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In this Issue

Analysis of the "Mode-Of-Operation" Theories in New Jersey and Pennsylvania

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Most retail liability practitioners are all too familiar with the slip-and-fall case and all of its variations. In most states, the duty owed to a patron by a business owner is proverbially set in stone. Business owners are required to maintain their property in a reasonably safe condition and they have duty to protect patrons from dangerous conditions of which they have actual or constructive notice. However, some states follow what is known as the Mode-of-Operation Doctrine. Under the Doctrine, a Plaintiff need not prove notice where, as a matter of sheer probability, a dangerous condition is likely to occur, based upon the nature of a business, a property's condition, or a pattern of conduct or incidents which can be demonstrated. The following article provides a brief overview of the applicability of that Doctrine in New Jersey and Pennsylvania. Retail establishments that operate in states that follow the Mode-of-Operation Doctrine must be aware of its implications.

New Jersey

New Jersey adopted the Mode-of-Operation Doctrine in the 1960s and Courts within the state recently had occasion to revisit its application. In *Prioleau v. Ky. Fried Chicken, Inc.*, a patron initiated a slip-and-fall action against the owner and operator of a fast food restaurant. The trial court entered judgment in favor of the patron and the Defendants appealed to the New Jersey Superior Court. *See Prioleau v. Kentucky Fried Chicken, Inc.*, 85 A.3d 1015 (Super. Ct. App. Div. 2014). On appeal, the Defendants argued, among other things, that the use of the Mode-of-Operation jury instruction at trial was erroneous, warranting a reversal.

In *Prioleau*, Plaintiff slipped on her way to the restroom after entering the Defendants' restaurant on a rainy day. When she realized a fall was imminent, she attempted to brace herself and was injured as a result. At trial, Plaintiff alleged the floor was slippery. While evidence presented at trial showed Defendants had a number of safety practices in place to prevent customer injuries, Plaintiff also introduced evidence that an employee could have tracked cooking oil onto the floor en route to the restroom, which was shared by both employees and patrons. Plaintiff also pointed out that there was no record of any dining room floor checks during the four-hour period prior to her fall.

In analyzing whether the Mode-of-Operation instruction was proper at the trial level, the Superior Court examined the reasoning behind the Doctrine. The court noted that the law recognizes certain instances where the nature of a business will result in dangerous conditions. This is especially true where a business has a self-service operation. The Mode-of-Operation Doctrine recognizes that concept, and extends the general principle of business owner-invitee liability as it relates to notice. The Superior Court held that pursuant to the Mode-of-Operation Doctrine, a Plaintiff is entitled to an inference of negligence where, as a consequence of mere probability, the dangerous condition that the Plaintiff allegedly met was the result of the nature of the Defendant's business, the subject property's condition, or a demonstrable pattern of conduct or incidents. Applying the Doctrine to the facts in *Prioleau*, the Superior Court held that the jury instruction was improper because the Plaintiff failed to establish a causal nexus between the manner in which Defendants conducted their business and the hazard that allegedly caused her fall.

On appeal, the New Jersey Supreme Court affirmed the Superior Court's decision in part and reversed it in part. *See Prioleau v. Ky. Fried Chicken, Inc.*, 122 A.3d 328 (2015). The Supreme Court held that the Mode-of-Operation jury instruction was improper at the trial level because the Plaintiff failed to establish a

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relationship between the self-service aspect of the Defendants' business and the Plaintiff's injury. The Court fine-tuned the Superior Court's Mode-of-Operation analysis and firmed up the application of the Doctrine as follows:

1. The Doctrine is limited to self-service settings where the customer handles merchandise without assistance;
2. The Doctrine only applies to accidents occurring in the areas affected by the self-service aspect of the Defendant's business;
3. The Doctrine is not limited to cases where customer negligence created the dangerous condition; rather, it also applies to cases where the hazard is caused by employee conduct or the character of the Defendant's merchandise; and
4. If the Doctrine applies, it impacts the Plaintiff's burden of proof by relieving them of proving notice (in any form) and it gives rise to an inference of negligence, shifting the burden of production to the Defendant who may only avoid liability by showing that it has done all that a reasonably prudent business entity would do in light of the risk of injury its operation entails.

Prioleau, 122 A.3d at 337-38.

As a result of *Prioleau*, retailers must review their policies and procedures, as well as the layout of their premises if they have any self-service operations. Businesses should ensure that they monitor the areas immediately surrounding their self-service operations and the areas where a patron may travel with their self-service goods. Based upon the holding in *Prioleau*, one could argue that an entire retail establishment may be subject to the Mode-of-Operation Doctrine even where the self-service operation is relatively limited, thus shifting the burden of proof to the Defendant at trial and giving Plaintiffs a real advantage.

Pennsylvania

Pennsylvania has declined to adopt the Mode-of-Operation Doctrine. *See Moultrey v. Great A & P Tea Co.*, 422 A.2d 593 (Pa. Super. Ct. 1980). The Pennsylvania Supreme Court recently reiterated that fact in *Ketchum v. Giant Food Stores LLC*, by explicitly stating that "[t]here is no 'mode of operation' exception in Pennsylvania that shifts the burden or relieves the plaintiff of the burden of proving actual or constructive notice of the danger." *Ketchum v. Giant Food Stores LLC*, 2014 Pa. Super. Unpub. LEXIS 2873, *8 (Pa. Super. Ct. 2014).

Under Pennsylvania law, a retail patron is typically considered an invitee. As such, the duty owed to retail patrons by retail establishments "is the highest duty owed to any entrant upon land" in Pennsylvania. *Emge v. Hagosky*, 712 A.2d 315, 317 (Pa. Super. Ct. 1998). In *Carrender v. Fitterer*, the Pennsylvania Supreme Court reiterated that the duty of care owed to a retail patron is derived from Section 343 of the Restatement (Second) of Torts. *Carrender v. Fitterer*, 469 A.2d 120, 123 (Pa. 1983). Section 343 highlights the requirement that a retail establishment have notice of a dangerous condition before it can be subject to liability for a patron's injury. Under Section 343, a retail establishment can be held liable for physical harm caused to a patron if it had either actual or constructive notice of the harmful condition that resulted in the patron's harm. Restatement (Second) of Torts §343 (1979). Actual notice can be found where a retail establishment actually knows of a dangerous condition and constructive notice can be found where by the exercise of reasonable care, the establishment would have discovered the condition. Restatement (Second) of Torts §343 (1979). It is important to note that under Pennsylvania law, the Plaintiff bears the burden of establishing notice. *See Swift v. Northeastern Hospital*, 456 Pa. Super. 330, 690 A.2d 719, 722 (1997). It is also important to understand that even though Pennsylvania does not recognize the Mode-of-Operation Doctrine, it is still possible for notice to be found where a retail establishment's self-service operation is known to cause harmful conditions. However, Pennsylvania practitioners can be assured that a Plaintiff is not relieved of their burden of proof as it relates to notice.

While Pennsylvania may not follow the Mode-of-Operation Doctrine, it is still important for retail establishments operated in the state to remain vigilant, inspect their premises for potential hazards, and remedy any hazards identified as soon as is reasonably possible. Retail establishments with self-service operations should continually monitor their premises, but also their policies and procedures, to ensure that they are meeting the high duty owed to Pennsylvania patrons.

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Back