr.P. art. 215; Rhymes v. Winn-Dixie Louisiana, Inc., 2010-1357 (La. App. 3 Cir. 3/9/11); 58 So.3d 1068.

Subsection (C) of article 215 provides a list of factors to be considered by the court in determining whether it is “reasonable under the circumstances” to detain a person for longer than sixty minutes. La. C.Cr.P. art. 215(C). These factors include: (1) the value of the merchandise in question; (2) the location of the store; (3) the length of time taken for law enforcement
personnel to respond; (4) the cooperation of the person detained; and (5) any other relevant circumstances to be considered with respect to the length of time a person is detained. *Id.*

1. **Questioning of Detained Person Required**

Louisiana Code of Criminal Procedure article 215(A) provides two purposes for detaining a person believed to be shoplifting: (1) for questioning; and (2) for arrest by a peace officer. Louisiana courts have addressed the issue of whether the article requires a merchant to question a detainee when the purpose of the detention is for arrest by a peace officer (as opposed to a detention solely for questioning). The courts impose a strict interpretation of this article to necessitate that a merchant conduct a reasonable post-detention inquiry in all cases of detention under article 215, even if the person is being detained for arrest by a peace officer. *Derouen v. Miller*, 614 So.2d 1304, 1307-08 (La. App. 3 Cir. 1993). Specifically, courts require that the merchant conduct a questioning of the detainee, who the merchant has reasonable cause to believe committed a theft, and if during that questioning, the merchant determines there is probable cause for an arrest, only then can the merchant detain such person for arrest by the police. *Id.*

2. **Implicit Authorization to Conduct a Reasonable Search**

Louisiana courts hold that article 215 implicitly authorizes the detaining merchant to conduct a search of the suspect’s person and/or articles in his possession, but such search must be reasonably related to the investigatory purposes of the detention and must be conducted in a reasonable manner. *State v. Hudgins*, 400 So.2d 889 (La. 1981). In *Wilson v. Wal-Mart Stores, Inc.*, the court held a merchant’s search of suspected shoplifters was reasonable when a female employee conducted a two to five minute search wherein the suspects were required to lift their shirts and skirts and lower their panty hose and under garments after one suspect had been observed placing clothing under her skirt. A total of thirty minutes elapsed from the time of the search until the police arrived. 525 So.2d 111 (La. App. 3 Cir. 1988).

3. **Merchant’s Premises**

Article 215 provides that the merchant may use reasonable force to detain a person for questioning “on the merchant’s premises.” La. C.Cr.P. art. 215(A). However, Louisiana courts broadly interpret the phrase “premises” for purposes of article 215 and have held that a merchant’s “premises” includes the sidewalk in front of the store or enclosed shopping mall area outside of the store. *Davis v. J.C. Penney Stores*, 05-881 (La. App. 5 Cir. 4/11/06); 930 So.2d 130, 138; *Durand v. Brookshire Grocery Co.*, 98-1738 (La. App. 3 Cir. 6/30/99); 747 So.2d 89; *Thompson v. LeBlanc*, 336 So.2d 344 (La. App. 1 Cir. 1976), app. not consid. 339 So.2d 26 (La. 1976); *Simmons v. J.C. Penney Co.*, 186 So.2d 358 (La. App. 1 Cir. 1966); *Durand v. United Dollar Store of Hammond, Inc.*, 242 So.2d 635 (La. App. 1 Cir. 1970).
Particularly, in *Davis v. J.C. Penney Stores*, the court held that the food court, an area of the shopping mall more than one-fourth of a mile away from the store, was considered the “premises” for purposes of La. C.Cr.P. art. 215(A), even though the plaintiffs were detained more than forty-five minutes after they left the store. 05-881 (La. App. 5 Cir. 4/11/06); 930 So.2d 130, 138. The court reasoned that the area in question was part of the shopping center complex where the store was located and this location was sufficient for purposes of the statute. *Id.*

4. Temporal Element of the Detention

Louisiana Code of Criminal Procedure article 215(A) provides that the detention should not “exceed sixty minutes, unless it is reasonable under the circumstances that the person be detained longer.” This sixty minute limit on the detention refers to the time of the detention, and does not include the time between the suspected criminal activity and the detention. *Davis v. J.C. Penney Stores*, 05-881 (La. App. 5 Cir. 4/11/06); 930 So.2d 130, 138. In *Davis*, the court rejected plaintiffs’ argument that the temporal element of article 215 began running when plaintiffs left the store, and thus, it included the forty-five minutes after plaintiffs left the store and before they were detained in the food court of the mall where the store was located. *Id.*

5. Reasonable Cause for Detention

Article 215 only provides immunity to merchants who detain customers for questioning when such merchant has “reasonable cause to believe that the person has committed a theft of goods held for sale by the merchant.” Reasonable cause is defined by Louisiana courts as “something less than probable cause and requires that the detaining officer [or merchant] have articulable knowledge of particular facts sufficiently reasonable to suspect the detained person of criminal activity.” *Mitchell v. Dillard Dept. Stores, Inc.*, 00-328 (La. App. 5 Cir. 10/18/00); 772 So.2d 733; *Vaughn v. Wal-Mart Stores, Inc.*, 98-1215 (La. App. 5 Cir. 4/27/99); 734 So.2d 156.

Subsection (B) of La. C.Cr.P. art. 215 provides for a specific situation wherein courts should find that a merchant had “reasonable cause” to detain a person pursuant to article 215(A). Specifically, subsection (B) provides:

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 or agent indicating the removal of specially marked merchandise shall constitute a sufficient basis for reasonable cause to detain the person.

Therefore, sufficient reasonable cause to detain a person pursuant to La. C.Cr.P. art. 215 occurs when: (1) sufficient notice is posted to advise patrons that an electronic device designed to detect the unauthorized removal of marked merchandise from the store is being utilized; and (2) a
signal from the device to the merchant or his employee or agent indicating the removal of specifically market merchandise. La. C.Cr.P. art. 215(B).

a. Patron’s Guilt or Innocence is Immaterial to “Reasonable Cause”

“[R]easonable cause” for purposes of article 215 is not based upon the store patron’s actual guilt or innocence, but rather on the reasonableness of the store employee’s action in detaining the patron under all of the circumstances. Durand v. Brookshire Grocery Co., 98-1738 (La. App. 3 Cir. 6/30/99); 747 So.2d 89, 91 citing Johnson v. Wal-Mart Stores, Inc., 575 So.2d 502, 504 (La. App. 3 Cir. 1991); Vaughn v. Wal-Mart Stores Inc., 98-1215 (La. App. 5 Cir. 4/27/99); 734 So.2d 156. A store may be absolved from liability notwithstanding the customer’s innocence. Vaughn, 734 So.2d at 156; Freeman v. Kar Way, Inc., 96-8 (La. App. 3 Cir. 11/6/96); 686 So.2d 51, writ denied, 970524 (La. 4/18/97); 692 So.2d 429; Estorge v. Schwegmann Giant Supermarkets, Inc., 604 So.2d 1012 (1992). However, once a customer’s innocence is established, the customer must be released immediately and unconditionally. McNeely v. National Tea Co., 94-392 (La. App. 5 Cir. 3/28/95); 653 So.2d 1231, rehearing denied, writ denied, 1995-1531 (La. 9/29/95); 660 So.2d 429. Below are summaries of cases wherein courts found reasonable cause for a detention in spite of the plaintiffs’ innocence.

In Vaughn v. Wal-Mart Stores, Inc., the court found that the Wal-Mart employee, who stopped plaintiffs, had reasonable cause to believe plaintiffs committed a theft, even though it was later confirmed that a theft had not taken place. 98-1215 (La. App. 5 Cir. 4/27/99); 734 So.2d 156, 160-61. It reasoned that the employee saw plaintiffs standing near a closed register in a secluded part of the store and saw one of the plaintiffs reaching into a bag. Id. The court further reasoned that the stop was reasonable because once it was confirmed that a theft had not taken place, plaintiffs were free to go. Id. at 161-62.

In Freeman v. Kar Way, Inc., the court held that the defendant-merchant had “reasonable cause” for a detention pursuant to La. C.Cr.P. art. 215 even though the detention revealed that plaintiff did not have stolen merchandise on her person. 96-8 (La. App. 3 Cir. 11/6/96); 686 So.2d 51, writ denied, 970524 (La. 4/18/97); 692 So.2d 429. The court reasoned that the store employees had reasonable cause to suspect the plaintiff of shoplifting after they saw the plaintiff near the earring counter, lift her shirt, and place her hand under it. Id.

In Estorge v. Schwegmann Giant Supermarkets, Inc., the court found that the defendant-merchant had reasonable cause to detain three customers for twenty-five minutes despite the fact that the detention revealed that plaintiffs had not committed a theft. 604 So.2d 1012 (1992). The court reasoned that the store employees had reasonable cause to suspect the customers of shoplifting after they observed plaintiffs pick up a carton of cigarettes, later found an empty carton of the same brand of cigarettes in another area of the store, observed one of the customers putting something in his pocket and then putting it back on the shelf, and observed that same customer with a bulge in his pocket the size of two packs of cigarettes. Id.
In *Durand v. United Dollar Store of Hammond, Inc.*, the court held that the store employee had reasonable cause for detaining a suspected shoplifter when the employee observed plaintiff’s niece transfer an article in a plastic bag, which had been in fact been previously purchased by plaintiffs at another store. 242 So.2d 635 (La. App. 1 Cir. 1970).

In *Eason v. J. Weingarten, Inc.*, the court affirmed a trial court decision finding that the defendant-merchant had reasonable cause to detain a customer who was seen placing a bottle of hair dye in her purse even though the bottle of hair dye was later found elsewhere in the store. 219 So.2d 516 (La. App. 3 Cir. 1969).

b. Theft Not Required

Article 215 requires that the detaining person have reasonable cause to believe that the person detained “has committed a theft.” (emphasis added). However, Louisiana courts broadly interpret this article and do not require the shoplifter to actually physically remove the goods from the store. *Ourso v. Wal-Mart Stores, Inc.*, 08-0780 (La. App. 1 Cir. 11/14/08); 998 So.2d 295, writ denied, 08-2885 (La. 2/6/09); 999 So.2d 785.

c. Second-hand Knowledge of Suspicious Activity

Louisiana courts are generally willing to determine that there is “reasonable cause” to detain a suspected shoplifter pursuant to La. C.Cr.P. art. 215 when the detaining employee made a detention based on second-hand information provided by a fellow employee. *Thompson v. LeBlanc*, 336 So.2d 344, 349 (La. App. 1 Cir.), writ not considered, 339 So.2d 26 (La. 1976). Conversely, Louisiana courts have been unwilling to determine that there is “reasonable cause” to detain a suspected shoplifter when the detaining employee made a detention based solely on second-hand information provided by an unnamed customer. *Chretien v. F.W. Woolworth Co.*, 160 So.2d 854 (La. App. 4 Cir. 1964).

d. Case Studies

i. “Reasonable Cause” Found

Below are summaries of cases wherein courts found that there was “reasonable cause” to believe that a patron was committing theft for purposes of immunity pursuant to La. C.Cr.P. art. 215(A).

In *Davis v. J.C. Penney Stores*, the court held that the merchant had reasonable cause to detain plaintiffs for suspected theft, even though customers claimed that some items were not on the receipt because they were exchanges, when the officers reviewed a surveillance video showing that the cashier, who was later learned to have known plaintiffs, placed twenty-three items in plaintiffs’ bags, but scanned only ten items and when the items allegedly returned were
not visible on the videotape during the checkout. 05-881 (La. App. 5 Cir. 4/11/06); 930 So.2d 130, writ denied 2006-1080 (La. 6/23/06); 930 So.2d 988.

In Freeman v. Kar Way, Inc., the court held that a store employee had “reasonable cause” for detaining a suspected shoplifter when such employee believed that the patron was looking around the store to see if anyone was watching her, the employee observed the patron touching earrings on an earring rack, and the employee saw the patron put her hand under her shirt near the waistband of her pants. 1996-8 (La. App. 3 Cir. 11/6/96); 686 So.2d 51, rehearing denied, writ not considered, 1997-0524 (La. 4/18/97); 692 So.2d 429.

In Jenkins v. Wal-Mart Stores, Inc., the court held that a store security officer had reasonable cause to detain a fourteen-year-old boy for suspected shoplifting when the officer observed the boy and a companion picking up things in an area where darts and b-b’s were located, saw the companion of the detainee put darts in front of his pants, and watched as both boys walked out of the store. 601 So.2d 21 (La. App. 1 Cir. 1992).

In Wilson v. Wal-Mart Stores, Inc., the court held that the merchant had reasonable cause for detaining a suspected shoplifter when the store employee observed the suspect hand an article of clothing to a companion, who proceeded to hide the merchandise under her skirt, and the two of them left the store without paying for clothing. 525 So.2d 111 (La. App. 3 Cir. 1988).

In Townsend v. Sears, Roebuck & Co., the court held that based upon a department store security guard’s personal observation, through video surveillance, of a customer walking to the edge of the aisles and placing an object inside the bag he was holding, the security officer had reasonable cause to detain the customer. 466 So.2d 675 (La. App. 5 Cir. 1985).

ii. Lack of “Reasonable Cause”

In Thomas v. Schwegmann Giant Supermarket, Inc., the court found that Schwegmann Supermarket lacked reasonable cause to detain the plaintiff, a suspected shoplifter, and thus, civil immunity from liability for false imprisonment was not applicable. 561 So.2d 992 (La. App. 4 Cir. 1990). The Thomas security guard detained the plaintiff for theft of glue from a false nail kit where the kit did not in fact contain glue. Id. The court reasoned there was not reasonable cause to detain the customer because the security guard, who had thirteen years of experience in the field and was a former member of the city police department, should have inspected the package in question before detaining the customer and accusing the customer of theft. Id.

6. Goods For Sale By Merchant

It is important to remember that the statute requires the detaining person to reasonably believe that the detainee has committed a “theft of goods held for sale by the merchant”. Thus, article 215 requires that the detaining person believe that the detainee was committing theft of
goods for sale by the merchant, and the statute does not provide immunity for theft of items contained inside the store, that are not for sale by the merchant. La. C.Cr.P. art. 215.

III. PREMISES SECURITY LITIGATION

Under Louisiana law, business owners, landlords, and similar entities can be subject to liability suits arising out of incidents resulting from criminal acts of third parties that were not prevented due to ineffective or inadequate security, or from actions taken by security personnel working for or with the proprietor. Liability will generally not be imposed on a business owner for the criminal acts of third parties absent a showing that the owner was aware or should have been aware of the risk of harm and failed to implement reasonable measures to prevent the harm from occurring. Liability can also be imposed related to criminal investigations where proper protocols are not followed and where unreasonable force is employed. The following materials are intended as a general overview of these topics as viewed by Louisiana courts, and an attempt to highlight certain issues that business owners and risk management professionals should examine in order to reduce exposure to such claims.

A. Legal Duty of A Business Proprietor to Patrons

A business proprietor's duty to his patrons requires that the proprietor must refrain from conduct likely to cause injury to a guest and that he must maintain the premises free from unreasonable risks of harm or warn patrons of known dangers.1 Generally, there is no duty to protect others from the criminal acts of third parties.2 Business owners are not insurers of their patrons' safety, but they do have a duty to implement reasonable measures to protect patrons from criminal acts when those acts are reasonably foreseeable.3 The foreseeability of the crime risk on the defendant's property and the gravity of the risk determines the existence and extent of the defendant's duty.4 Even where a business owner owes a duty of reasonable care to protect patrons from criminal acts of third parties, that duty can be discharged by summoning the police at the time the proprietor knows or should reasonably anticipate that the third person poses a probable danger.5 In a lawsuit filed following an incident on the premises of a business, the

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3 Posecai, 752 So.2d at 766.

4 Bezet v. Original Library Joe's, Inc., 838 So.2d 796, 801 (La.App. 1 Cir. 2002).

plaintiff has the burden of establishing the duty that a defendant business proprietor owed to him under the circumstances, and also that the owner breached that duty. 6

A business proprietor owes his patrons the duty to provide a reasonably safe place. 7 A proprietor must exercise reasonable care to protect his guests from harm at the hands of an employee, another guest, or a third party. 8 Should a disturbance or a likely disturbance manifest itself, the proprietor, if time allows, must attempt to prevent injury to his patrons by calling the police. 9 Also, should the business owner or manager become aware of impending or possibly impending danger, he must warn his patrons of the potential danger. It is only when the proprietor has knowledge of, or can be imputed with knowledge of, the third party’s intended conduct is the duty to protect invoked, requiring either of these actions.


When an incident occurs involving injury to a patron from the result of the acts of another person or party, Louisiana courts employ a “duty-risk” analysis of the circumstances surrounding the incident and conduct a jurisprudentially-developed balancing test to determine whether the business owner should be held at fault. There is no duty to protect from the unforeseeable and unprecedented criminal acts of third parties at the premises. However, liability may be imposed where the proprietor fails to implement reasonable measures to protect patrons from criminal acts that are reasonably foreseeable. The following line of cases from the Louisiana Supreme Court and Courts of Appeal provide context to this analysis.

In Posecai v. Wal-Mart Stores, Inc., the Louisiana Supreme Court adopted the rule of most state supreme courts across the country: although 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. 10 However, the Posecai court emphasized that there is generally no duty to protect others from the criminal activities of third persons. 11 This duty only arises under limited circumstances, and only when the criminal act in question was reasonably foreseeable to the owner of the business. 12 The Posecai court reasoned that while businesses are arguably in the best position to appreciate the crime risks that are posed

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6 Morales, 27 So.3d at 917, citing Bezet, 838 So.2d at 801.
8 Id. at 307.
9 Id.
10 752 So.2d 766 (La. 1999) (emphasis added).
11 Id. (emphasis added).
12 Id.
on their premises and to take reasonable precautions to counteract those risks, businesses are
generally not responsible for the endemic crime that plagues our communities, a societal problem
that even our law enforcement and other government agencies have been unable to solve.\(^\text{13}\)

In *Posecai*, the plaintiff filed suit against Wal-Mart arising from an incident where she
was robbed at gunpoint in the store’s parking lot. The Court conducted a careful consideration
of the previous incidents of predatory offenses on the property, which revealed that there was
only one other crime in the store’s parking lot, a mugging three years earlier was perpetrated
against a delivery man, that was even closely similar to the crime of which Ms. Posecai was a
victim.\(^\text{14}\) Further, the Court noted that although the neighborhood bordering the store was
considered a high crime area by local law enforcement, the foreseeability and gravity of harm in
the store parking lot remained slight.\(^\text{15}\) Accordingly, the Supreme Court concluded that there
was no duty for the store to provide security patrols in its parking lot or to implement lesser
security measures.

To determine when business owners owe a duty to provide security for their patrons, the
Supreme Court in *Posecai* adopted a balancing test which is applied by Louisiana courts in
similar cases. 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. In such a case, the plaintiff has the burden of establishing the duty the
defendant owed under the circumstances.

The Louisiana Supreme Court again addressed the duty of a business owner to take
security precautions to protect its patrons from criminal acts of third parties at nighttime in
*Pinsonneault v. Merchants & Farmers Bank & Trust Co.*\(^\text{16}\) In *Pinsonneault*, a young man was
robbed and killed while making a night deposit at the bank. The Court examined the history of
the area and the lack of similar incidents and held that because the bank’s night deposit
customers “faced a very low crime risk,” the bank “did not possess the requisite foreseeability
for the imposition of a duty to employ heightened security measures for the protection of patrons
of its night depository.”\(^\text{17}\)

\(^{13}\) *Id.* at 768.
\(^{14}\) *Id.* at 768-769.
\(^{15}\) *Id.* at 769.
\(^{16}\) 816 So.2d 270 (La. 2002).
\(^{17}\) 816 So.2d at 277.
In *Taylor v. Stewart*, a woman was assaulted by her former boyfriend in the parking lot of a bar, and both had been patrons of the bar shortly before the attack occurred. The court held the bar proprietor had no duty to protect her from such an attack, despite a history of past troubles between the plaintiff and her attacker, because neither the proprietor nor its employees had any prior knowledge that the former boyfriend might physically harm the plaintiff. The court drew no distinction between injury inflicted on a guest by another guest and injury inflicted on a guest by a stranger, stating:

> As set forth earlier, while a proprietor must exercise reasonable care to protect his guests from harm at the hand of an employee, another guest, or a third party, reasonable care embraces an attempt to prevent injury to his patrons by calling the police, if time allows, or warning the patron. However, as to criminal acts performed by third parties, the general duty of reasonable care does not extend to protecting patrons from the unanticipated criminal acts of third parties. Only when the proprietor has knowledge of, or can be imputed with knowledge of, the third party’s intended conduct is the duty to protect invoked.

The *Taylor* court also noted, however, that if a business owner or manager becomes aware of impending or possibly impending danger, he must warn his patrons of the potential danger.

> Liability is not imposed if the incident occurs very quickly and there is no evidence that the proprietor knew or should have known of the impending threat to the patron’s safety. In *Fredericks v. Daiquiris & Creams of Mandeville, LLC.*, a bar patron brought an action against the bar proprietor arising out of injuries he sustained after other bar patrons allegedly followed him out of the bar to the parking lot, where they beat him severely. The court distinguished the circumstances in *Fredericks* to other cases where liability was imposed, finding no duty to protect the patron from assault by the other bar patrons because there was no history of problems at the bar, no history of problems between the patrons involved in the altercation, no actions from which the bar employees or any other observer could conclude that trouble was imminent and no time or opportunity to warn the plaintiff or prevent the attack on him once it began.

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18 672 So.2d 302 (La.App. 1 Cir. 1996).
19 Id.
20 Id. at 307. See, *Johnston v. Fontana*, 610 So.2d 1119 (La. App. 2 Cir. 1992)(finding restaurant did owe a duty to prevent injury to the plaintiff, a bystander, who was injured during a fight between two patrons, after thirty minutes of verbal argument and several warnings from restaurant employees.)
21 906 So.2d 636 (La App. 1 Cir. 2005).
22 Id. See also, *Delgado v. Laboucherie, Inc.*, 508 So.2d 956 (La. App. 4 Cir. 1987)(finding no breach of duty to plaintiff bar patron where another patron harassed plaintiff by shouting obscenities on the dance floor for approximately twenty minutes, arguing with plaintiff at the bar, and struck the plaintiff with his fists); *Silvio v. Pharaoh’s Palace*, 517 So.2d 185 (La. App. 1 Cir. 1987)(affirming the involuntary dismissal of plaintiff’s case arising out of a bar brawl lasting approximately one minute
In *Turley v. Straughn*, the plaintiff brought an action against a bar and its owner alleging that he was at the café when “suddenly and without warning, an unknown white male . . . and invitee of the Owners, struck (him) in the face.”23 The plaintiff’s deposition stated that he was dancing with several friends when unidentified male patrons began dancing provocatively behind some of the females in the plaintiff’s group on three separate occasions. The plaintiff’s friend asked the other men to leave, and the physical altercation immediately began.24 The plaintiff estimated that the assailants attacked him for a couple of minutes, and that the entire incident unfolded in ten minutes. The bartender summoned the police “immediately after the commotion began.” The Fourth Circuit affirmed summary judgment in favor of the bar, finding that the plaintiff did not establish that the bartender knew or should have known of the assailants’ intended conduct.25 Even if the dancing incidents lasted fifteen minutes, the alleged provocative dancing was not sufficient to alert an owner or employee that a dangerous situation could develop. Plaintiff did not complain to the bartender, and the bartender stated that there was no argument or warning that a fight would occur.26 In these circumstances, no liability was imposed on the bar owner for the criminal acts that injured the plaintiff.


Store security often acts in concert with off-duty police officers acting as security guards, as well as on-duty police officers, in response to various situations. Additionally, off-duty police officers, in full uniform, work as private security guards for businesses. Potential claims or liability under civil rights laws are implicated where incidents occur that involve the actions of such individuals in uniform. The store owner may also be held vicariously liable for the actions of its security personnel, depending on the circumstances.

The statutory basis for federal civil rights claims, 42 USC §1983, in pertinent part provides as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities

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23 694 So.2d 532 (La. App. 4 Cir. 1997).
24 *Turley*, 694 So.2d at 534.
25 *Id.* at 534-535.
26 *Id.* at 534.
secured by the Constitution and laws, which shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress…

A suit alleging a violation of §1983 can be brought in the United States District Courts of this State as well as any State District Court. Those actions first filed in State Court are potentially removable to a United States District Court by the defendant, depending upon the facts alleged on the face of the plaintiff’s lawsuit.

In those situations where a non-law enforcement officer, such as a private security guard, acts in concert with a police officer, acting under color of law, the courts apply a nexus-type test to determine when a private enterprise or private security officer may be subject to constitutional liability for a civil rights violation. The courts have held that in order to subject the merchant through its employees to liability, the plaintiff had to demonstrate that the police and store employees were acting in concert, meaning the private merchant and the police had a customary plan which result was the detention of a customer. Should the requisite nexus be established, then the merchant is subjected to liability.

The typical situation arises where the police and merchant have maintained a pre-conceived policy, for instance by which shoplifters would be arrested based solely on the complaint of the merchant. The application of that doctrine has been refined to provide that a merchant is not a state actor unless the conduct on the part of a guard or officer giving rise to the claim deprivation of rights occurred based solely on designation of suspicion by the merchant and was not accompanied by an independent investigation of the officer. Where the officers have a policy of conducting independent investigations to make determinations to arrest and do not customarily rely on the merchant’s accusations, then the merchant is not likely to be found a state actor and subjected to liability under §1983.

In *Morris v. Dillard Department Stores, Inc.*, 277 F.3d 743 (U.S. 5th Cir. 2001), the Court, in addressing the premises owner’s liability under §1983, found that a merchant will not be subjected to §1983 liability unless an officer has failed to perform an independent investigation. Evidence of a proper investigation by an officer may include such indicators as an officer’s interview of an employee, independent observation of a suspect, and the officer writing his own report. Should the court find that the officer performed an independent investigation of the alleged crime, the premises owner should not be found to be a state actor and therefore subject to liability under §1983.

In addition to those cases arising out of shoplifting, private non-law enforcement security personnel are often requested by law enforcement to render assistance, especially in those situations where the officer is being overwhelmed by the force of the suspect.

Louisiana Code of Criminal Procedure Articles 219 and 220 provide a statutory basis for both the authorization of an officer to request assistance and the guidelines by which the private security officer should act.
Louisiana Code of Criminal Procedure Article 219 provides as follows:

A peace officer making a lawful arrest may call upon as many persons as he considers necessary to aide him in making the arrest. A person thus called upon shall be considered a peace officer for such purposes.

Louisiana Code of Criminal Procedure Article 220 provides as follows:

A person shall submit peaceably to a lawful arrest. The person making a lawful arrest may use reasonable force to affect the arrest and detention, and also to overcome any resistance or threaten resistance of the person being arrested or detained.

Security personnel who act pursuant to an officer’s request for assistance do not subject themselves to §1983 liability when acting pursuant to Code of Criminal Procedure Articles 219 and 220 unless it is determined that there was no independent investigation an action being performed by the officer under the circumstances. Notwithstanding, where a private security officer is assisting a law enforcement officer pursuant to a request, the security officer must use reasonable force under the circumstances existing at the time.

In an unpublished decision in *Latrisha Williams on behalf of Justin Addison and Cedric Addison v. Wal-Mart Louisiana, L.L.C.*, 2010-0024 (La. App. 1st Cir.10/29/2010), the court granted summary judgment on behalf of Wal-Mart, finding that its security officers assisting uniform officers in an attempt to subdue the deceased plaintiff were not liable for his death when he sustained a fatal heart attack while being subdued. The testimony reflected Mr. Addison’s violent and strenuous efforts to resist arrest, the officer’s repeated commands for him to stop resisting, and the absence of evidence that the officers and employees’ actions were an unreasonable use of force.

**D. Vicarious Liability for Acts of Security Personnel**

Vicarious liability may attach to a business owner if its employee is acting within the ambit of his/her assigned duties and also in furtherance of the employer’s objective. Generally speaking, an employee’s conduct is within the course and scope of his employment if the conduct is of the kind he is employed to perform, occurs substantially within the authorized limits of time and space, and is activated at least in part by a purpose to serve the employer. It is likely that a merchant would be vicariously liable for the negligence of its employee, even if the employee is an off-duty police officer. However, if the officer’s actions could not be legally performed by a private citizen, the officer could then be viewed as an employee of the sheriff’s department in addition to the store, thus exposing them both to comparative liability.

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27 *Duplantis v. Dillard’s Department Store*, 2002-0852 (La. App. 1st Cir.5/9/03), 849 So.2d 675.
The principle of vicarious liability is codified in Louisiana Civil Code article 2320, which provides that an employer is liable for the tortious acts of its employees “in the exercise of the functions in which they are employed.” In interpreting the language, “in the exercise of the functions in which they are employed,” Courts have held that this language is the codal expression of the usual phrase, “in the course and scope of the employment.” To establish vicarious liability for an employee’s negligence pursuant to Article 2320, it must be shown that the employee’s general activities at the time of the tort were within the course and scope of his employment. While the course of employment test refers to time and place, the scope of employment test examines the employment-related risk of injury.

Stated another way, for an employer to be vicariously liable for the acts of its employee, the conduct must be so closely connected in time, place, and causation to his employment duties as to be regarded as a risk of harm fairly attributable to the employer’s business, as compared with conduct instituted by purely personal considerations entirely extraneous to the employer’s interest. Vicarious liability will attach in such a case only if the employee is acting within the ambit of his assigned duties and also in furtherance of his employer’s objective.

The justification for assigning vicarious liability to the employer is based on the foundation that “a business enterprise cannot disclaim responsibility for accidents that could be considered characteristic of its activities.” The burden of a court in evaluating whether an employer should incur the vicarious liability for the tort is to determine “if the particular accident is part of the more or less inevitable toll of a lawful enterprise.” The test is sometimes described as being whether or not the employee “is acting within the ambit of his assigned duties and also in furtherance of his employer’s objective.”

The Louisiana Supreme Court listed the following factors for inquiry into whether the tortious act was: 1) primarily employment rooted, 2) reasonably incidental to the employee’s duties, 3) occurring on the employer’s premises, and 4) occurring during the hours of employment. The LeBrane court instructed that the factual circumstances to be examined to determine if vicarious liability is appropriate include:

30 *Cooper v. Reed*, 02-0575 (La. App. 1st Cir.2/14/03), 845 So.2d 411, 2003 WL 343209.
31 *Baumeister v. Plunkett*, 95-2270 (La.5/21/96), 673 So.2d 994, 996.
32 *LeBrane v. Lewis*, 292 So.2d 216, 217-18 (La.1974); *Baumeister*, 673 So.2d at 996.
33 *Baumeister*, 673 So.2d at 996.
34 *Richard v. Hall*, 2002-0366 (La. App. 1st Cir. 2/14/03) 846 So. 2d 433.
35 *Id.*
36 *Duplantis v. Dillards*, 2002-CA-0852 (La. App. 1st Cir. 5/9/03); 849 So.2d 675.
Payment of wages by the employer, the employer’s power of control, the employee’s duty to perform the particular act, the time, place, and purpose of the act in relation to serving the employer, the relationship between the employee’s act and the employer’s business, the benefits received by the employer from the act, and the reasonable expectation of the employer that the employee would perform that act.  

In *Duryea v. Handy*, 700 So.2d 1123 (La. App. 4 Cir. 10/3/97), an off-duty sheriff’s deputy hired by a Mardi Gras parade organization struck an off-duty police officer in the face with his arm as he threw a bag of beads into the crowd. The sheriff’s deputy was working as security for the parade through the Sheriff’s office, on what is known as a ‘paid detail. In finding no liability on the part of the sheriff’s office, the court stated as follows:

[The sheriff’s deputy’s] actions—responding to the wishes of krewe guests while on the parade route—are far more tied to his employment by the Gentilly Carnival Club than his employment by the Sheriff’s Office. Although the complicated relationship between the two entities makes a determination difficult, we must hold the Gentilly Carnival Club to be [the deputy’s] sole employer during the time in question. As a result, we will not hold the Sheriff’s office liable for damages incurred by [the off-duty deputy] in this incident.  

In *Duplantis v. Dillard’s Department Store* the court held that the sheriff was not vicariously liable for the negligence of the off-duty deputy, who served as the store’s security guard, in the action brought by a store employee who was injured during deputy’s detainment of a shoplifting suspect. In so holding, the Court focused on whether the officer’s “specific duties and actions in [the] situation were rooted in his law enforcement function as a TPSO deputy or whether they were actions that could also have been performed by any other Dillard’s employee by virtue of that employment relationship.” Relying on Article 215 of the Code of Criminal Procedure, which allows for the detention and arrest of shoplifters by shopkeepers, the Court found that the officer’s actions, “although…traditionally carried out by a law enforcement officer…are not exclusively relegated to a police officer.” In finding that the Sheriff was not liable for the officer’s actions, the Court further emphasized that the officer’s actions were “reasonably incidental to” the duties of both a law enforcement officer and a merchant’s employee, the sheriff’s office derived no real benefit from deputy’s employment with store, and the sheriff’s office did not require deputy to work on his own time as a security guard for store.

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38 700 So.2d at 1128.
39 849 So.2d at 680.
40 849 So.2d at 681.
The case of *Luccia v. Cummings*, 646 So.2d 1142 (La. App. 5 Cir. 11/16/94) involved a uniformed levee district police officer hired by a nightclub as a bouncer and peace-keeper. The plaintiff, a nightclub employee, claimed that he had been injured when the police officer physically attacked him. The court denied liability to the plaintiff, holding that none of the *LeBrane* factors was satisfied and that the police officer was outside the scope of his employment as a police officer, relieving the levee board of vicarious liability. The court likewise found no basis for primary liability.

The **dual employment doctrine** allows both the borrowing and lending employer to be held liable for the torts of the employee. The doctrine of enterprise liability holds that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities. The liability of an employer is based not so much on the employer’s control of the employee’s actions, but rather on the concept of enterprise liability.

Enterprise liability for the actions of an employee requires consideration of the activities that the employer is involved in. If the activities that both employers are involved in encompass the tortious activities of the employee, then both employers may be held liable. If only one employer is involved in the activities out of which the employee’s tortious conduct arises, then only that employer may be held liable.

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41 646 So.2d at 1144.

42 *Morgan v. ABC Mfr.*, 710 So.2d 1077, 1082 (La. 1998); *Blair v. Tynes*, 621 So.2d 591 (La.1993).

43 Id. at 1083.

44 Id. at 1084.

45 Id. at 1083.