



# SHOPPING CENTER LEGAL UPDATE

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## The Retailer's Perspective On Claims Of False Arrest: The "Reasonable Grounds" Defense

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The tort of false arrest, which is also commonly referred to as false imprisonment, under the common law consists of three basic elements: an intent on the part of the detaining party to confine; an awareness on the part of the detained that they are being confined; and lack of consent on the part of the detained to the confinement. Confinement may be the wrong terminology in a false arrest claim and, in fact, it has been suggested that too much emphasis has been placed on the name of the tort of false arrest or false imprisonment. *Prosser, Torts 4th Edition*, Section 11. However, there must be a restraint in the claimant's freedom of movement and the restraint must be complete, rather than a "mere obstruction" of the right to go where one pleases. *35 Corpus Juris Secundum*, Section 8.

There is no minimum length of confinement which must be met to constitute a false imprisonment, and it is not necessary that any damage result from the confinement. *Prosser, Torts 4th Edition*, Section 11. Thus, actions for false arrest are often brought simply out of a desire for revenge or annoyance, and may yield only nominal damages to the aggrieved claimant, often at a cost to the defendant/

retailer far in excess of the actual judgment or settlement amount.

A claim for false arrest/false imprisonment often goes hand in hand with claims for malicious prosecution and/or defamation, depending upon how far the post-detention criminal proceedings have gone. While an action for false arrest does not in all instances include a claim for malicious prosecution and/or defamation, the converse usually is true.

Virtually every state has enacted statutes to create a limited privilege on the part of a merchant to detain a suspected shoplifter in order to conduct a brief and reasonable investigation of an alleged shoplifting incident. See Ala. Code §15-10-14; Alaska Stat. §11.46.230; Ariz. Rev. Stat. Ann. §§13-1805(C) & (D); Cal. Penal Code §490.5(f); Colo. Rev. Stat. §18-4-407; Conn. Gen. Stat. Ann. §53a-119a; Del. Code Ann. tit. 11, §§840(c) & (d); Fla. Stat. §812.015(3); Ga. Code §51-7-60; Hawaii Rev. Stat. §663-2; Idaho Code §§48-704, -705; Ill. Ann. Stat. ch. 38 §§16A-5, -6; Ind. Code Ann. §§35-33-6-2 to -6-4; Iowa Code Ann. §808.12; Kan. Stat. Ann. §21-3424(3); Ky. Rev. Stat. Ann. §433.236; La. Code Crim. Proc. Ann. art. 215; Me. Rev. Stat. Ann. tit. 17, §3521; Md. Cts. & Jud. proc. Code Ann. §5-307; Mass. Ann. Laws ch. 231, §94B; Mich. Comp. Laws Ann. §600.2917; Minn. Stat. Ann §629.366; Miss. Code Ann. §97-23-95; Mo. Ann. Stat. §537.125; Neb. Rev. Stat. §§28-315(2), 29-402.01-.03; Nev. Rev. Stat. §598.030; N.J. Stat. Ann. §2C:20-11(e); N.M. Stat. Ann §30-16-23; N.Y. Gn. Bus. Law §218; N.C. Gen. Stat. §14-72.1(c); N.D. Cent. Code §51-21-03 and -04; Ohio Rev. Code Ann. §2935.041; Okla. Stat. Ann. tit. 22, §1344; Or. Rev. Stat. §131.655; Pa. Stat. Ann tit. 18 §3929(d); R.I. Gen. Laws §11-41-21; S.C. Code Ann. §16-13-140; S.D. Comp. Laws Ann. §22-30A-19.2; Tenn. Code Ann. §40-7-116; Tex. Civ. Prac. & Rem Code §124.001; Utah Code Ann. §§76-6-603 and -604; Vt. Stat. Ann. tit. 12, §2576; Va. Code §§18.2-105, -105.1; Wash. Rev. Code §9A.16.080, §4.24.2200; W. Va. Code §61-3A-4; Wis. Stat. Ann. §943.50(3); Wyo. Stat. §6-3-405. If applicable, the privilege allows a merchant to escape liability in a claim based on false arrest or false imprisonment. Generally, the stated purpose of the statutes is to protect merchants from false arrest suits, even where the criminal actions are eventually dismissed. *Jacques v. Sears Roebuck & Co.*, 30 N.Y.2d 466, 334 N.Y.S.2d 632, 285 N.E.2d 871 (1972) (citing the New York Legislative Annual, 1960). Indeed, the application of most of these statutes is not dependent upon the actual guilt of the shoplifter; see, for example, *Coblyn v. Kennedy's, Inc.*, 359 Mass. 319, 268 N.E.2d 860, 47 A.L.R.3d 991 (Supreme Judicial Court, Suffolk, 1971).

The specific elements of the "merchant detention

statutes" vary from one jurisdiction to another, but share several common features. Generally, these statutes require: 1) probable cause or reasonable grounds to suspect that shoplifting has occurred; 2) detention of the suspect in a reasonable manner; and 3) detention for a reasonable time. Several jurisdictions have held that the existence of "probable cause" or "reasonable grounds" must be judged against the objective standard of whether the facts available to the detaining party at the time of detention would cause a reasonably prudent person to believe that the individual whom they have detained had been shoplifting.

Often, a merchant's action in detaining a customer on suspicion of shoplifting is based upon information furnished by another person, such as an employee of the retailer, a contracted security officer, or another customer. Whether or not the merchant had "probable cause" within the meaning of the applicable shoplifting statute would depend upon whether the informer had probable cause to believe from what he or she saw that the suspect was shoplifting. *J.C. Penney, Co. v. Cox*, 246 Miss. 1, 148 So. 2d 679 (1963); *Butler v. W.E. Walker Stores, Inc.*, 222 So. 2d 128 (Miss. 1969); *Lukas v. J.C. Penney, Co.*, 233 Or. 345, 378 P.2d 717 (1963).

In any event, the issue of a merchant's probable cause to detain a suspected shoplifter is a mixed question of law and fact. If the basic facts surrounding the detention are not in dispute, the courts will generally decide whether, as a matter of law, probable cause existed. If the facts are in dispute, the trier of fact, ordinarily the jury, decides the issue, although the court may rule on the reasonableness of the detention based upon the facts as found by the jury. 47 A.L.R.3d 998.

The cases which follow analyze the issue of "probable cause" or "reasonable grounds" to detain, as a defense which is statutorily available to the defendant/retailer in a false imprisonment action brought in most jurisdictions. These cases fall into three categories: a) those in which the court, as a matter of law, held that reasonable grounds existed; b) those in which the facts were sufficiently in dispute so as to create an issue of fact concerning the reasonableness of the grounds for detention; and c) those cases in which the court held, as a matter of law, that reasonable grounds to detain did not exist.

#### **Cases In Which The Court Finds Reasonable Grounds To Detain As A Matter Of Law**

A store detective observed a customer carrying a prescription drug package in his shopping cart and, moments later, when the customer passed again, he noted that the prescription package was no longer in the cart. The detective immediately investigated and

learned that the customer had picked up a prescription from the pharmacist but had not paid for it at the check-out station. The trial court held, as a matter of law, that the detective had probable cause to detain the customer after he had left the store. *J.S. Dillon & Sons Stores Co. v. Carrington*, 169 Colo. 242, 455 P.2d 201 (1969).

A store detective observed a customer walk by a counter of hair brushes near the entrance to the store and, in one continuous motion, run her hand across several of the brushes, suddenly raise her hand and pull her overcoat tightly around her, and then immediately exit the store, where she was detained. The court held that the detective had reasonable grounds to detain on suspicion of shoplifting. The court's decision was made easier by the fact that the customer admitted in her testimony that her actions might have been such as would lead others to believe that she was taking something from the counter and hiding it under her coat. *Simmons v. J.C. Penney Co.*, 186 So. 2d 358 (La. Ct. App., 1st Cir. 1966).

A store manager, who had been warned by police officials to be on the lookout for three teenage girls believed to be responsible for shoplifting in the area, upon noticing that two hairpieces were missing from his store, detained the two female plaintiffs who, together with a companion, were in the defendant's store on two different occasions on the date in question and had been walking around looking at various merchandise. The manager requested that the three females return to the store and they were detained no longer than 10 minutes, during which their purses were searched and they were offered a partial explanation for the manager's activities. The court held, as a matter of law, that the manager had probable cause to momentarily detain the plaintiffs to search and interrogate them in an attempt to recover articles reasonably thought by him to have been unlawfully taken. *Meadows v. F.W. Woolworth Co.*, 254 F. Supp. 907 (N.D. Fla. 1966).

A store detective observed a customer pick up a green scarf from a counter. On the way to the blouse counter, the detective saw the customer unpin the price tag from the scarf, drop the tag on the floor and place the green scarf in her pocketbook. After picking up the tag, he followed the customer out of the store. The court held that there were reasonable grounds upon which to detain her as a matter of law. The customer was acquitted on a criminal charge of shoplifting, a fact which was not determinative of whether the detective had sufficient grounds upon which to detain her in the first place. *Tota v. Alexander's*, 63 Misc. 2d 908, 314 N.Y.S.2d 93 (1968).

A store security officer observed a customer place 19 reflectorized letters and numbers in his pants

cause the 13-year-old was not wearing a baseball cap, was neither wearing nor carrying a pair of new white tennis shoes, and because the shoplifter had fled from the store in a direction opposite that in which the 13 year old plaintiff was seen in relation to the store. *Wolf v. Nordstrom, Inc.*, 51 Or. App. 715, 626 P.2d 953 (1981).

#### **An Afterthought:**

The cases summarized above, and other reported cases interpreting the various "reasonable grounds" criteria found in most merchant detention statutes, offer several lessons that retailers can and should follow if they are to avoid false arrest/false imprisonment claims:

1. Ideally, there should be an uninterrupted observation of the suspected shoplifter, from the time of the suspected shoplifting through the time the suspect leaves the establishment. Any periods of interrupted observations may enable a false arrest claimant to cast doubt on the reasonable grounds defense.
2. A suspected shoplifter should not be confronted until he or she has exited the store.
3. When confronting a suspected shoplifter, the retailer's representative should politely identify him or herself and reasonably explain their suspicion. The observations creating the suspicion should be articulated to the suspect, and an opportunity to explain should be given.
4. To the extent possible, all suspicions of shoplifting should be investigated prior to the initial confrontation; i.e., by checking with cashiers and/or sales personnel to determine if the merchandise had been paid for.
5. At the earliest time during the detention, and optimally at the time of the initial inquiry, a request should be made for a receipt or proof of purchase of an item thought to have been taken, if the suspect claims to have purchased the item. If the suspect contends that he or she was about to pay for the item, a request should be made for proof that the individual has the means to do so.