

Proper Documentation Establishes Probable Cause and Preserves the Shopkeeper's Privilege

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It's a risk of doing business – a person comes into a store with the intent of walking out with an item for which they did not pay. What can a shop owner do to protect his/her business and minimize their losses?

The following overview of the Shopkeeper's Privilege (MCLA 600.2917) highlights the importance for shopkeepers to document the steps taken by an agent to establish the probable cause necessary to make a valid "stop" under the law and invoke the limitation of damages provided for by the Shopkeeper's Privilege.

Following is a hypothetical case where the plaintiff claimed a company representative stopped her and her girlfriend at the door and accused the plaintiff of shoplifting. Unfortunately, the identified Loss Prevention Agent (LPA) could not recall the interaction with the customer. As such, the company had no information to establish probable cause. Absent probable cause, the limitation of damages as provided by MCL 600.2917, was not available to the company.

Although the situation did not cover the limitation of damages provided in the Shopkeeper's Privilege statute, it shows that documentation of the LPA's actions (probable cause) would likely have reduced the time and expense of litigation, and it could have possibly prevented the claim from going forward.

The Shopkeeper's Privilege MCLA 600.2917(1) states:

"In a civil action against a library or merchant, an agent of the library or merchant, or an independent contractor providing security for the merchant or for false imprisonment, unlawful arrest, assault, battery, libel or slander, if the claim arises out of conduct involving a person suspected of removing or attempting to remove, without right or permission, goods held for sale in a store from the store or library materials from a library, or . . . and if the merchant, library, agent or independent contractor had probable cause for believing and did believe that the plaintiff had committed or aided or abetted in the larceny of goods held for sale in the store, or of library materials . . . damages for or resulting from mental anguish or punitive, exemplary or aggravated damages shall not be allowed a plaintiff, unless it is proved that the merchant, library, agent or independent contractor used unreasonable force, detained the plaintiff an unreasonable length of time, acted with unreasonable disregard of the plaintiff's rights or sensibilities, or acted with intent to injure the plaintiff." (Emphasis added)

Under Michigan law, as established in the case of *People v Yost*, 468 Mich 122, 659 NW 2d 604 (2003), probable cause is simply a reasonable belief that a crime was committed and not an absolute certainty of such.

It should be noted that the issue of a party's innocence or guilt is irrelevant to the issue of whether there existed probable cause at the time of the arrest or detainment. In *Drobczyk v Great Lakes Steel Corporation*, 367 Mich 318, 116 NW 2d 736 (1962), the court held that "probable cause is not contingent upon the fact of guilt or of the accused . . . the law would violate common sense and destroy itself if it were to say that [probable cause exists only if there is] knowledge of the guilt of the suspected party." Emphasis added.

Where the facts are undisputed, as in the case of *Hall v Pizza Hut of America, Inc.*, 153 Mich App, 609, 396 NW 2d 809 (1986), the determination of whether probable cause exists is a question of law.

Based upon the above noted cases, merchants must establish probable cause to invoke the limitation of damages as provided for by MCLA 600.2917. The unique facts presented involved a well-trained LPA, who understands that probable cause is a prerequisite to making a stop. Unfortunately, in our hypothetical case, the LPA had no recollection of the interaction with the plaintiff. Absent the LPA's recollection of the circumstances that would establish probable cause, the company was unable to invoke the Shopkeepers Privilege, therefore limiting the plaintiff's damages to actual damages. (The plaintiff in the hypothetical case admitted at deposition she had no actual damages).

In an effort to avoid costly litigation, contact legal counsel to discuss the merits of developing a system to document the facts and circumstances leading to a stop of a suspected shoplifter. In the long run, such a system may provide the probable cause necessary to invoke the Shopkeeper's Privilege and save your business from losing thousands of dollars.

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