Expansion and Retraction for “Mode of Operation” Theories: Case Studies from Massachusetts and Florida

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We invite you to contribute by sending us a summary of the “Mode of Operation” law in your state. The article this month addresses the law in Massachusetts and Florida. Our goal is to compile a state-by-state analysis of this area of law in future editions of the Newsletter. Please email your submissions to DRINewsletter@gmail.com.

Lawyers representing retailers and the hospitality industry know that slip-and-fall cases represent a constant source of litigation against their clients. As the types of retail operations have changed, so too have the theories of liability behind these claims. Across the country, many jurisdictions have been experimenting with the elimination of one of the plaintiff’s major burdens of proof in slip-and-fall cases: proving the defendant had notice of the dangerous condition on the premises. Such courts have concluded that when a defendant’s “mode of operation” involves self-service (such as most modern pick-your-own-product stores), proof of actual notice of a dangerous condition is not a prerequisite to liability where it is foreseeable to the defendant that customers may leave merchandise in such a manner that it becomes dangerous to other customers. In this type of situation, to defeat summary judgment, a plaintiff does not need to prove that the defendant had notice of a spillage on the floor, but only that the hazard was due to the defendant’s self-service “mode of operation.”

Negligent “mode of operation” cases have seen rapid development in recent years, both in jurisdictions embracing and expanding them as well as some which have rejected this new theory of liability. For example, in Florida, the “mode of operation” theory was first developed through common law and later codified by the Legislature in 2002 with the enactment of Florida Statute §768.0710(2), which utilized the phrase “mode of operation” when describing possible causes of action that a premises owner could potentially face in negligence actions involving transitory foreign substances. However, when §768.0710 was later repealed in 2010, and replaced with the newly enacted Florida Statute §768.0755, the Legislature omitted this “mode of operation” language from the statute entirely, suggesting that negligent mode of operation is no longer applicable in slip and fall cases in Florida[i].

In Florida, the “negligent mode of operation” rule was first developed through common law and later codified by the Legislature in 2002 with the enactment of Florida Statute §768.0710(2), which utilized the phrase “mode of operation” when describing possible causes of action that a premises owner could potentially face in negligence actions involving transitory foreign substances. However, when §768.0710 was later repealed in 2010, and replaced with the newly enacted Florida Statute §768.0755, the Legislature omitted this “mode of operation” language from the statute entirely, suggesting that negligent mode of operation is no longer applicable in slip and fall cases in Florida[i].

The Florida Supreme Court, in the case of Markowitz v. Helen Homes of Kendall Corp., 826 So. 2d 256, 260 (Fla. 2002), explained that the basis for the negligent mode of operation theory is “the claim that the specific mode of operation
Prior to 2010, a Plaintiff in a slip and fall case in Florida needed only to prove that a business establishment “acted negligently by failing to exercise reasonable care in the maintenance, inspection, repair, warning, or mode of operation of the business premises” without having to show the business had actual or constructive notice of the transitory foreign substance that caused the incident. See §768.0755, Fla. Stat. (2010) (now repealed). When Florida Statute §768.0755 was enacted, however, the burden was shifted to the Plaintiff to “prove that the business establishment had actual or constructive knowledge of the dangerous condition and should have taken action to remedy it.” See §768.0755 (1), Fla. Stat. (2010). This could only be accomplished in one of two ways: (i) by offering circumstantial evidence that the dangerous condition existed for such a length of time that the business establishment should have known of the condition; or (ii) by proving that the condition occurred with such regularity that it was foreseeable. §768.0755(1)(a) and (b), Fla. Stat. (2010).

Although the Legislature’s exclusion of other theories of proof (including mode of operation) is indicative of its intent to limit proof to those two articulated bases, Plaintiffs throughout Florida have continued to allege negligent mode of operation in their Complaints as a means to avoid the requirement of having to prove that a business had actual or constructive knowledge of a foreign transitory substance. In April 2015, however, the United States District Court for the Middle District of Florida evaluated the continued viability of the negligent mode of operation rule following the Legislature’s enactment of Florida Statute §768.0755. See Woodman v. Bravo Brio Restaurant Group, Inc., 6:14-cv-2025-Orl-40TBS; 2015 WL 1836941 (M.D. Fla. Apr. 21, 2015). Specifically, in Woodman, the Defendant filed a Motion to Strike a count in Plaintiff’s Complaint for negligent mode of operation on the grounds that the theory no longer served as a basis for liability in slip and fall cases given the requirement in Florida Statute §768.0755 that Plaintiffs prove actual or constructive knowledge. After conducting a detailed analysis of the statute, as compared with its repealed counterpart, and implementing various canons of statutory construction, the Woodman Court concluded that “[s]ection 768.0755 has clearly eliminated the mode of operation theory as a basis for recovery in slip-and-fall cases and Plaintiff may not pursue her claim on this basis.” Woodman, 2015 WL 1836941 at *3.

The Woodman Court recognized that the plain language of subsection (1) requires, without exception, proof of actual or constructive knowledge as a necessary element of a slip and fall claim. Id. at *2 (citing Pembroke Lakes Mall Ltd. v. McGruder, 137 So.3d 418 (Fla. 4th DCA 2014) in explaining how this section reinserts the knowledge element into slip and fall claims). This, coupled with the fact that the term “mode of operation” has now been excluded from Florida Statute §768.0755, makes it apparent that the Legislature must have intended to preclude Plaintiffs from invoking the mode of operation theory in slip and fall cases. Id. at *2-3.

Notably, the Woodman Court’s analysis concerning the viability of the negligent mode of operation rule in light of Florida Statute §768.0755 was very recent and, currently, no other Court in Florida has directly addressed this issue. While other Courts in Florida will soon be faced with the same challenges to the negligent mode of operation rule and will have to determine whether the theory still applies to slip and fall cases, the Woodman decision will serve as powerful precedent in favor of Florida’s abolition of the negligent “mode of operation” rule.

Massachusetts

Massachusetts has taken the opposite position to Florida, albeit without interference of the legislature. Massachusetts first embraced the concept of a “mode of operations” theory in Sheehan v. Roche Brothers Supermarkets, Inc., 448 Mass. 780 (2007). In Sheehan, the plaintiff slipped and fell on a grape in the defendant’s supermarket. Id. at 781. The defendant won summary judgment at the trial court level because the plaintiff could not prove that the supermarket had actual or constructive knowledge of the dangerous condition, i.e., that the grape was on the floor. In reversing the trial court’s decision, the Supreme Judicial Court embraced the “mode of operations” theory and held that the supermarket had notice of the “inherent risks associated with the operation of its self-service
In adopting the “mode of operations” theory, the Massachusetts court noted that modern trends in premises liability tended to one of three theories: the “traditional” theory, the “mode of operations” theory, and the “burden-shifting” theory. Id. at 786. Under the traditional theory, which is adopted by the Restatement (Second) of Torts § 343 (1965), the plaintiff has the burden of proving that the defendant had actual or constructive knowledge of the dangerous condition. “Constructive” knowledge is often proved by showing how long the item had been on the floor, such that a reasonably prudent defendant would have had time to discover and remedy the condition. Id. at 782-783. Under the burden-shifting theory, when the plaintiff shows that the injury occurred due to a premises hazard in a self-service store, a rebuttable presumption of negligence arises. The defendant then has the burden to prove that it exercised reasonable care of the premises under the circumstances. Id. at 787.

In Sheehan, the Massachusetts Supreme Judicial Court adopted the “mode of operations” theory, eliminating the plaintiff’s burden to show the defendant had actual or constructive knowledge of the dangerous condition all together. Id. at 787-788. The court determined that, under the traditional theory, the plaintiff was force to engage in “conjecture and speculation” regarding the appearance or discoloration of matter on the floor to prove how long the dangerous condition had been there and that this was an “unfair burden” to place on plaintiffs, since defendants had more ready access to this type of evidence. For policy reasons, it also found that store owners should have a greater requirement to make preparations to ensure the safety of their invitees. Id. at 788-789.

The Massachusetts Supreme Judicial Court noted criticism of the “mode of operations” theory, however, from some courts that have declared it to be akin to “strict liability.” Id. (citing Dumont v. Shaw’s Supermarkets, 664 A.2d 846, 849 n.1 (Me. 1995). The court rejected this conclusion, noting that the “mode of operations” theory only substitutes the elements of a prima facie case. The plaintiff would still be required to present evidence supporting his or her case and bear the burden of proving that defendant acted unreasonably under the circumstances. Id. at 790.

The “mode of operations” theory was believed to be limited to self-service food retailers in Massachusetts until 2015, when the Massachusetts appellate courts then applied it in slip-and-fall cases in two very different circumstances. In Sarkisian v. Concept Restaurants, Inc., 471 Mass. 679 (2015), the Supreme Judicial Court allowed a plaintiff to utilize the “mode of operations” theory to an injury to a fall in a nightclub. The plaintiff slipped on a wet dance floor in the nightclub. The wet floor was due to spillage of drinks from patrons who were allowed to carry their drinks onto the dance floor. Id. at 680-681. The trial court had granted summary judgment to the defendant on the basis that the plaintiff could not prove that the defendant had actual or constructive knowledge of the wet floor. Id. at 680. The Supreme Judicial Court reversed. It reasoned that the “mode of operations’ theory should be applied wherever a proprietor’s ‘operating methods’ enhance the risk of recurring dangerous conditions brought about by third party interference.” Id. at 684. Applying that logic to the nightclub, it found that because the nightclub allowed its patrons to take their drinks on to the dance floor, it was “reasonably foreseeable” to the nightclub that those drinks might spill and create a dangerous condition for the plaintiff. Id. at 686-687.

Also in 2015, the Massachusetts Appeals Court decided Bowers v. P. Wile’s, Inc., 30 N.E.3d 847 (Mass. App. 2015). In Bowers, the defendant was a retail establishment that sold, among other things, decorative outdoor items for customer’s yards. The birdbaths and other items on display were placed in an outdoors area covered with river stones, with paved sidewalks for customers to use when walking around the displays. The plaintiff fell after she stepped on a small river stone that had been displaced from the display area onto the sidewalk. Id. at 849-850.

The Appeals Court allowed the plaintiff to utilize the “mode of operations” theory under these circumstances. It found that the rationale for the theory was that when “store owners invite customers to use ‘self-service’ to manipulate merchandise displays, there is a foreseeable risk that customers’ handling of merchandise or displays will cause disruption of the store’s arranged display, to the end that hazardous conditions will result.” Id. at 852. In short, under this analysis, the “mode of operation” theory would be applicable in any retail setting, not merely self-service supermarkets.
The impact of these two decisions in Massachusetts has yet to be determined, but it appears likely that Massachusetts now has essentially eliminated the "notice" requirement for any situation when a defendant retailer has reason to know that a customer could create a dangerous condition on the premises or himself or another customer. The potential expansion of liability for retailers and those in the hospitality industry is likely to prove dramatic.

**Conclusion**

Slip-and-fall litigation is undergoing a transformation in many jurisdictions through the adoption of "mode of operations" theories and other approaches meant to make it easier on the plaintiff to avoid summary judgment and establish liability at trial. These changes will prove challenging for retailers who simultaneously operate in jurisdictions that continue to hold fast to the traditional "notice" approach. The authors welcome the input of other DRI Retail & Hospitality Committee members on this topic: What position have the courts or legislatures of your states taken on this newly developing area of the law? Short responses will be published in the next newsletter. We hope this recurring column will provide insight to DRI Retail & Hospitality Committee members through investigation of a comparative approach of several jurisdictions.

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[i] The Florida Courts have not addressed whether the change in law affects other premises liability cases that do not involve a slip and fall on a transitory substance.