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PERSONAL INJURY

Applying Mode-of-Operation in Slip/Fall Cases at Retail Stores

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In September 2007, I published an article in the New Jersey Law Journal titled, "Store Owners Face Difficult Defense: Getting slip and fall dismissed at summary judgment is nearly impossible." That article outlined the history of New Jersey's "mode of operation" rule, which holds that in a slip/fall case, a plaintiff is not obligated to prove actual or constructive notice of a hazardous condition, if the day-to-day operations of a defendant's retail store create certain dangerous conditions, which allegedly caused the fall. See *Wollerman v. Grand Union Stores*, 47 N.J. 426 (1966) (plaintiff slipped on a string bean on a grocery store floor); *O'Shea v. K Mart Corp.*, 304 N.J. Super. 489 (App. Div. 1997) (a golf bag fell on plaintiff in a department store); *Ryder v. Ocean Cnty. Mall*, 340 N.J. Super. 504 (App.Div.), *certif. denied*, 170 N.J. 88 (2001) (plaintiff slipped on an "Orange Julius" beverage in a shopping mall); *Nisivoccia v. Glass Gardens*, 175 N.J. 559 (2003) (plaintiff slipped on a grape on a grocery store floor).

For nearly five decades, New Jersey courts have expanded this legal doctrine of law which dispenses with the question over how long the hazard was in existence, and/or whether the defendant had the opportunity to remedy the hazard. Essentially, lack of notice is not a material defense, so long as the plaintiff can show that there was a "nexus" between the store's business operations and the alleged hazard. Now, utilizing the mode-of-operation doctrine, all that matters is whether the establishment's operations could have generated the hazard in question. As the previous article points out, retail stores have a nearly impossible task to win on summary judgment motions.

Retail stores also face difficult hurdles at trial, as seen in Model Jury Charge 5.20(11), which applies in mode-of-operation cases:

> A proprietor of business premises has the duty to provide a reasonably safe place for his/her customers. If you find that the premises were in a hazardous condition, whether caused by defendant's employees or by others, such as customers, and if you find that said hazardous condition was likely to result from the particular manner in which defendant's business was conducted, and if you find that defendant failed to take reasonable measures to prevent the hazardous condition from arising or failed to take reasonable measures to discover and correct such hazardous condition, then defendant is liable to plaintiff.
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> *In these circumstances defendant would be liable even if defendant and his/her employees did not have actual or constructive knowledge of the particular unsafe condition, which caused the accident and injury.* (Emphasis added.)

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As one can see, the jury instructions make it very clear that the plaintiff is absolved of the burden of showing that the defendant had any actual or constructive notice of the alleged hazardous condition. All the plaintiff has to do is meet two burdens: 1) prove that the hazardous condition was caused by the defendant's employees or other customers; and 2) prove that the hazardous condition "was likely to result from the particular manner in which defendant's business was conducted."

However, a case that is currently before the New Jersey Supreme Court, may dramatically impact the mode-of-operation doctrine. Several months ago, a 2–1 panel of the Appellate Division, in *Prioleau v. Kentucky Fried Chicken*, 434 N.J. Super. 558 (App. Div. 2014), held that the mode-of-operation rule was not applicable in a case where a customer at a fast-food restaurant slipped on water tracked in from a rain storm. The court held that there was no nexus between the operation of the store and the fact that it was raining.

> Mode-of-operation liability does not apply merely because defendants operated a fast-food restaurant. Rather, plaintiff must establish a causal nexus between the fast-food or other business operation and the harm causing her injuries. Contrary to the trial judge's conclusion, defendants' business as a "fast-food operation" has no relationship to plaintiff's fall. There is no link between the manner in which the business was conducted and the alleged hazard plaintiff slipped on or its source. No testimony showed the alleged wet/greasy floor was the result of a patron's spilled drink or dropped food. Further, there was no evidence the restaurant's floor was ill-kept, strewn with debris or laden with overflowing trash.

The majority also held that the proper jury instruction would have been Model Jury Charge 5.20(8), which does require proof of notice.

> Notice of Particular Danger as Condition of Liability
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> If you find that the land (or premises) was not in a reasonably safe condition, then, in order to recover, plaintiff must show either that the owner/occupier knew of the unsafe condition for a period of time prior to plaintiff's injury sufficient to permit him/her in the exercise of reasonable care to have corrected it, or that the condition had existed for a sufficient length of time prior to plaintiff's injury that in the exercise of reasonable care the owner/occupier should have discovered its existence and corrected it.

Additionally, the majority rejected plaintiff's argument that in addition to water in front of the bathrooms, the floor was slippery due to grease tracked by employees who were working in the kitchen. The majority held that the evidence showed plaintiff slipped and fell on water in front of the bathrooms tracked by customers, and there was no evidence of any grease on the floor. More importantly, the majority held that even if there was grease on the floor, that would not invoke the mode-of-operation rule.

> This record is devoid of proof plaintiff fell on grease caused by defendants' fry cook who used the restroom. Plaintiff could not identify with any certainty the substance she thought caused her fall, alternating her description of the foreign substance between grease and water. The evidence marshalled by plaintiff may tend to show defendants had constructive notice that the restaurant floor was greasy. *Moreover, even if the record revealed the fry cook used the restroom prior to plaintiff's fall and, in doing so, tracked grease onto the floor area leading to the restroom, the mode-of-operation doctrine would not apply. The doctrine's focus is not upon the conduct of the establishment's employees. Rather, the focus is upon the business model that encourages self-service on the part of the customer, which can reasonably and foreseeably create a risk of harm to the customer.* (Emphasis added.)

In other words, the majority held that merely because an employee might have created the hazardous condition by walking to the bathroom, the plaintiff still must prove the hazardous condition resulted from how the business was conducted. Further, the majority stressed the importance of the self-service nature of the business in determining whether there was a nexus between the particular manner of the business and the hazardous condition.

However, there was a partial dissenting opinion in which Judge Hoffman argued that the mode-of-operation rule should apply to the case. Judge Hoffman held that the evidence supported the assertion that the floor was slippery due to a combination of water tracked in from customers and grease tracked in by employees from the kitchen. Furthermore, Judge Hoffman's dissent raised the issue that because store employees might have used the same bathrooms as customers, the alleged hazardous condition was related to the day-to-day operations of the fast food establishment, thus supporting the inclusion of the mode-of-operation jury charge. Some may argue that the dissent would require that plaintiffs meet only one out of the two mode-of-operation burdens. In other words, the plaintiff merely needs to show that the hazardous condition may have been caused by defendant's employees or other customers, and dispense with the burden that the plaintiff prove the condition was related the particular manner of the business' day-to-day operations. Due to the dissenting opinion, there is an Appeal of Right to the state Supreme Court, which was posted on June 25, 2014.

It is clear that store owners and retail chains will be keenly interested in how the Supreme Court decides this matter. Defendants will undoubtedly argue that the dissent's reasoning is so overly broad, that any case involving plaintiffs who allegedly slip on tracked-in rain, snow, leaves, etc., would invoke the mode-of-operation rule. In other words, the mere fact that a store has a front door, a plaintiff would not have to show any notice of defect on the part of the store owner. Even more distressing to store owners, as a customer, plaintiffs themselves would be able to create their own hazardous conditions in which the store owner would have an inference of liability. Clearly, if the Supreme Court adopts the reasoning of the *Prioleau* dissent, defendant store owners will have a much more difficult burden defending mode-of-operation cases. ■