The Voice of the Defense Bar

Customer Connection

The newsletter of the Retail and Hospitality Committee

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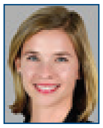

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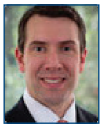

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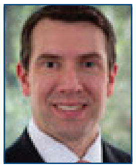
In This Issue

Letter from the Editors

By Shawn Libman and Ryan Blazure



Welcome to the Fall 2018 newsletter! We have lots of great articles and news to share with you in this edition.

Did you know we have multiple ways to engage with our community online? Follow on LinkedIn Austin Smith and Chantel Lafrades, who are sharing past articles published by the Retail and Hospitality Committee. Our past articles are a great source of information and we encourage you to be part of the conversation.

We also have an online forum to engage with our members. Check it out by clicking "My Community" at www.dri.org. You can sign up to receive live email updates or get daily/weekly digest emails from the online forum. Recent topic discussions include the upcoming DRI Annual Meeting, Committee sponsored webinars, experts, changes in law, networking and practice questions.

Our Community is also very charitable! Lana Olson is leading the charity efforts by organizing a Silent Auction and Raffle at the Annual Meeting on October 18. You can purchase tickets to win great items like an IPad, FitBit, Oscar de la Renta Jewelry, a Burberry Tote, Commemorative and Signed Footballs and Baseballs, and even a South African Safari for Two! That is just a few of the many amazing items available. Email Lana Olson (lolson@lightfootlaw.com) to purchase tickets and click here for more information about the auction and all the prizes,

The *Customer Connection* newsletter's mission is to cover all the latest topics that can benefit your daily practice. Is there something brewing that you want to know more about? Any recent experiences that your colleagues could benefit from? Do you have a great win that should be celebrated? Let us know! We would love to cover it in our next issue. Contact us at Shawn.Libman@bowmanandbrooke.com and rblazure@tthlaw.com to make it happen.

Thank you to the entire Newsletter Committee for their hard work. We also want to thank all of the volunteer authors. If you enjoyed one of their articles please do not hesitate to reach out and tell them! I am sure they would enjoy hearing from you.

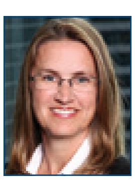
And don't forget…please share this Newsletter with your clients! Now go enjoy reading those articles!

Shawn Libman is a partner in the Miami, Florida, office of Bowman and Brooke LLP, where her practice focuses mainly on premises liability and general liability defense for some of the most well-known retailers and consumer product manufacturers in the country. She has second-chaired trials in both state and federal court and is involved with all aspects of litigation, from discovery and case evaluation to motion practice and mediation.

Ryan C. Blazure is a partner with the firm of Thomas, Thomas & Hafer LLP in Wilkes Barre, Pennsylvania, practicing in all manner of civil litigation and workers compensation. He is proud to personally represent insured persons and national retailers, as well as commercial and utility interests. He is admitted to practice before the Commonwealth of Pennsylvania, the United States District Court for the Middle District of Pennsylvania, the United States District Court for the Western District of Pennsylvania, the United States Court of Appeals for the Third Circuit, and the United States Supreme Court.

Leadership Opportunities: Become an SLG Chair

By Stacy Fulco



The DRI Retail and Hospitality Committee is expanding its SLG program and there are still a few chair positions available. As a chair, you will assist with running the SLG and contribute to the annual seminar held in May. Every chair position also puts you on the Steering Committee of the Retail and Hospital-

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ity Committee. Please email Stacy Fulco at sfulco@cremer-spina.com if you are interested in filling one of these positions.

Available Positions

- Cybersecurity / Technology - Marketing, Publications & Seminar Chairs
- Alcohol / Dramshop - Marketing & Publications Chairs
- Employment - Publications Chair
- Food Safety - Marketing & Publications Chairs
- Insurance Coverage - Marketing, Publications & Seminar Chairs
- Hotels & Resorts - Marketing & Seminar Chairs
- Leasing & Real Estate - Marketing, Publications & Seminar Chairs

In-House Counsel Chair Positions Available

- Premises
- Negligent Security
- Franchising, Cybersecurity
- Amusement
- Alcohol/Dramshop
- Employment
- Food Safety
- Insurance Coverage
- Hotels/Resorts

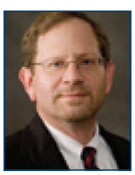
If you know someone who works in-house who may be interested in one of these positions, please contact them and Stacy Fulco (SFulco@cremerspina.com).

Stacy D. Fulco is a partner at Cremer Spina, LLC in Chicago. Her practice focuses on the representation of retail, restaurant and hospitality companies through trial and appeal. She also oversees security related cases on a national level. Ms. Fulco is an active DRI member and the author of a retail, restaurant and hospitality law blog (www.stacyfulco.com). Ms. Fulco also provides training to companies and TPAs in areas such as security, investigations, discovery, negotiations and other aspects of claim handling. Ms. Fulco was the Program Vice Chair for the 2018 DRI Retail and Hospitality Seminar.

Feature Articles

Third-Party Criminal Acts with a Firearm: Beyond Foreseeability

By Mark W. Wortham and Jason T. Vuchinich



A truly unfortunate litigation trend exists within the retail and hospitality industry: major verdicts and settlements deriving from third-party criminal acts, particularly those involving the intentional misuse of a firearm. While, overall, violent crime is on a markedly downward decline, the most recent data compiled over an aggregate analysis of gun deaths from 2012 to 2016 estimates that in the United States there are approximately 12,246 firearm homicides per year. Centers for Disease Control and Prevention. WISQARS Fatal Injury Reports. Data reflect a 5 year average (2012-2016) of gun deaths by intent. Gun deaths have significantly impacted the Retail and Hospitality industry, with relatively small-scale incidents to unfathomably tragic mass shootings—and a media attraction to these horrible incidents. The motives for these shootings vary widely, but the impact upon the Retail and Hospitality industry is certainly worth exploring.

It is well known that on June 12, 2016, a gunman entered the Pulse night club in downtown Orlando, Florida, killing 49 people and wounding 53 others. Then on October 1, 2017, a shooter killed 58 people who were attending an outdoor concert headlined by country star Jason Aldean at the Mandalay Bay in Las Vegas, Nevada. Both of these tragedies resulted in large-scale lawsuits against the owners of these establishments.

In the Orlando incident, the plaintiffs allege that Barbara and Rosario Poma, owners of the Pulse night club, did not take reasonable steps to prevent a person with a gun from entering the club, negligently securing that club and, thus, leading to the shooting. Similarly, hundreds of victims from the Las Vegas shooting filed suit against MGM Resorts International, the owner of Mandalay Bay, alleging inadequate security policies, improper staff training, inadequate property surveillance and failure to timely respond to the incident. In response, entities involved pre-emptively filed suit against other persons who could be identified as plaintiffs in Federal court, citing the Support Anti-terrorism by Fostering Effective Technologies Act of 2002, found at 6 U.S.C. §§441-444 (the "SAFETY Act"). The SAFETY Act provides liability protections for facility owners and operators relating to their implementation and deployment of "qualified anti-terrorism technologies" in defense against, response to, or recovery from an "act of terrorism." The effect of the raising of the SAFETY Act as a defense remains to be seen in this specific case.

However, exploration of the issue should not be limited to "mass" shootings, as similar litigation occurs in the Retail and Hospitality industry nationwide. In May of 2014, Motel 6 was hit with a $5.1 million verdict after a shooting death in a hotel room in Albany, Georgia. In November 2014, a $2.1 million verdict was entered against a convenience store owner in Pittsburgh, Pennsylvania, after the plaintiff was shot several times in the parking lot of the premises. *John Stapas v. Giant Eagle, Inc., t/d/b/a Getgo*, 33 Pa. J.V.R.A. 1:C2. Then, in January 2015, a $3.68 million verdict was awarded against a Country Inn & Suites in downtown Atlanta, Georgia where a would-be hotel guest was shot while he was attempting to check in. In March 2015 in Seattle, Washington, a $4.2 million verdict was awarded against the owners of Bellevue Square's nightclub for a shooting death of a patron after another guest bypassed security with a firearm. *Estate of Deshawn Milliken; Destiny Milliken v. Brewhaha, LLC, d/b/a Munchbar*, 15 Id.Verd.Stlmnt.Rpts. 74.

As a facility owner or operator, it is critical to understand just what the courts interpreting these cases focus upon. The primary concentration of opinions addressing negligent security claims against Retail owners, hotels, nightclub or bar establishments is whether the criminal act which occurred was foreseeable. The two most common major analytical approaches are the totality of the circumstances test and the existence of prior similar incidents test. Erin G. Young, *Causes of Action Against Tavern Owners, Restaurants, and Similar Businesses for Injuries Caused to Patrons by the Criminal Acts of Others*, Cause of Action Second Series, Updated July 2018.

The totality of the circumstances analysis encompasses the nature, condition and location of the defendant's premises. *Traynom v. Cinemark USA, Inc.*, 940 F. Supp. 2d 1339, 1356 (D. Colo. 2013). This is a broad test which allows plaintiffs to bring forth many forms of evidence to argue the breach of the duty owed by a property owner. On the other hand, the existence of prior similar incidents test focuses upon the existence of crimes of a similar nature on or near the premises of the establishment. *Walker v. Aderhold Properties, Inc.*, 303 Ga. App. 710, 712, 694 S.E.2d 119, 121 (2010). This means that crimes of a similar nature create foreseeability for those same crimes; but, in the context of shooting-related crimes, the presence of previous non-shooting related crimes on or near the premises cannot generally create foreseeability for shootings. *Higgins v. Holiday Inn and Conference Ctr.*, No. L–1835–12, 2017 WL 1228848 (N.J. Sup. Ct. App. Div. Apr. 4, 2017). It should be noted, though, that a pattern of generalized criminal activity has been taken into account for the foreseeability analysis due to its apparent relevance to a so-called "atmosphere of violence." *Magers v. Diamondhead Resort, LLC*, 224 So. 3d 106 (Miss. Ct. App. 2016).

Furthermore, a foreseeability analysis often concentrates upon the existence of violent crime in the area *near* the establishment. Courts note that such foreseeability can be proven through five factors: proximity, publicity, recency, frequency and similarity. *Park v. Exxon Mobil Corp.*, 429 S.W.3d 142 (Tex. 2014). Focused on more closely are the occurrences of arrests or reports of similar crimes in the days, weeks or months leading up to the incident at issue. However, the foreseeability can be applied in a short-term context as well. For example, in *Mu v. Omni Hotels Mgmt. Corp.*, a case from 2018, the Plaintiff was brutally beaten by patrons in the lobby of the defendant's hotel. While there was no evidence of prior incidents at or near the hotel, the incident was deemed foreseeable because on the evening of the incident, the hotel had observed rowdy behavior from certain patrons and even removed them from the property once before. *Mu v. Omni Hotels Mgmt. Corp.*, 882 F.3d 1 (1st Cir. 2018). Such a finding is especially problematic for property owners in the Retail and Hospitality industry because an entirely novel violent criminal act could arguably impute liability to the property owner for a subsequent, yet remotely similar, act.

Another key factor of which facility owners and operators should be aware is constructive knowledge. Courts have taken into account not only whether a property owner actually *knew* of previous similar incidents or other criminal activity, but whether the property owner *should have known* of the same. Kroger Co. v. Knox, 98 So. 3d 441 (Miss. 2012); *Bass v. Gopal, Inc.*, 680 S.E.2d 917 (S.C. Ct. App. 2009); *E.H. v. Overlook Mountain Lodge*, 638 So. 2d 781 (Ala. 1994). This constructive knowledge can be dangerous for property owners, as ignorance is not a viable defense. Regardless of what a property owner is actually aware, if certain criminal acts are occurring at or “near” their premises, liability can be imputed simply based upon an argument about something of which they should have known. As a facility owner or operator, this legal landscape not only poses many risks, but it begs multiple questions: what are the scope of factors that can be considered in the totality of the circumstances test, how many previously similar incidents constitute a sufficient amount to make a particular event foreseeable and what can one do on a practical level to mitigate legal risks and create a safe environment for patrons?

From the outset, a facility owner or operator should become familiar with the applicable legal test(s) and legal analyses applied in their jurisdiction. Beyond this, fostering and cultivating a working relationship with local law enforcement is highly advantageous. The exchange of information with local law enforcement will keep a facility owner or operator apprised of all criminal occurrences and developments near their premises. Additionally, such a positive relationship can encourage a police presence near the establishment, acting as an effective crime deterrent. Such activities can even be coupled with outreach to local community watch groups and other civilian-based anti-crime initiatives.

Another crucial practice for facility owners and operators in the Retail and Hospitality industry is to seek a pervasive corporate culture of awareness, prevention and diligence toward identifying and, where possible, preventing criminal activity on or near their premises. Such a culture can be founded in the development and implementation of a systematic employee training and reporting program. Of similar benefit, clear and decisive company policy concerning the monitoring, detection and reporting of criminal and other suspicious activity should be explored as well. Additionally, the application of physical security measures on and near the premises such as lighting, fencing, signage, security checkpoints for nightclubs and bars, security personnel and cameras are without mention important. Lastly, but not conclusively, it is crucial that these implementations and methods of practical risk mitigation not only be installed, but that they be maintained and consistently monitored and evaluated over time.

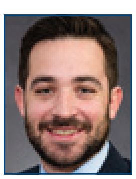
While this article by no means provides an exhaustive analysis of applicable law in the context of liability attributable to Retail and Hospitality facility owners and operators stemming from third-party criminal acts, it is the authors’ hope that it provides a starting point for analysis of more recently discussed trends in the industry. It is encouraged that business and property owners reach out to their local counsel regarding the laws and regulations in force in their jurisdictions. There is no method of absolute immunity from liability for business owners in the Retail and Hospitality industry related to third party criminal acts, but a thoughtful and thorough business owner who diligently implements appropriate measures for safety can effectively mitigate their risk and potential exposure.

Mark W. Wortham is a partner in Hall Booth Smith’s office in Atlanta, Georgia. Mark is a veteran attorney who practices in a broad range of litigation matters, but specializes in the defense of retail establishments, apartment complexes and hotels against negligent security matters involving third-party criminal acts. He can be reached at 404-954-5000 or mwortham@hallboothsmith.com.

Jason T. Vuchinich is an associate in Hall Booth Smith’s office in Atlanta, Georgia. His practice predominantly involves the defense of general liability matters, with a concentration upon the needs of retail and hospitality businesses and property owners against negligent security matters. He can be reached at 404-586-6634 and jvuchin@hallboothsmith.com.

Best Practices for Protecting the Franchisor’s Brand While Mitigating Risk from Employment Claims

By Kevin J. O’Connor and Joseph Vento



In recent decades, franchising has developed as one of the fastest-growing and most popular business models. A 2016 PwC study concluded that there were 801,000 franchises in the United States with 9 million in associated jobs, all of which contributed $541 billion toward the national gross domestic product. PwC, *The Economic Impact of Franchise Businesses*, Vol. IV, 2016. The franchising model's success is directly attributable to its focus on creating a standard public image and the insistence on uniformity and consistency by franchisees. It is this control that plaintiffs' lawyers throughout the country have leveraged to successfully assert employment claims directly against franchisors for personnel decisions made by franchisees.

Direct employment claims against franchisors have been slowly growing in recent years, due in large part to the expansion of the "joint employer" theory of liability. Using that theory, some agencies and courts have determined that the level of control that the franchisor exerts over its franchisees is enough to treat both the franchisor and franchisee as employers responsible for certain employment claims such as discrimination and retaliation. Because the law is far from uniform or clearly defined, franchisors are effectively left to "thread the needle" by creating a comprehensive franchise system designed to protect their intellectual property and proprietary systems, while also carefully defining franchisee responsibility for personnel and human resource decision making so as to insulate themselves from individual employment claims.

This article provides an overview of the joint employer theory as it has been used against franchisors. We describe the reaction to these legal developments on the part of scores of state legislatures to enact statutes designed to protect franchisors, and we conclude with some suggested best practices that may help franchisors by mitigating or eliminating risk of these employment claims.

The Franchise Business Model

In many ways, the key to franchising (uniformity in operations) is its Achilles' heel in defending employment claims. Franchising is premised on the idea of uniformity in appearance, business practices, and the overall scope of services offered to the public. Franchisors often reserve the right to perform inspections at each franchise location to verify franchisees' compliance with certain contractual obligations and to protect the brand and the associated intellectual property.

Franchisors often develop comprehensive training programs, business models, and marketing plans that are used on a system-wide basis, both to ensure uniformity and to enhance profitability often across multiple, geographically dispersed locations.

The Expansion of Joint Employer Theory and Its Potential Effect on Franchisors

Broadly stated, joint employment can exist when an employee is held to be "employed" by two (or more) employers to the extent that each "employer" may be held responsible, both individually and jointly, for any violations of law. It is becoming more and more common for franchise employees asserting employment claims to sue both franchisor and franchisee, claiming to be jointly employed by both.

The "joint employer theory" has evolved over decades, and the factors for consideration differ, depending on the statute or theory of recovery that is implicated, and the particular jurisdiction involved. In many ways, a franchisor's ability to defend itself will rest on where the suit is filed.

For instance, proving the elements of joint employer status in the Second Circuit will differ depending on whether the claim is for wage-and-hour violations or discrimination. In 1984, the court placed an emphasis on whether the putative employer had actually exercised "formal control" over the worker in question. *Carter v. Dutchess Community College*, 735 F.2d 8 (2d Cir. 1984). Almost 20 years later, the court *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 72 (2d Cir. 2003). loosened the standard by stating that satisfying the "formal control" test was "sufficient" but not "necessary" to showing joint employment because the Fair Labor Standards Act (FLSA) defines employment more broadly. *Id*. at 71.

In the context of Title VII claims, on the other hand, courts in the Second Circuit have considered the putative employer's control over (1) hiring, (2) firing, (3) discipline, (4) pay, (5) insurance, (6) employment records, and (7) employee supervision. *Donahue v. Asia TV USA Ltd.*, 208 F. Supp. 3d 505, 518 (S.D.N.Y. 2016).

Another approach by employees seeking to hold a franchisor liable has been to allege that the franchisor and franchisee are part of a "single enterprise," entitling the plaintiff to relief from both or either entity. *Arculeo v. On-Site Sales & Marketing, LLC*, 425 F.3d 193, 198 (2d Cir. 2005). This theory is often used when a plaintiff can claim that the franchisor and the franchisee are both run by corporations with common ownership and management. In the Second Circuit, courts will look for (1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control. *Cook v. Arrowsmith Shelburne, Inc.*, 69 F.3d 1235, 1240 (2d Cir. 1995).

The law in the Third Circuit is not well-settled, but the courts there appear to follow the Ninth Circuit's approach (*see Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983)), and apply a set of four factors, which focus on actual control over day-to-day personnel decision making. *See Thompson v. Real Estate Mortg. Network*, 748 F.3d 142, 149 (3d Cir. 2014); *Enterprise Rent-A-Car Wage & Hour Employment Practices Litig.*, 683 F.3d 462, 469 (3d Cir. 2012); *see also Graves v. Lowery*, 117 F.3d 723, 727 (3d Cir. 1997) (analyzing joint employer theory in Title VII case); *Faust v. Tuesday Morning, Inc.*, 808 F.3d 208 (3d Cir. 2015) (applying theory in context of claims of systemic, race-based discrimination). The Fourth Circuit's recent opinion on this topic has been the subject of much critique over its exceedingly broad interpretation of who is an "employer" for purposes of the FLSA. S*alinas v. Commercial Interiors*, 848 F.3d 125 (4th Cir. 2017). The court first denounced the trial court's focus on the actual written agreement between the general contractor and its subcontractor as non-dispositive of the joint employment issue, and then rejected various tests employed by other circuits. The Fourth Circuit instead created its own test, which considers whether the putative employer shares control, regardless of whether that control is actually exercised. Notably, the Fourth Circuit's recent holding does not line up with its previous approach of employing a, "hybrid test" of the economic realities test in the context of Title VII claims. *Butler v. Drive Auto. Indus. of Am., Inc.*, 793 F.3d 404, 409, 414 (4th Cir. 2015). As for the balance of the circuits, for the most part, each has adopted one of the above tests, or some hybrid thereof.

The *Browning-Ferris* Decision and Its Reversal

This article could not be considered complete without some mention of the Obama era decision of the National Labor Relations Board (NLRB) in *Browning-Ferris Industries of California* (*Browning-Ferris*), 362 NLRB No. 186 (Aug. 27, 2015).

Under the rule of joint employer liability articulated by the NLRB in *Browning-Ferris*, franchisors could face liability for reserved, "indirect," or "potential" control over the employees of another company (*e.g.*, a franchisee). The decision significantly expanded franchisors' potential liability for matters related to their franchisees' employees (including collective bargaining and employment torts).

In early 2017, President Donald Trump appointed two Republicans to the five-member NLRB, giving his party a 3–2 majority for the first time in a decade. In a 3–2 decision on December 14, 2017, the NLRB reinstated a previous test that says companies are "joint employers" only when they exercise direct control over workers. *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (Dec. 14, 2017).

However, on February 9, 2018, the NLRB's Office of Inspector General (OIG) published a report which chastised that decision, in part because of the fact that one board member previously worked at a firm that represented one of the parties in the original *Browning-Ferris* matter. The OIG's report concluded that Board Member Emanuel should have recused himself from the case and that his failure to do so warranted a vacatur of the Board's decision. In response, the Board vacated its earlier decision later that month. 366 NLRB No. 26 (Feb. 26, 2018). As a result, the overruling of the *Browning-Ferris* decision was itself reversed.

State Legislatures Have Reacted to the Trend by Adopting Protective Statutes

The reaction of state legislatures to the wave of litigation and the Browning-Ferris decision has been swift. Nineteen states have adopted one or more statutory provisions designed to protect franchisors. (A list of those statutes is available upon request of the authors).

The result is a patchwork of state statutes that run the gamut from expressly prohibiting franchisors from being considered the employer of a franchisee's employees (*see, e.g.*, Ga. Code Ann. §34-1-9 (2017)), to new statutes that allow potential liability based solely on a finding that a franchisor has "exercised a type or degree of control over the franchisee or the franchisee's employees not customarily exercised by a franchisor for the purpose of protecting the franchisor's trademarks and brand." *See* Tex. Labor Code §21.0022 (2015); see also Utah Code §34-20-14 (2016).

The Common Thread and "Best Practices" to Be Considered by Franchisors

In reviewing the body of case law that has developed in this area (a list of which is available upon request of the authors), a few common threads can be identified. Those include a lack of clarity in the documentation of the franchise relationship; a failure to update documentation to reflect the actual way that the businesses are operated; and a relationship between franchisor and franchisee in which the franchisor reserved significant control over the day-to-day employment decisions of the franchisee (whether such control was exercised or not).

Considering the above, here are some "best practices" we recommend franchisors utilize:

Documentation and Discipline

Franchisors must be aware of the risk of having franchisees use forms for hiring, employee discipline, complaint procedures, or other personnel issues that make reference to a franchisor in a way that can be exploited by plaintiffs' counsel. Avoid any process through which a franchisor receives grievances or complaints from a franchisee's employees about workplace conditions. If complaints are received, immediately forward them to the franchisee to handle. Franchisees should be instructed to explain to their workers that they have one boss, and one employer. The franchisee should be directed to ensure that its name is prominently displayed in all employee manuals, employment applications, vendor applications, business stationery, business checks, etc. Franchisors should avoid providing "templates" to franchisees and instead direct franchisees to retain competent advice from human resource professionals of their own choosing. Consider having franchisees obtain signed acknowledgements from each employee, which state that the employee has been hired by a franchisee and no one else, the franchisor is not his or her employer, and the franchisor has no control over employment decisions.

Mandatory Systems and Policies

While it is commonplace for franchisors to require that franchisees use a uniform point-of-sale system for reporting sales data, many of these programs have software features that include workforce management. If such features cannot be unbundled, it is important to make clear that franchisors are not mandating use of the workforce management features. Franchisors should not set specific work schedules for franchisees' workers; the franchisees should control all aspects of the working schedule and the assignment of particular workers to specific jobs. While it is okay to inform franchisees which jobs need to be done, it is too risky to tell a franchisee who must do those jobs. Franchisors should also refrain from setting minimum hours of work or limiting dates of closure.

Reservation of Control

A reservation of authority by a franchisor within franchise agreements or other documentation that would, even theoretically, allow a franchisor to approve or to disapprove of employees of a franchisee, or to terminate the franchise if certain personnel directives are not followed, can be used to show direct control that is sufficient for joint employer liability purposes.

Inspections and Training

Franchisor employees who conduct periodic inspections and who become engaged in day-to-day operations and disciplinary issues, or who take an active role in redirecting a franchisee's employees or training them in any regard, create liability for the franchisor.

Employees who visit franchise locations must be trained to avoid any involvement in employment matters, and franchisors should avoid undertaking any training of franchisees' employees other than the management-level employees. When interacting with a franchisee's employees, the franchisor's employees should be trained to avoid any language or tone that could be viewed as authoritative or "top down."

Reviews and inspections of franchisee operations are acceptable and justified by protection of a brand. However, when a franchisor's brand standard is violated, the franchisor should not engage in any direction of the franchisee's employees. Rather, the franchisor should notify the franchisee of the inspection results and have the franchisee implement any corrective action.

Use of Brand Name

Allowing franchisees to use the brand name when establishing their franchisee entities, or permitting franchisees to operate without prominently displaying placards on the premises giving notice that the business is an independently owned and operated business, creates significant risk. Establish a policy of disallowing the use of the brand name in franchisee operating companies.

Conclusion

The joint employer theory is being used to drag franchisors into employment cases throughout the country with increasing frequency, and it does not appear that that trend will end anytime soon. Franchisors can proactively tighten up their procedures to put themselves in a better position to obtain early dismissal from such cases by adopting a few best practices set forth above.

Kevin O'Connor is a shareholder at Peckar & Abramson PC in River Edge, New Jersey. His areas of concentration are employment and D&O defense, class action defense, partnership and corporate dissolutions, restrictive covenant, and trade secret litigation.

Joseph Vento is an associate at Peckar & Abramson PC. His areas of concentration include employment and D&O defense, restrictive covenant, and other employment litigation.

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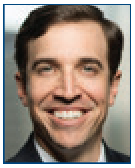
The Ever-Changing Joint Employer Standard Under the NLRA Enters the Administrative Rule-Making Realm: What Retailers Can Expect

By Jonathan E. Schulz



By now, most companies are at least aware of the possibility of being held liable for violations of worker protection statutes committed by their franchisees, subsidiaries, or third-party contractors. Under the doctrine of joint-employer liability, a company—depending on the degree of control it maintains or exerts over terms of employment—may be deemed a joint employer of the employees of a separate company with whom it contracts.

To protect themselves, companies need to know what type and amount of control over employment terms could be sufficient to trigger joint-employer liability and deem them an employer of another company's employees. Unfortunately, the National Labor Relations Board ("NLRB") continues to change the joint-employer standard under the National Labor Relations Act ("NLRA"), 29 U.S.C. §151, *et seq.*

Following the recent vacatur of a decision setting forth the then-current standard, the NLRB has apparently given up on using the facts of a particular case as a vehicle to delineate the joint-employer standard. Instead, the NLRB will engage in administrative rulemaking to set its joint-employer standard, and it very recently released its Notice of Proposed Rulemaking ("NPRM") setting forth a new proposed rule. A review of the changes to this standard over time should help retailers understand how we got here and how to prepare for the forthcoming changes.

Browning-Ferris Standard: Authority to Control Can Be Sufficient

While the NLRB's joint-employer jurisprudence predates 2015, its *Browning-Ferris* decision in that year – which provides some historical context to the standard—is a good starting point. In that case, the NLRB noted that its *official* joint-employer standard was premised on a Third Circuit opinion decided in 1982. *Browning-Ferris Indus. of Cal, Inc., d/b/a BFI Newby Island Recyclery*, 362 NLRB No. 186, at 1 (2015) (citing *NLRB v. Browning-Ferris Indus. of Pa., Inc.*, 691 F.2d 1117 (3d Cir. 1982)). That Third Circuit decision explained as follows:

> where two or more employers exert significant control over the same employees-where from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment-they constitute "joint employers" within the meaning of the NLRA.

691 F.2d at 1124. According to a majority of the Board deciding *Browning-Ferris*, the NLRB, since 1982, has deviated from that standard and has "imposed additional requirements for finding joint-employer status, which have no clear basis in the Third Circuit's decision, in the common law, or in the text or policies of the [NLRA]." 362 NLRB No. 186, at 1. Therefore, the majority of the Board in *Browning-Ferris* reaffirmed the above-excerpted standard and, importantly, clarified what the standard *did not* require:

> We will no longer require that a joint employer not only *possess* the authority to control employees' terms and conditions of employment, but also *exercise* that authority. Reserved authority to control terms and conditions of employment, even if not exercised, is clearly relevant to the joint employment inquiry. . . . Nor will we require that, to be relevant to the joint-employer inquiry, a statutory employer's control must be exercised directly and immediately. If otherwise sufficient, control exercised indirectly—such as through an intermediary—may establish joint-employer status.

Id. at 2 (emphasis in the original).

Hy-Brand Standard: Actual Exercise of Control Required

A little more than two years later, with a differently comprised Board, *Browning-Ferris* was overruled in a highly critical majority decision borrowing heavily from the dissent in *Browning-Ferris*. *See Hy-Brand Indus. Contractors, Ltd. & Brandt Constr. Co.*, 365 NLRB No. 156 (2017). The majority in *Hy-Brand*—ironically just like the majority in *Browning-Ferris*—claimed to be "return[ing] to the principles governing joint-employer status that existed prior to that decision." *Id.* at 2. Under the standard set forth in *Hy-Brand*:

> [A] finding of joint-employer status requires proof that the alleged joint-employer entities have actually exercised joint control over essential employment terms (rather than merely having "reserved" the right to exercise control), the control must be "direct and immediate" (rather than

> indirect), and joint employer status will not result from control that is "limited and routine."

Id. at 35 (emphasis in the original).

Vacatur of *Hy-Brand*: Nullifying the Overruling

On February 9, 2018, the Office of Inspector General ("OIG") for the NLRB issued a report identifying problems underlying the deliberative process in the *Hy-Brand* matter. Specifically, a party in the *Browning-Ferris* matter was represented by the former law firm of a Board member in the *Hy-Brand* majority named William Emmanuel. Because the *Hy-Brand* majority opinion largely incorporated the *Browning-Ferris* dissent, the OIG deemed the deliberative process in *Hy-Brand* to be a mere continuation of that in *Browning-Ferris*. Accordingly, the OIG concluded that Member Emmanuel should have recused himself from consideration of *Hy-Brand* and that his failure to do so called into question the validity of that decision.

A couple weeks later on February 26, 2018, and following motions by the Charging Parties, the Board formally vacated *Hy-Brand*. *See Hy-Brand Indus. Contractors, Ltd. & Brandt Constr. Co.*, 366 NLRB No. 26 (2018). The effect of this overruling was to reinstate *Browning-Ferris* and the joint-employer standard set forth in that majority decision. *See id.* ("Because we vacate the Board's earlier Decision and Order, the overruling of the *Browning-Ferris* decision is of no force or effect.").

Administrative Rulemaking: A Proposed Return to the *Hy-Brand* Standard

Left with a joint-employer standard it does not like, the current Board is apparently uninterested in waiting for the right set of facts to come along that will enable it to change the standard through case law. Instead, the Board, on May 9, 2018, announced that it is considering administrative rulemaking to address the standard for determining joint-employer liability under the NLRA. Following a letter from three Democratic Senators expressing concern about the NLRB's approach, the NLRB Chairman, Jon Ring, clarified in a June 5, 2018 letter that "[a] majority of the Board is committed to engage in rulemaking, and the NLRB will do so." Chairman Ring further stated that a NPRM would be issued by the end of the summer at the latest.

Staying true to Chairman Ring's word, the Board, on September 14, 2018, issued its NPRM and requests for comments. *See Standard for Determining Joint-Employer Status*, 83 Fed. Reg. 46681-01 (Sept. 14, 2018) (to be codified at 29 C.F.R. pt. 103). Consistent with the foregoing history, the NPRM notes that "[t]he last three years have seen much volatility in the Board's law governing joint-employer relationships." *Id.* at 46682. The Board claims that its new rule will address this volatility by "foster[ing] predictability and consistency regarding determinations of joint-employer status in a variety of business relationships, thereby promoting labor-management stability." *Id.* at 46681.

The Board's proposed rule is effectively a return to the *Hy-Brand* standard. The proposed standard provides as follows:

> [A]n employer may be considered a joint employer of a separate employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction. A putative joint employer must possess and actually exercise substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not limited and routine.

Id. at 46686. Further limiting the scope of this proposed rule, the Board clarified that exerting control over contracted labor services "is not in and of itself[ ] sufficient justification" for imposing joint-employer liability; rather, there must be a demonstration that the employer "meaningfully affects matters relating to the employment relationship." *Id.* Similarly, even "'direct and immediate' control over employment terms may not give rise to a joint-employer relationship where that control is too limited in scope." *Id.* And finally, "it will be insufficient to establish joint-employer status where the degree of a putative joint employer's control is too limited in scope (perhaps affecting a single essential working condition and/or exercised rarely during the putative joint employer's relationship with the undisputed employer)." *Id.* at 46687.

In an effort to provide concrete examples of an otherwise abstract proposed rule, the Board provides twelve helpful factual examples meant to illustrate application of this proposed rule. *See id.* at 46696–46697. For example, if a franchisor requires a franchisee to operate its store between certain hours but the franchisor neither participates in scheduling assignments nor selects shift durations, the franchisor—under the proposed rule—would not be deemed to have exercised sufficient direct and immediate control over the franchisee's employees. *Id.* at 46697. On the other hand, if the franchisor and franchisee agree on a health insurance and retirement plan the franchisee must make available to its employees, the franchisor—under the proposed rule—has in fact exercised sufficient control over essential employment terms. *Id.*

The NLRB will receive and consider comments on the proposed rule from interested parties over a period of 60 days, through and including November 13, 2018. Parties may reply to existing comments for an additional week until November 20, 2018. Thereafter, the Board will formally promulgate the new rule. Even then, critics may seek to challenge the new rule in courts, meaning the dust will not settle on this forthcoming rule for some time.

How to Avoid Liability under the NLRA as a Joint Employer Going Forward

So, what does this all mean for retailers? For now, the *Browning-Ferris* standard applies to proceedings before the NLRB. Merely possessing authority – without ever even exercising it – can trigger joint employer liability. Companies would be well-advised to review franchise agreements or standard contracts with independent contractors to identify what, if any, control they retain over third-party employees. Retailers should then engage in a cost-benefit analysis of sorts—weighing the need to control employment terms and perhaps manage a brand against the possible exposure to joint employer liability.

However, reprieve for retailers is very likely right around the corner. The majority of the current Board is poised to promulgate a joint employer rule consistent with the *Hy-Brand* standard, which requires direct and actual control over another's employees, concerning essential terms of employment, in a manner that is not limited or routine. Once formally promulgated, this new rule will allow companies to maintain some level of supervision and control over third-party employees without risking liability for claims of those third-party employees brought under the NLRA.

Jonathan E. Schulz is an associate in the Charlotte, North Carolina, office of Bradley Arant Boult Cummings LLP. He concentrates his practice in the area of business litigation, with a particular emphasis on disputes involving contracts, unfair competition, business torts, and intellectual property, at both the trial and appellate levels. Jonathan has particular experience in the franchise industry, where he regularly represents franchisors in disputes involving the termination of franchisees, violations of post-termination restrictive covenants, and other breaches of franchise agreements. He can be reached at jschulz@bradley.com.

Addressing Spoliation in the Retail and Hospitality World

By Fred M. Heiser

Most retailers know not to destroy evidence that is relevant to litigation. Yet preserving the right evidence can be a difficult issue to navigate. And a retailer's failure to recognize what evidence to keep, or how to properly do it, can lead to spoliation exposure and penalties.

Spoliation and Its Potential Penalties

Spoliation is the destruction or failure to preserve evidence necessary to pending or contemplated litigation. For retailers, this can include evidence like incident reports, video surveillance, or electronically stored information (*i.e.* e-mails, computer files, or USB drives). Sometimes spoliation is intentional. But, more often, it occurs by accident. Either way, courts can impose weighty penalties against a retailer for failing to meet its obligation to maintain the right evidence and information once there is notice of a potential claim.

These penalties vary by jurisdiction. Still, they generally range from monetary sanctions to an instruction at trial that allows a jury to assume that missing evidence would have been unfavorable to a retailer that lost it. In the most egregious cases, spoliation sanctions can include the dismissal of defenses or the preclusion of evidence.

When necessary, courts will impose a combination of penalties to fully compensate one party for another party's spoliation. For example, in *Klipsch Grp. Inc. v. ePRO E-Commerce, Ltd.*, 880 F.3d 620 (2d Cir. 2018), the Second Circuit upheld multiple sanctions against a defendant for engaging in willful spoliation. Although only about $20,000 of actual, compensatory damages were at issue in *Klipsch*, sanctions against the defendant included:

- $2.7 million in monetary sanctions to compensate the plaintiff for corrective discovery efforts it undertook as a result of the defendant's spoliation;
- One jury instruction requiring the jury to find that the defendant destroyed relevant evidence, along with a second instruction permitting the jury to presume that this evidence would have been favorable to the plaintiff; and
- A $2.3 million bond to preserve the plaintiff's ability to recover expected treble damages and attorney's fees from the defendant at the end of the case.

Klipsch Grp. Inc. v. ePRO E-Commerce, Ltd., 880 F.3d 620, 623 (2d Cir. 2018).

Addressing the proportionality between these sanctions and the relatively minor amount in controversy, the Second Circuit noted that the heightened penalty . . . "properly reflects the additional costs [defendant] imposed on its opponent by refusing to comply with its discovery obligations." 880 F.3d at 627.

When Does a Duty to Preserve Evidence Begin and What Evidence Needs to Be Preserved?

A duty to preserve evidence begins when litigation is pending (*e.g.* the filing of a complaint), or when litigation is "reasonably foreseeable."

Recognizing when litigation is reasonably foreseeable can be tricky. It occurs when a party *should have known* that evidence may be relevant to future litigation. This is a flexible, fact-specific standard. Still, it often begins well before an opposing party files a claim. For example, upon a retailer's receipt of an attorney representation letter or evidence preservation request. Retailers must, therefore, remain on the lookout for any practical indication that litigation may be on the horizon. When in doubt, reach out to legal counsel to determine whether a duty to preserve has been triggered.

Once a duty to preserve arises, retailers should maintain all documents and tangible things relevant, or potentially relevant, to a plaintiff's claims. This too can be tricky and also requires a fact-specific analysis. Err on the side of caution. Retain liberally. This should not be left to chance. Again, when in doubt, work with legal counsel to determine the scope of any necessary evidence retention.

A Good Retention Policy Helps Limit Spoliation Exposure

In addition to understanding spoliation and recognizing its triggers, retailers should establish a good document retention policy to further limit potential exposure. A strong policy can play a major role in ensuring that business documents are properly maintained, and that routine document destruction completed under the policy is not interpreted as spoliation.

A retention policy need not be extensive. To be most effective, however, it should lay out: when employees are to retain documents; what documents they are to retain; who is responsible for retaining documents; where documents are to be stored; and how long documents should be maintained. A policy like this helps guide employees through the retention process. It is more likely to be followed properly. And it is more likely to help months or years later when a retailer (or its counsel) attempts to locate documents relevant to litigation.

Remember: a retention policy loses its impact if employees neglect to implement it, either because they ignore it or fail to recognize what it is. Thus, developing employee awareness about any retention policy is critical. This usually comes down to explaining to employees what the policy is and highlighting for them why it is so important. Often, it is beneficial to partner with legal counsel to develop this policy and properly train employees about how to utilize it. If done right, retailers will be on top of their evidence retention and consistently minimize their spoliation risks.

Fred M. Heiser is Counsel in Klinedinst PC's Los Angeles and Orange County offices, and is a Member of the firm's Business and Commercial Litigation, Commercial General Liability, and Employment Practice Groups. His clients include local entrepreneurs, small family businesses, and Fortune 500 companies. Mr. Heiser is regularly called on by general counsel, business owners, and claims representatives to protect their interests and to provide hands-on, strategic, and efficient direction for complex civil cases. He can be reached at fheiser@klinedinstlaw.com

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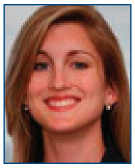
Mode of Operation: Louisiana

By Megan Peterson



Louisiana does not follow a "mode of operation" rule for premises liability, largely due to a legislative abrogation of a line of cases that typically required the premises defendant to exculpate itself from a presumption of liability. Today, proof of negligence against a merchant requires proof of a knowledge element, as well as unreasonable conduct. Notably, Louisiana's primary source of law is drawn from legislation and, while case law is important authority, it remains secondary, entitled only to judicial deference. See, *e.g.*, *Eagle Pipe & Supply, Inc. v. Amerada Hess Corp.*, 2010-2267 (La. 10/25/11, 7), 79 So.3d 246, 256. Thus, it is no surprise to learn that Louisiana does not follow a "mode of operation" theory of liability against retail, restaurant, or hospitality establishments, because it does not exist in the statutory scheme for liability. While the precise phrase "mode of operation" has not existed as a theory in Louisiana jurisprudence, Louisiana once allowed a form of premises liability that presumed negligence which has since been legislatively abolished in favor of a knowledge-based approach to liability in premises cases.

Before the modern approach was adopted, Louisiana law presumed the merchant's negligence and shifted the burden to the defendant to exculpate itself. *See Gonzales v. Winn-Dixie Louisiana, Inc.*, 326 So.2d 486, 488 (La.1976). Once the plaintiff proved an injury caused by a dangerous condition in the premises, the defendant was presumed negligent. *See Welch v. Winn-Dixie Louisiana, Inc.*, 94 2331 (La. 5/22/95, 10), 655 So.2d 309, 314, *overruled by White v. Wal-Mart Stores, Inc.*, 97-0393 (La. 9/9/97), 699 So.2d 1081. To rebut the presumption of negligence, the merchant often had to prove adequate safety and clean up procedures and that none of its employees were responsible for the spill, a nearly impossible burden. *See McCardie v. Wal-Mart Stores, Inc.*, 511 So.2d 1134, 1136 (La. 1987).

However, in 1990, in direct response to this burden-shifting line of cases, the Louisiana Legislature adopted the modern version of Louisiana Merchant Liability Act, La. R.S. §9:2800.6, which requires proof of defendant's knowledge of the condition. Presently, the Louisiana Merchant Liability Act applies in slip/trip and fall or falling merchandise cases involving a defendant who sells goods, merchandise, or food at a fixed location. In a slip and fall case, the plaintiff must prove (1) the presence of a condition that presented an unreasonable risk of harm that was reasonably foreseeable, (2) the defendant's actual or constructive knowledge of the condition prior to the incident, and (3) the defendant's failure to exercise reasonable care. As to the last element, the statute specifically states that the absence of a uniform cleaning or safety procedure, alone, is insufficient to prove a failure to exercise reasonable care. La. R.S. §9:2800.6.

Although the statute is clear, some references to earlier law remain for each element, often in the context of (1) the reasonableness of the plaintiff's conduct in assessing the dangerousness of the condition, (2) efforts to impute knowledge to the defendant, or (3) regarding the reasonableness of the merchant's conduct. For example, as to the first element, the courts often look to the plaintiff's actions to determine whether the risk was unreasonable. Specifically, the plaintiff's "duty to keep a proper lookout is diminished when shelved merchandise distracts a shopper." *Perez v. Wal-Mart Stores, Inc.*, 608 So.2d 1006, 1008 (La.1992); *Lofton v. Hayward*, 2000–2019 (La.App. 4 Cir. 1/9/02, 8), 806 So.2d 877, 883. However, if the condition was open and obvious, then the risk is not unreasonable and the defendant owes no duty at all to the plaintiff. *See Bice v. Home Depot U.S.A., Inc.*, 2016-0447 (La.App. 1 Cir. 12/22/16, 5), 210 So.3d 315 (affirming summary judgment finding no duty where plaintiff tripped and fell over a fixture in the store).

As to the third element, evidence of adequate clean-up and safety procedures to determine reasonableness of the defendant's conduct remains often referenced, despite the burden properly falling on the plaintiff. This is because "[a]lthough evidence of adequate inspection procedures may be part of the merchant's burden to disprove negligence, evidence of inadequate or neglected inspection methods is relevant to prove negligence." *King v. Toys "R"' Us-Delaware, Inc.*, 35,461 (La.App. 2 Cir. 1/23/02, 6), 806 So.2d 969, 973 (reversing summary judgment to store based on evidence that store's policy on hourly inspections was neglected by or not properly communicated to employees). Thus, evidence of clean-up procedures or safety inspections remains useful to both plaintiffs and defendants in either proving or exculpating from premises liability.

The second element of knowledge is where the arguments seeking to impute negligence have arisen. In the context of a "self-service" restaurant or merchant, plaintiffs previously sought to impute knowledge simply because of the type of establishment. As one court noted: "The duty that self-service stores owe their patrons to minimize risks by frequent inspections and clean-ups also applies to self-service type restaurants where customers are required to carry their own food." *Valley v. Specialty Rest. Corp.*, 98-0438 (La.App. 4 Cir. 1/19/99, 11), 726 So.2d 1028, 1035, writ denied, 99-0478 (La. 4/1/99), 742 So.2d 560 (finding that restaurant's clean up policy requiring hostesses to check the floor for spills was unreasonable). Some plaintiffs attempted to chip away at the knowledge requirement and reestablish a presumption of negligence in the context of self-service restaurants, such as fast food or buffets.

Despite these efforts, Louisiana courts remain unwilling to find that the mere mode of operating a business will create actual knowledge of a dangerous condition. For example, in *Williams v. Shoney's Inc.*, plaintiff argued that the mere use of a food bar should satisfy the knowledge element. *Id.*, 1999-0607 (La.App. 1 Cir. 3/31/00, 6), 764 So.2d 1021. However, the court clearly stated that "a claimant who simply shows that a condition existed at the time of the fall without an additional showing that the injury-causing condition existed for some time before the fall has not carried the burden of proving constructive notice under the applicable statute governing slip and fall cases." *Id.* at 1024. Similarly, in *Richard v. Liberty Mutual Insurance Company*, plaintiff argued that Popeye's use of greasy and deep-fried foods should create an inference that the slippery condition was created by Popeye's own foods. *Id.*, 2013-26 (La.App. 3 Cir. 10/9/13, 7), 123 So.3d 345. The court refused to make such an inferential leap, granting summary judgment to the defendants because the plaintiff could not prove the temporal element required by the Louisiana Merchant Liability Act. *Id.* at 349. Thus, the mode of operating a business, such as in the case of a self-service establishment, does not shift the burden of proof or otherwise satisfy the knowledge element without supporting evidence.

In fact, in adopting the Louisiana Merchant Liability Act, the primary change to the law was the requirement to prove actual or constructive knowledge of the presence of the condition before the plaintiff's incident. "[T]he claimant must come forward with *positive evidence* showing that the damage-causing condition existed for some period of time and that such time was sufficient to place the merchant defendant on notice of its existence." *White v. Wal-Mart Stores, Inc.*, 97-0393 (La. 9/9/97, 1), 699 So.2d 1081, 1082. Premises defendants can often successfully obtain summary judgment because of the lack of proof of knowledge, regardless of the mode of operation of the business. *See Mills v. Cyntreniks Plaza, L.L.C.*, 2014-1115 (La.App. 1 Cir. 8/19/15, 8), 182 So.3d 80 (affirming summary judgment to a night club where there was no evidence that the nightclub had any knowledge of the liquid and broken glass on the dance floor prior to plaintiff's fall); *see Moore v. Brookshire Grocery Co., Inc.*, 2002-0525 (La. 6/21/02), 824 So.2d 345 (affirming defendant's directed verdict when there was "no positive evidence that the grapes were on the floor for some period of time before [plaintiff's] fall," indicating a lack of proof as to the constructive notice element of the claim).

Thus, regardless of the type of retail, restaurant, or hospitality establishment, Louisiana requires the same burden of proof in all slip and fall cases against merchants. While efforts to reinsert vestiges of the former law remain, the courts have consistently rejected them, referring back to the clearly stated statutory law in the Louisiana Merchant Liability Act. Louisiana law plainly requires proof of a dangerous condition of which the merchant had knowledge prior to the incident and failed to exercise reasonable care. However, with the knowledge of the prior case law and arguments seeking to revert to presumptions of negligence will aid in the defense of a premises liability case under the Louisiana Merchant Liability Act.

Megan Peterson is an attorney at Simon, Peragine, Smith, & Redfearn in New Orleans, Louisiana. She represents a range of local, regional, and national clients in matters of litigation and alternative dispute resolution. Although she handles a variety of civil litigation matters, her practice focuses on defense of business clients in premises liability, retail and hospitality litigation, and trucking and transportation. Megan is licensed in all state and federal courts in Louisiana and Mississippi. She has experience obtaining favorable defense rulings before both trial and appellate courts. Megan has consistently been selected by Super Lawyers as a Louisiana "Rising Star" in Civil Litigation Defense since 2014.

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Paul Caleo and Katrina R. Durek


Defense verdict obtained in slip and fall accident at Starbucks in lawsuit venued in Alameda County, California with injury claims of traumatic brain injury, tinnitus and loss of balance.

On February 23, 2015, Plaintiff Liduina "Lee" Teles was visiting Berkeley, CA from Tewksbury, MA, to tour the UC Berkeley campus with her granddaughter. At around 12 pm, she went to the Starbucks at 2128 Oxford Street, Berkeley, and placed an order for tea. Plaintiff waited for her drink and then walked to the short counter "hand-off plane" to pick up her tea and slipped on coffee that was on the floor adjacent to the hand-off plane. Plaintiff alleges that as she fell she hit the right back of her head on the edge of the counter and then landed on her right side, hitting her elbow and hip.

The coffee was spilled by a male customer as he was picking up his drink from the hand-off plane moments before the plaintiff slipped. The male customer was trying to mop up the spilled coffee on the hand-off plane when he was noticed by the Barista who immediately approached and began to assist the male customer in cleaning up the spill while simultaneously verbally warning the other customers in the area. The Barista could see that some of the coffee had dripped onto the floor and called to his shift manager to take care of the spill in the customer area as the Barista could not access it from behind the bar.

After the Barista believed he had adequately warned all of the customers of the spill in the area of the hand-off plane, he turned to the cold beverage station to complete a drink, and when he turned back he saw the plaintiff being helped up off the floor. Almost simultaneously, the shift manager arrived to clean the spill and began to assist the plaintiff. Plaintiff was asked if she was okay and she said that she was all right but was concerned that there was no wet floor sign.

The Barista estimated that 30 seconds had elapsed from the time he had noticed the spill by the male customer until he saw the plaintiff being helped up off the floor. He also testified that 10 seconds elapsed from the time he turned away from the spill to complete the drink until he saw the plaintiff being helped off the floor. The store's CCTV recorded and confirmed that 90 seconds lapsed from the time that the plaintiff walked out of the camera view after ordering her tea to when the plaintiff is seen leaving the store with her tea in hand and in no apparent physical distress. The location of the slip and fall was not covered by a CCTV camera.

Shortly after leaving the store, Plaintiff returned to make a report and is recorded on the CCTV entering and approaching the cash register and motioning to the shift supervisor to get his attention and pointing to her right forearm and elbow but seemingly in no acute distress. Plaintiff and her daughter then completed an incident report form.

Plaintiff went with her family to the Emergency Department at Alta Bates Hospital in Berkeley and complained that she had struck the back of her head in a fall and had pain in her right elbow and hip among other complaints. The medical records confirmed that both the attending nurse and treating doctor did not observe any signs of trauma to the plaintiff's head. Plaintiff was diagnosed with a head injury, back pain and elbow contusion and instructed to follow-up with her primary care physician back in MA.

On July 6, 2015, the plaintiff was transported to the Emergency Department at a local hospital in MA after feeling dizzy while walking on the treadmill at her gym. The plaintiff was diagnosed with vertigo, nausea and vomiting. The plaintiff was admitted to hospital and remained there for four days. Plaintiff was ultimately diagnosed with vestibular neuritis. Significantly, during the entire time the plaintiff was hospitalized for the vertigo incident, she did not tell any of her treating or consulting doctors about the head injury she allegedly suffered at the Starbucks store in Berkeley five months prior. During the litigation, the plaintiff stipulated that her vestibular neuritis condition was not caused by the fall at Starbucks in Berkeley.

Plaintiff alleged that Starbucks was negligent in that it failed to adequately protect and warn her from the coffee spill that it knew was on the floor. Plaintiff called a retail industry expert, Alex Balian, who testified that the Barista's efforts to verbally warn the customers of the spill were not sufficient and reasonable in the circumstances and therefore constituted negligence. Plaintiff argued that the case was about public safety and holding Starbucks responsible for failing to protect its customers.

Plaintiff argued that she suffered a traumatic brain injury as a result of falling and hitting her head. She claimed that the blow to her head changed her life completely and she was no longer the same person and couldn't enjoy her life and family as she had before the fall. Plaintiff claimed that immediately after hitting her head she had a loud "whooshing" sound in her head that had been with her every minute since the fall. Plaintiff also claimed that she now had a problem with her balance and with walking since the accident. Plaintiff called a medical expert who was certified in "brain injury medicine" and who testified that all of the plaintiff's ongoing symptoms and residuals were as a result of suffering a mild traumatic brain injury in the fall at Starbucks and that the plaintiff's ongoing balance problems were not related to her subsequent vertigo incident.

Starbucks argued that the actions of its Barista in verbally warning the customers about the spill was both adequate and reasonable in the circumstances and met its legal obligation in protecting the plaintiff. Additionally, Starbucks argued that the unknown male customer was a cause of the accident and that the plaintiff should have seen the male customer cleaning up the spill and was therefore aware of the spill prior to slipping and falling. Starbucks called a neurologist who testified that even if the plaintiff hit her head in the fall and suffered a concussion, which by the now accepted definition is a mild traumatic brain injury, any symptoms from it resolved within months and that the plaintiff had no ongoing symptoms related to the fall at Starbucks. Starbucks also called an ENT who testified that if the plaintiff had tinnitus then it was more likely as a result of normal hearing loss. It was significant to him that the plaintiff did not make a subjective complaint of the noise to the initial treating doctors.

Plaintiff asked the jury to award her $650,800 in damages in closing argument. Starbucks counsel and DRI members Paul Caleo and Katrina Durek asked the jury to render a defense verdict. Starbucks served a pre-trial statutory offer of $45,001. The plaintiff's lowest demand pre-trial was $150,000.

After a nine day jury trial in Oakland, California, the jury returned a defense verdict after deliberating for three hours. The jury found that Starbucks was not negligent (9/3) and not negligent in the use and maintenance of its property (9/3). As the prevailing party, Starbucks filed a cost bill of just under $100,000.

Starbucks obtained a significant pre-trial ruling when it successfully excluded the opinion of the plaintiff's retail industry expert, Alex Balian, as to what the industry standard was regarding how to warn customers of a known spill. Mr. Balian testified that the industry standard was that the employee had to physically stand over and become a barrier to the spill and that verbally waring customers was insufficient. Starbucks was successful in excluding this opinion on the basis that this was the witness' personal opinion and not based on any industry literature.

Additionally, Starbucks successfully argued that there was sufficient evidence for the unknown male customer to be on the verdict form as "fault of others" so that it was open to the jury to apportion fault to him as a cause of the plaintiff's fall. Over plaintiff's objections, the verdict form allowed the jury to apportion fault to both the unknown male customer and to the plaintiff herself.

Paul Caleo is a partner at Burnham Brown and one of the firm's premier trial lawyers who has extensive experience in complex tort, personal injury and large loss cases involving claims of products liability, premises liability, government and public entity defense, construction site accidents and trucking/motor carrier accidents. He routinely represents retail corporations of all sizes in a wide variety of cases including wrongful death, serious personal injuries, traumatic brain injury (TBI), loss prevention and retail theft cases, and injuries caused by the criminal acts of third parties, in addition to prosecuting and defending contractual indemnity claims and breach of retail lease contract claims

Katrina R. Durek is an associate at Burnham Brown who counsels and represents businesses of varying sizes, including multi-national retailers, restaurant franchises, and small businesses. Ms. Durek is a trial attorney who handles a variety of matters including premises liability, products liability, contract disputes and employment matters. Ms. Durek represents parties in all phases of litigation, including investigation, law and motion, mediation and trial.

Eileen Buholtz

Eileen Buholtz obtained a defense verdict in favor of Aldi's, Inc. (New York) in New York Supreme Court, Livingston County. Plaintiff alleged the negligent design, installation, and maintenance of an endcap at the approach end of a cashier's station. At the time of the incident, plaintiff had her back to the end cap and was facing a customer who was coming up to the cashier's station. Plaintiff wanted to get in line before the customer, so plaintiff was sidestepping to squeeze between the endcap and the other customer's cart. Plaintiff claimed that the back of her heel caught on the bottom shelf of the endcap. The incident was captured on the store's surveillance cameras, which showed that plaintiff had stumbled, lost her balance, and fell. The jury returned a defense verdict.

David L. Schwalm

DRI member **David L. Schwalm**, of the law firm of Thomas, Thomas & Hafer, LLP, scored a Summary Judgment win in favor of a college located in Northeastern Pennsylvania before the United States District Court for the Middle District of Pennsylvania. It was alleged that the college had coordinated with the local police department to violate the plaintiff club owner's civil rights. Further, while it had also been alleged, the court identified that the evidence of record was not sufficient to support a reasonable interference of the existence of a conspiracy to "shut down" that club based upon the race of its customers. In entering the ruling, the court emphasized that crimes had certainly been occurring in and about the area near the college, of which the club was a part, and that any emphasis on police presence and activity was to provide for an atmosphere of safety for the college's students and staff. Similarly, the court found that there was no evidence that such "increased" police presence had anything to do with the racial make-up of the attendees of the club.

Mr. Schwalm is in Thomas, Thomas & Hafer, LLP's, Harrisburg, Pennsylvania office and can be reached at (717) 255-7643 or dschwalm@tthlaw.com. Thomas, Thomas & Hafer, LLP, serves the needs of its clients throughout Pennsylvania, Maryland, New Jersey and the District of Columbia.