

# Retail Liability In Connecticut



GORDON, MUIR & FOLEY, LLP  
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May 2011

## Renée W. Dwyer, Esq.



Gordon, Muir and Foley, LLP (GM&F), a mid size firm founded in 1947, maintains its office in Downtown Hartford, Connecticut. GM&F is dedicated to providing prompt, reliable and cost-

effective legal representation. The firm's objective is to resolve disputes for our clients as expeditiously and cost effectively as possible. While our attorneys are skilled and active in the trial of cases, our attorneys are also adept and experienced in the negotiation, mediation and arbitration processes.

Renée W. Dwyer's litigation practice involves the defense of serious premises liability actions, and pharmacy misfill cases as well as retail store false arrest and malicious prosecution claims that often flow from retail sales operations for major chain stores. As part of that

representation Renee is also called upon to represent those clients in employment matters before the CHRO and in court.

Ms. Dwyer was a speaker at Mealy's Retail seminar in Las Vegas, Nevada. She spoke on the topic of indemnification.

Ms. Dwyer also lectures on retail liability, basic practice and procedure, premises liability and sexual harassment.

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- Member of DRI Retail & Hospitality Committee

## Strictly Retail Seminar May 12-13, 2011—Chicago, IL

On May 12-13, Renée W. Dwyer will be in Chicago, attending a seminar addressing the following topics:

- Dealing with Defective Products and the Consumer Product Safety Commissions (CPSC)
- A Retailer's Obligation to Protect Customer and Employee Personally Identifiable Information
- Concerns for the Retail Industry Relating to Medicare Secondary Payer Act
- Reaching the Decision Point Quickly After the Lawsuit is Filed: Strategic

use of ADR

- FLSA and ADA Employee Disability Litigation and the Common Mistakes Made by Retailers in Both Areas
- Protecting the Retailer Through the Best Available Insurance Products and Risk Transfer
- Current Trends in Loss Prevention and Security
- Detecting and Preventing Fraud at the Claim's Stage
- How to Manage Excessive Damages Cases Involving Unnecessary Care and Overtreatment

- Social Networking Sites and the Ethical Issues That They Create
- Managing Retail During Catastrophic Events
- Intellectual Property and Patent Law for the Retailer
- Violence in the Marketplace: Catastrophic Premises Cases

For more information see [www.dri.org](http://www.dri.org).

Hope to see you there.

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## MODE OF OPERATION RULE CLARIFIED BY CONNECTICUT SUPREME COURT



In *Kelly, et al. v. Stop and Shop, Inc.* 281 A.2d 768 (2007), the Connecticut Supreme Court adopted the "mode of operation" rule. Under this premises liability rule, "a business invitee who is injured by a dangerous condition may recover without proof that the business had actual or constructive notice if that condition if the business' chosen mode of operation creates a foreseeable risk that the condition regularly will occur and the business fails to take reasonable measures to discover and remove it." In *Kelly*, the plaintiff commenced suit against Stop and Shop, Inc. when she slipped and fell on a piece of lettuce that had fallen to the floor from a self-service salad bar at Stop and Shop. The plaintiff in *Kelly* was not arguing that a Stop and Shop employee had cre-

ated the dangerous condition. If that were the claim, this case would not be nearly as noteworthy.<sup>1</sup>

For litigators, in burden of production terms, the Connecticut Supreme Court's adoption of the rule means that a plaintiff can establish a prima facie case of negligence absent a showing of notice, "upon presentation of evidence that the mode of operation of the defendant's business gives rise to a foreseeable risk of injury to customers and that the plaintiff's injury was proximately caused by an accident within the zone of risk." Thereafter, the defendant "may rebut the plaintiff's evidence by producing evidence that it exercised reasonable care under the circumstances." Ultimately, the finder of fact bears the ultimate responsibility of determining whether the defendant exercised such care.

In *Fisher v. Big Y Foods, Inc.*, 298 Conn. 414 (2010), the Supreme Court limited the "mode of operation" rule by holding that the rule does not apply to every accident that occurs in a self-service retail stores. In *Fisher*, the plaintiff fell in a puddle

that he believed to be fruit cocktail juice. The puddle was in the aisle where the fruit cocktail was sold. The plaintiff proceeded under the "mode of operation" theory only and obtained a verdict. The Defendant who had unsuccessfully moved for directed verdict, filed an appeal.

The court agreed with the defense's position and stated:

We agree that the "mode of operation" rule, as adopted in Connecticut, does not apply generally to all accidents caused by transitory hazards in self-service retail establishments, but rather, only to those accidents that result from particular hazards that occur regularly, or are inherently foreseeable, due to some specific method of operation employed on the premises. *Id.* at 926.<sup>2</sup> The court further stated:

We conclude by noting that a rule that presumptively established a storekeeper's negligence simply for having placed packaged items on shelves for customer selection and removal, without requiring any evidence

that they were displayed in a particularly dangerous manner, would require us to ignore the modern day reality that all retail establishments operate in this manner and, given competitive considerations and customer demands, they have no other choice. *Id.* at 935(footnote deleted).

The ruling in *Fisher* is welcome news to retailers and those defending retail establishments as *Kelly* was seen by many in the plaintiff's bar to open the door to a new theory of recovery where the chance of a plaintiff's verdict was much greater since a plaintiff would no longer bear the "insuperable burden" of proving actual or constructive notice. We now know that "mode of operation" rule first set forth in *Kelly* is much more limited. In fact, in December 2010, the State of Connecticut issued new standard jury instructions on the "mode of operation" rule to specially address the holding in *Fisher*.<sup>3</sup>

<sup>1</sup>Connecticut courts have long recognized that when a storeowner creates a dangerous condition, proof of notice is not required because courts can safely infer that by creating the condition, the storeowner had knowledge of the condition. What made *Kelly*'s claim significant, and what makes this case so important, is that *Kelly* was claiming that Stop and Shop should be held liable for a condition created by a third party of which the store did not have notice of.

<sup>2</sup>The court majority also noted that when the "mode of operation" rule does apply, it does not amount to the imposition of strict liability on business owners. A defendant may rebut that case, however, with evidence that it exercised reasonable care under the circumstances, and the plaintiff retains the burden of proving that the steps taken by the defendant were not reasonable. *Kelly v. Stop & Shop, Inc.*, supra, 281 Conn. at 791-92, 918 A.2d 249. In short, the mode of operation rule, when it applies, eases substantially a plaintiff's burden of proof in a premises liability matter, but does not eliminate it.

<sup>3</sup> 3.9-17 Commercial Mode of Operation (Revised to December 10, 2010)

The plaintiff has alleged that (his/her) injuries were caused by the mode by which the defendant operated the business, in particular, by the way the defendant designed, constructed or maintained <identify the mode of operation, e.g., the self-service arrangement>.

This is called the mode of operation rule. Under this rule, the plaintiff need not show that the defendant had notice of the particular item or defect that caused the injury. Rather, the plaintiff must prove:

1. that this mode of operation gave rise to a foreseeable risk of injury to customers [or other invitees],
2. that the defendant failed to exercise reasonable care to avoid foreseeable accidents created by this mode of operation, and
3. that the plaintiff's injury was proximately caused by such failure.

[It is not the law that a defendant who runs a business guarantees the safety of those who come to the premises. If a customer [or other invitee] is injured because of a negligent act that the defendant cannot reasonably be expected to foresee or guard against, then the defendant is not liable.][ *Kelly v. Stop & Shop, Inc.*, 281 Conn. 768, 790 (2007).]

Notes: It will be most common that this theory will be advanced by the plaintiff as an alternative to the traditional premises liability theory that requires proof of actual or constructive notice. The charge should make clear that the plaintiff can recover under either theory.