

Shopkeepers Privilege

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Shopkeeper's Privilege is given to merchants by common-law or statute to allow the merchant to detain a suspected shoplifter for a reasonable time and in a reasonable manner if probable cause exists to believe a theft occurred. It is a defense to claims of false arrest and false imprisonment as well as other tortious conduct allegedly arising from the detention.

New Jersey's statutory codification of the common-law privilege, N.J.S.A. §2C:20-11(e) is illustrative:

A law enforcement officer, or a special officer, or a merchant, who has probable cause for believing that a person has willfully concealed unpurchased merchandise and that he can recover the merchandise by taking the person into custody, may, for the purpose of attempting to effect recovery thereof, take the person into custody and detain him in a reasonable manner for not more than a reasonable time, and the taking into custody by a law enforcement officer or special officer or merchant shall not render such person criminally or civilly liable in any manner or to any extent whatsoever...

A merchant who causes the arrest of a person for shoplifting, as provided for in this section, shall not be criminally or civilly liable in any manner or to any extent whatsoever where the merchant has probable cause for believing that the person arrested committed the offense of shoplifting.

Sometimes called "merchant's privilege," there are similar enactments in many if not most states, including California (Cal. Penal Code §495.50); Florida (Fl. Stat. §812.015(3)); Illinois (720 ILCS 5/16-26); Massachusetts (MA. L. c.231, §94B) and New York (N.Y. General Business Law §218).

The privilege is triggered by probable cause to believe shoplifting is occurring. This is typically established by store personnel observing the shoplifter handle, select and conceal the merchandise; observing the shoplifter's movement through the store; and witnessing the shoplifter's failure to pay for the merchandise, such as by the shoplifter passing through check-out with the merchandise still concealed and unpaid. An alarm raised by an "electronic article surveillance device" also will suffice. (See Va. Code §8.01-226.9). Failure to present a receipt for merchandise at the request of a "door checker" is probable cause. *Archer v. Wal-Mart Stores East, L.P.*, 2020 U.S. Dist. LEXIS 6757 (M.D. Fla.).

The cases considering the privilege generally accept that a request to accompany store personnel to a private location constitutes a detention without any further coercion. A closer question of fact exists in those situations where a customer is challenged to present a receipt then

permitted to leave without the merchandise when a receipt cannot be produced. See *Archer, supra; Moore v. Federated Retail Holdings, Inc.*, 2009 U.S. Dist. LEXIS 3500 (M.D. Fla). In *Archer*, the Court found that no detention occurred after plaintiff refused to produce a receipt for a television he purchased, when a 5 minute video of his encounter with security showed that plaintiff "was never moved from the scene of the incident, taken to another room or arrested" (although his television was removed from his cart and kept by the store). In *Moore*, plaintiff came into defendant's store wearing a fleece jacket purchased at the same store 2 months earlier that unfortunately still had the sales tags attached. Plaintiff was challenged to produce a receipt by store personnel. Plaintiff was made to leave the fleece at the store (which was later returned with apology when a receipt was produced later) but never restrained from leaving, causing the Court to question whether a detention ever took place.

The privilege is limited to detentions occurring in or near the store, in a reasonable manner, and for a reasonable time. *Davis v. May Dep't Stores Co.*, 2001 Ohio App LEXIS 4321 (2001); *Guijosa v. Wal-Mart Stores, Inc.*, 101 Wn. App. 777, 6 P.3d 582 (Wash. 2000); *Gortarez v. Smitty's Super Valu*, 140 Ariz. 97, 680 P.2d 807 (1984).

The burden is on the store to show the privilege is supported by the facts leading up to the detention. The store must be prepared to detail the observations made of the suspected shoplifter supporting probable cause; vague suspicions will not be sufficient. However, the privilege will survive as a defense if properly supported by probable cause even if the accused shoplifter is ultimately exonerated from criminal charges.